



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

**Not reportable
Case No: 2924/2022**

In the matter between:

YOKOGAWA SOUTH AFRICA (PTY) LTD

Plaintiff

and

THEKO LETSIE

First Defendant

MAKABELE BELINAH LETSIE

Second Defendant

3E CONTROL AND INSTRUMENTATION (PTY) LTD

Third Defendant

Coram: Petersen ADJP

Date heard: 5 May 2026

Heads of argument delivered: 8 June 2026 (plaintiff); 23 June 2026 (defendants);
no replication by plaintiff on 30 June 2026

Date reserved: 30 June 2026

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 10h00 on 10 September 2026.

Summary: Personal liability of company directors for reckless trading and conduct calculated to defraud a creditor in terms of sections 22 and 214(1)(c) of the Companies Act 71 of 2008, read with section 218(2) thereof, and alternatively section 424(1) of the Companies Act 61 of 1973 - Plaintiff confined its oral evidence to a single witness - Defendants called only the first defendant - Plaintiff abandoned prayer for a declaration that the defendants personally contravened section 22 - First defendant found to have contravened section 214(1)(c) and to be personally liable in terms of section 218(2) for conduct calculated to defraud the plaintiff as creditor - Second defendant found personally liable under section 218(2) read with section 22 based on knowing acquiescence in reckless trading - Both defendants jointly and severally liable to the plaintiff for R2 832 601.73 together with interest - Costs on Scale B.

JUDGMENT

PETERSEN ADJP:

Introduction

[1] In this action, the plaintiff, Yokogawa South Africa (Pty) Ltd (“Yokogawa”), seeks to hold the first defendant, Mr Theko Letsie (“Mr Letsie”), and the second defendant, Ms Makabele Belinah Letsie (“Ms Letsie”), personally liable for the debt owed to it by the third defendant, 3E Control and Instrumentation (Pty) Ltd (in liquidation) (“3E Control”), in the sum of R2 832 601,73.

[2] The plaintiff, Yokogawa South Africa (Pty) Ltd, is a private company duly incorporated under the laws of South Africa with registration number 97/10718/07. It carries on the business of marketing and selling process control instrumentation and related products produced by the Yokogawa Group. It appointed 3E Control as a distributor of those products in the North West Province and surrounding regions.

[3] The first defendant, Mr Letsie, was at all material times a director and the principal managing officer of 3E Control. He signed a payment plan dated 25 November 2019, a distributorship agreement dated 1 August 2020, and relevant correspondence in August and October 2021.

[4] The second defendant, Ms Letsie, was also, at all material times, a director of 3E Control. The particulars of claim allege that she was at all material times in control of the business of 3E Control, actively participated in its management, and was aware of its financial position.

[5] The third defendant, 3E Control and Instrumentation (Pty) Ltd (in liquidation), is cited only insofar as it may have an interest in these proceedings. No substantive relief is sought against it. 3E Control was voluntarily liquidated by special resolution effective 27 August 2021.

[6] Yokogawa and 3E Control were parties to a distribution agreement in terms of which 3E Control acted as a non-exclusive distributor of Yokogawa’s process control instruments and related products within a defined territory. 3E Control purchased those products from Yokogawa on credit and resold them to its own clients, principally Rustenburg Platinum Mines. It accumulated substantial arrears from December 2019 to April 2021 and was ultimately voluntarily wound up in August 2021, with its assets far short of its liabilities.

[7] Yokogawa’s case against Mr and Ms Letsie rests on two alternative statutory bases. The primary basis is civil liability in terms of s 218(2) of the Companies Act 71 of 2008 (“the Companies Act”), predicated on the third defendant’s contravention of s

22 (prohibition against reckless trading). Mr and Ms Letsie being knowingly a party to that conduct and to acts calculated to defraud the plaintiff as a creditor, in contravention of s 214(1)(c). The alternative basis is personal liability under s 424(1) of the Companies Act 61 of 1973 ("the old Companies Act"), which remains operative by virtue of Schedule 5 of the Companies Act in respect of companies wound up under the old regime.

[8] As the heads of argument settled on behalf of Yokogawa correctly acknowledge, s 22 of the Companies Act is directed at the company as a legal entity and does not create a personal obligation on individual directors. That prayer was accordingly abandoned. The remaining relief is accordingly, (a) a declaration under s 214(1)(c) that the first and second defendants were knowingly party to the third defendant's conduct prohibited by s 22(1) or calculated to defraud the plaintiff; (b) civil liability under s 218(2) for the loss flowing from that contravention; and in the alternative, (c) personal liability under s 424(1) of the old Companies Act.

[9] At the trial which commenced on 5 May 2026, the plaintiff confined its case to the oral testimony of a single witness, Mr Raymond Motlhaping Motlhabane ("Mr Motlhabane"). Mr Motlhabane is Yokogawa's senior financial manager. The liquidator's report was admitted into evidence by agreement without the liquidator being called. Upon the close of the plaintiff's case, the defendants elected to call only the first defendant, Mr Letsie. The second defendant, Ms Letsie, did not testify.

Background

(a) The pre-existing relationship and the November 2019 payment plan

[10] Before November 2019, the plaintiff and 3E Control had concluded a distribution agreement (the original agreement), the terms of which are reflected in, and were renewed by, the written distributorship agreement concluded on 1 August 2020. Mr Motlhabane confirmed in evidence that the terms of the prior verbal agreement were identical to those of the written agreement. The commercial relationship entailed 3E Control placing orders with Yokogawa, supplying those products to Rustenburg Platinum Mines as the end-user, receiving payment from the mine, and then remitting payment to Yokogawa.

[11] By November 2019, 3E Control had accumulated a substantial backlog of unpaid invoices owed to Yokogawa. On or about 25 November 2019, a written payment plan was concluded between the plaintiff, represented by its Managing Director Naoki Nakamura, and 3E Control, represented by Mr Letsie. The payment plan acknowledged three tranches of indebtedness. First, Hatch SO2 Project Orders in the amount of R2 689 426 (inclusive of VAT). All amounts received from Anglo Platinum in respect of these orders were to be transferred to Yokogawa's account within 24 hours of receipt. Second, orders delivered but not yet paid by clients in the amount of R1 631 037 (inclusive of VAT). These were to be paid to Yokogawa within 24 hours of 3E Control receiving payment from its clients. Third, legacy overdue

invoices already paid by clients but not remitted to Yokogawa, approximately R2 200 878 (inclusive of VAT). These represented monies 3E Control had already collected on Yokogawa's behalf but had not remitted. They were to be addressed through a R1 500 000 loan facility sourced from the Anglo-Zimele fund, supplemented by average monthly payments of R30 000 for 24 months.

[12] The cumulative indebtedness reflected in the payment plan amounted to approximately R6 521 341, inclusive of VAT, at the time of signature in November 2019. A critical feature of the payment plan is that the third range of payments above expressly acknowledged that the end-user had already paid 3E Control for Yokogawa's products, but that 3E Control had not remitted those funds to Yokogawa. Mr Letsie personally signed that acknowledgment. This is not an inference. It is an admission under his own hand.

(b) *The 2020 Distributorship Agreement*

[13] On 1 August 2020, the parties concluded a formal written distributorship agreement, described as a renewal of the pre-existing arrangement, to remain in effect until 31 July 2021. Its material terms include, first, non-exclusivity. Clause 12 expressly provides that the distribution arrangement is non-exclusive and that the plaintiff retains the right to sell any products directly in the territory or through another distributor, broker, or agent, without incurring any liability to the distributor. Second, payment terms. All amounts owed to the plaintiff were payable within 30 days of statement, with interest at 2% above the First National Bank overdraft rate per annum on late payments. Third, retention of title. Title to the products would not pass to 3E Control until the plaintiff had received full and final payment. Fourth, clause 26.9.1 provides that the written agreement comprises the entire agreement between the parties, and that no alteration shall be of any force or effect unless reduced to writing and signed by both parties.

(c) *The outstanding invoices*

[14] For the period 9 December 2019 to 30 April 2021, 3E Control placed 59 purchase orders with the plaintiff, all of which were accepted and fulfilled. The total amount invoiced was R2 832 601,73. This outstanding amount remained unpaid at the time the plaintiff instituted proceedings. The invoice schedule shows that 3E Control's indebtedness to the plaintiff exceeded R1 000 000 by January 2020 and surpassed R2 400 000 by May 2020, reflecting a consistent pattern of increasing arrears without corresponding payments.

(d) *The termination correspondence and the admissions of insolvency*

[15] On 30 June 2021, Mr Letsie, on behalf of 3E Control, wrote to Yokogawa requesting withdrawal from the distribution agreement, citing announcements regarding a new channel partner. Yokogawa's attorneys demanded payment of the outstanding amount and required 3E Control to settle all outstanding payments totalling R2 651 307 within thirty (30) days.

[16] On 2 August 2021, Mr Letsie responded by letter, making significant admissions. These admissions include that 3E Control was unable to settle Yokogawa's outstanding invoices within thirty (30) days from the date of the demand, due to its current financial position. 3E Control's business turnover was such that it was unable to pay for Yokogawa orders in advance. And that 3E Control proposed to address the legacy debt by paying 50% of net profits generated from future sales. This letter constitutes an unambiguous admission of commercial incapacity at the date of writing and was signed by the first defendant personally.

[17] On 11 October 2021, Mr Letsie confirmed by letter that 3E Control had been experiencing financial distress and had been unable to pay its debts when they became due and payable, and that it had been voluntarily liquidated by special resolution effective 27 August 2021.

(e) *The liquidation and the liquidator's findings*

[18] Yokogawa proved its claim in the estate of 3E Control in the amount of R2 891 446,25. The liquidator's report and the minutes of the second creditors' meeting were admitted into evidence by agreement. It establishes the following. First, that the assets of 3E Control were far less than its liabilities at the date of liquidation, with a shortfall of R2 118 841 before the payment of administration costs and creditors. Second, that Yokogawa's claim was listed in the amount of R2 891 446,25. And lastly, that Mr and Ms Letsie, as directors, failed to provide 3E Control's books of account to the liquidators as required by section 284 of the Companies Act, thereby impeding the orderly administration of the insolvent estate.

The Evidence

(a) *The evidence in chief of Mr Motlhabane*

[19] Mr Motlhabane described himself as Yokogawa's senior financial manager, responsible for all accounting functions, including collections management, claims accounts, and oversight of the commercial ledger. He confirmed the existence and material terms of both agreements. He confirmed that the prior verbal agreement had the same terms as the written agreement. He testified that the payment plan arose from 3E Control's inability to meet its financial obligations and that the first defendant had himself proposed it following numerous meetings with Yokogawa.

[20] Mr Motlhabane confirmed that the 59 invoices issued for the period 9 December 2019 to 30 April 2021, totalling R2 832 601,73, remain unpaid. He confirmed both the invoice schedule (POC3) and the individual invoices referenced therein. He further confirmed that the amounts reflected in POC3 increased consistently throughout the trading period, with no corresponding payments received.

[21] On the legacy invoices, Mr Motlhabane confirmed that the overdue invoices in category (c) of the payment plan represented amounts Rustenburg/Anglo Platinum Mines had already paid to 3E Control but had not remitted to Yokogawa. He

characterised this as the clearest manifestation of 3E Control receiving payment for Yokogawa products and retaining those funds instead of passing them on.

[22] Mr Motlhabane was referred to a series of transactions in 3E Control's bank statements including recurring payments to a restaurant (Spur Grey Wolf, Papachinos Broad Acres); payments to a spa (Orient Spa); recurring payments to Discovery Insure; and, under the reference "loan from Teko" or "loan payment back to" Letsie, a series of payments including amounts of R4 000, R5 000, R15 000, R60 000, R65 000, R80 000, and several further amounts. Mr Motlhabane expressed the view that the directors had traded recklessly and that their conduct amounted to trading with the intention to defraud Yokogawa.

[23] Mr Motlhabane also drew attention to the transfer, described as an 'overdraft transfer', of R450 000 from 3E Control's bank account, dated 24 June 2021, five days before the first defendant's purported withdrawal from the distribution agreement and only approximately two months before the voluntary liquidation. In the absence of any board resolution or loan agreement to explain it, and in the context of Yokogawa being 3E Control's sole main supplier operating on a credit basis, Mr Motlhabane testified that this transaction was unexplained and indicative of the directors preferring their own interests or those of related parties over those of Yokogawa as principal creditor.

(b) *The cross-examination of Mr Motlhabane*

[24] The cross-examination of Mr Motlhabane by counsel for the defendants produced several significant concessions which this court must assess with proper circumspection. First, on the allegation of fraud, counsel took Mr Motlhabane through the elements of fraud as a legal concept: misrepresentation, prejudice or potential prejudice, unlawfulness, and intention. He acknowledged that he did not have direct personal evidence that the defendants had financially benefited individually from their alleged fraudulent conduct. After sustained questioning, he retracted his characterisation of the defendants' conduct as fraudulent, saying 'I retract the statement', and accepted that, on his evidence alone, common-law fraud had not been established.

[25] Second, on the bank transactions, Mr Motlhabane conceded that the restaurant, spa, and retail transactions may have been incurred during business trips or client entertainment and that he had no evidence to refute that explanation. He similarly conceded that the insurance payments could relate to personal vehicles used for 3E Control's business. He acknowledged that it would not be unreasonable for a company to insure vehicles used in its operations.

[26] Third, Mr Motlhabane confirmed that the agreement with the new distributor was signed on 3 February 2022, postdating the termination of the 3E Control agreement. He was put on notice that the defendants would contend the new distributor had been engaged while the 3E Control agreement was still in force.

(c) *The re-examination of Mr Motlhabane*

[27] In re-examination, counsel for the plaintiff sought to clarify certain of the concessions. Counsel for the defendants objected that the re-examination traversed matters not arising from cross-examination and was in substance argument. The court sustained the objection in part, noting that the issues raised were primarily legal conclusions more appropriately addressed in closing submissions. The court permitted limited clarifications. In particular, Mr Motlhabane clarified that when he spoke of reckless trading, he was referring to the defendants' conduct as directors, and that they had caused the company to trade in insolvent circumstances. He clarified that his concessions regarding individual transactions were that he could not personally rebut those explanations from his own knowledge, but that the absence of any board resolution, loan agreement, or documentary support for the pattern of expenditure was inconsistent with the responsible conduct of directors of a company in financial distress. He confirmed that, despite 3E Control's proposals appearing sound at the time, the plans were never implemented: the company continued to take orders, was paid by the mine for some of them, and nonetheless did not remit those funds to Yokogawa.

(d) *The examination in chief of Mr Theko Letsie*

[28] Mr Letsie testified under oath in defence of the action. He described his background as a former Yokogawa business development manager who had identified business opportunities in the mining sector through a client initiative known as "Unbundling," which encouraged large companies to partner with smaller enterprises. 3E Control was formed on the strength of those opportunities, and a distribution agreement was concluded with Yokogawa in 2017. He testified that total payments made by 3E Control to Yokogawa over the duration of the relationship amounted to approximately R32 million to R35 million, far exceeding the original annual quota.

[29] On efforts to prevent liquidation, Mr Letsie testified that he had appointed an advisory board in April 2019 to provide governance oversight. He had invested personal funds into 3E Control from its inception, drawing from personal savings, pension funds, and personal overdrafts and credit cards. He said the outstanding amount of his personal loans to 3E Control at the time of liquidation was approximately R240 000. He denied that 3E Control had traded recklessly, advancing two principal contentions: first, that the nature of the instrumentation business, requiring ongoing servicing and replacement of installed equipment, provided inherent commercial justification for continued trading; and second, that the introduction by Yokogawa of a competing channel partner in approximately June 2021 was the proximate cause of 3E Control's financial failure.

[30] Regarding the bank transactions, Mr Letsie denied any personal benefit and maintained that the restaurant, spa, and retail transactions were incurred during business trips and for client entertainment. The insurance payments, he said, were for the insurance on personal vehicles used in 3E Control's business. On the loan

repayments, he relied on a bookkeeper-prepared statement reflecting loan account movements from 2017 to 2020. He acknowledged that no board resolution specifically authorising the loans had been passed, explaining that the advisory board had not yet been appointed when the initial advances were made.

[31] On the voluntary liquidation, Mr Letsie testified that the decision was triggered by two concurrent factors, (a) the demand for the full accumulated debt within 30 days, which was impossible to meet; and (b) Yokogawa's refusal to renew the distribution agreement, which extinguished the prospect of future income. He characterised the R35 million installation base as a commercial "asset" in the sense that it represented guaranteed future servicing and replacement business.

(e) *The cross-examination of Mr Letsie*

[32] In cross-examination, the following material concessions and exchanges occurred. First, Mr Letsie accepted that directors are responsible for managing and operating a company, and that the company's conduct is carried out through its directors. He did not accept that all company failures are necessarily attributable to the directors, citing COVID-19 as an external cause beyond directorial control. Second, when clause 12 of the distribution agreement (the non-exclusivity clause) was read into the record, Mr Letsie acknowledged its existence but maintained that the parties' actual conduct over four years had been inconsistent with non-exclusivity. He conceded, when pressed, that the emails and correspondence upon which he relied to establish this de facto exclusive treatment were not included in the discovered bundle and had not been placed before the court.

[33] Third, Mr Letsie accepted that 3E Control was factually insolvent at the date of liquidation, with its liabilities exceeding its assets, as reflected in the liquidator's report. However, he interpreted this as a consequence of the 30-day demand for accumulated debt rather than as evidence of long-standing insolvency. Fourth, on paragraph 5 of POC6, admitting inability to pay within 30 days and inability to fund orders in advance, Mr Letsie maintained that the admission referred to the lump-sum demand. He sought to justify the continuation of trading by reference to the installed base and the proportion of total business paid, approximately R32 million of R35 million in total business transacted, leaving less than 10% outstanding in his submission.

[34] Fifth, Mr Letsie was referred to the R450 000 "overdraft transfer" dated 24 June 2021. He could not adduce any specific evidence to explain or legitimise that transaction, offering only that it was possibly a repayment of a personal overdraft advanced by himself or another party. Sixth, on the director loans and s 45 of the Companies Act, Mr Letsie confirmed that no board resolution specifically authorising the loans had been passed. When s 45 was put to him, which requires a board resolution before a company may provide financial assistance to its directors, he did not adequately address the legal requirement, explaining only that the advisory board had not been appointed at the relevant time.

(f) The re-examination of Mr Letsie

[35] In re-examination, Mr Letsie reiterated that COVID-19 was an external event that could cause the company's failure without fault on the part of the directors, and that, in such circumstances, the failure should not be attributed to the directors. The court noted this evidence.

(g) The second defendant, Ms Letsie

[36] Ms Letsie did not testify. No explanation was tendered for her failure to give evidence. The significance of this omission is considered in the analysis below.

Issues for Determination

[37] The issues for determination, as crystallised by the pleadings, and the oral evidence, are:

(a) Whether the third defendant's business was carried on recklessly in contravention of s 22(1) of the Companies Act, and whether the first and second defendants, as directors, were knowingly a party to that conduct.

(b) Whether the first and second defendants, or either of them, were knowingly a party to conduct by the third defendant calculated to defraud the plaintiff as a creditor, in contravention of s 214(1)(c).

(c) Whether, by reason of the above contraventions, the first and second defendants are civilly liable to the plaintiff in terms of s 218(2) of the Companies Act.

(d) Whether, in the alternative, the first and second defendants are personally liable in terms of s 424(1) of the old Companies Act.

(e) If personal liability is established, whether the quantum of that liability is R2 832 601,73 together with interest.

The Applicable Legal Principles

(a) Section 22 of the Companies Act 71 of 2008: reckless trading prohibited

[38] Section 22(1) of the Companies Act 71 of 2008 provides 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 prohibition is directed at the company as a legal entity. A director is not personally liable merely by reason of being a director, and s 22 contains no express provision making a director individually liable for acting in the manner described in s 22(1). The plaintiff correctly conceded this point in its heads of argument. Section 22 is, however, the predicate condition for the offence created by s 214(1)(c) and the consequent civil liability under s 218(2).¹

[39] The concept of recklessness connotes a complete failure to consider the consequences of one's actions or an attitude of reckless disregard for them. A

¹*Ozinsky NO v Lloyd and Others* 1992 (3) SA 396 (C) at 414G–H; *Philotex (Pty) Ltd and Others v Snyman*; *Braitex (Pty) Ltd and Others v Snyman* 1998 (2) SA 138 (SCA) at 143H–144B.

company carries on business recklessly when, in the opinion of a reasonable businessman standing in the shoes of the directors, there would be no reasonable prospect of the creditors receiving payment when due. Incurring debts at a time when there is no reasonable prospect of repayment will almost invariably be reckless. The test is objective.²

[40] In determining whether a company's business has been conducted recklessly, relevant considerations include the scope of the company's operations, the functions and powers of the directors, its assets and liabilities, working capital, cash flow, access to capital, the extent of the company's financial difficulties, the amount of the debt, the prospects of payment at the dates when particular debts were incurred, and, if any, the prospects of recovery. If a company continues to carry on business and to incur debts at a time when, to the directors' knowledge, there is no reasonable prospect that the company will be able to pay its debts when they are due, it is in general a proper inference that the business is being carried on with intent to defraud creditors.

(b) Section 214(1)(c) and section 218(2): the civil liability mechanism

[41] Section 214(1)(c) of the Companies Act provides that a person is guilty of an offence if the person was knowingly a party to an act or omission by a company calculated to defraud a creditor or employee of the company, or a holder of the company's securities, or with another fraudulent purpose. Importantly, the provision does not require proof of all elements of common-law fraud. It requires knowledge and participation in the company's conduct that is "calculated to defraud", that is, conduct that has the objective tendency or design to cause financial prejudice to a creditor.

[42] A director who is knowingly a party to the carrying on of the company's business in contravention of s 22(1) is, in the exercise of that directorial function, a person who contravenes a provision of the Companies Act for the purposes of s 218(2). Section 218(2) provides that any person who contravenes any provision of the Companies Act is liable to any other person for any loss or damage suffered as a result of that contravention. The ordinary meaning of "contravenes" encompasses a breach or infringement of any provision of the Act that is prescriptive or otherwise regulates conduct.³

[43] A person who is found guilty of the offence created by s 214(1)(c) must accordingly be found to have contravened a provision of the Companies Act for the purposes of section 218(2). Civil liability in terms of s 218(2) arises upon the commission of the s 214(1)(c) offence, and the plaintiff does not additionally need to prove the ordinary common-law elements of delict such as wrongfulness or fault

²*Rabinowitz v Van Graan and Others* 2013 (5) SA 315 (GSJ) paras 17–25.

³Schedule 5, Item 9(1) of the Companies Act 71 of 2008.

independently of the statutory contravention. The section creates a *lex specialis* right of recovery for creditors harmed by the prescribed conduct.⁴

[44] To establish that a director contravened s 214(1)(c), however, the plaintiff must prove that the director was *knowingly* a party to the relevant conduct. It is not sufficient to show that the director ought to have known. Actual knowledge must be proved, though it may be inferred from the surrounding circumstances, including the director's role in and control over the company's affairs, as well as the information available to them.

(c) Section 424(1) of the old Companies Act

[45] Section 424(1) of the old Companies Act provides that when it appears, in the course of the winding up of a company, that any business of the company has been carried on recklessly, with gross negligence, with intent to defraud creditors, or for any fraudulent purpose, the court may declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company. Section 424 is preserved by Schedule 5 of the Companies Act in relation to companies wound up under the old Act.⁵

[46] The Supreme Court of Appeal has confirmed that s 424 is only available to a claimant where the company is unable to pay its debts. Therefore, recovery of the claimant's claim is imperilled.⁶ The requirements are (a) the company must be in the course of being wound up; (b) its business must have been carried on recklessly or with fraudulent intent; (c) the person against whom the order is sought must have been knowingly a party to that conduct; and (d) a sufficient causal link must exist between the manner of trading and the debts in respect of which personal liability is sought.

(d) The applicable statutory regime

[47] The conduct at issue spans the period from December 2019 to August 2021, well within the Companies Act's operation (which came into force on 1 May 2011). The primary statutory basis accordingly falls to be determined under the Companies Act. The alternative claim under s 424(1) of the old Act is preserved by Schedule 5 and may co-exist with a s 218(2) claim arising from the same conduct, provided the plaintiff does not obtain double recovery.

⁴*Ozinsky NO v Lloyd and Others* (above) 1992 (3) SA 396 (C) para414G-H; *Philotex (Pty) Ltd and Others v Snyman; Braitex (Pty) Ltd and Others v Snyman and Others* (above) 1998 (2) SA 138 (SCA) at 143H–144B.

⁵*Wackrill NO v Sandton International Removals (Pty) Ltd* 1984 (1) SA 282 (W); Henochsberg on the Companies Act vol 2, s 424.

⁶*Ex parte De Villiers* (above) at 502C–D.

Analysis and Findings

(a) *Preliminary observations on the evidence*

[48] Before turning to the substantive analysis, two preliminary observations are necessary. First, Mr Motlhabane's retraction of his fraud allegation must be assessed with appropriate circumspection. The retraction was extracted in cross-examination from a lay witness who was being tested on his understanding of the legal definition of common-law fraud. As the court noted when ruling on the re-examination objection, these are issues more properly addressed in legal argument. Whether the facts established by the evidence constitute fraud, reckless trading, or conduct calculated to defraud is a matter for the court, not the witness. A lay witness's retraction of a legal conclusion does not determine that issue. The court will assess the objective facts established by all the evidence. The more important statutory concept is whether the first defendant was knowingly a party to conduct "calculated to defraud" the plaintiff within the meaning of s 214(1)(c), a concept that does not require the common-law proof of an intention to profit personally.

[49] Second, Mr Motlhabane's concessions in cross-examination regarding individual bank transactions must be properly understood. He acknowledged that he could not personally rebut the explanation that restaurant, spa, and insurance transactions were incurred for business purposes. Those concessions established only that he, from his own knowledge as an outsider to 3E Control, could not disprove those explanations. They did not establish that the explanations are accurate. The first defendant's own account of those transactions must be assessed on its merits, in the light of the pattern of conduct as a whole, the absence of documentary corroboration, and the failure to deliver books of account to the liquidators.

[50] Third, on the question of witness credibility, it is well established that in resolving disputes of fact a court must make findings on (a) the credibility of the various witnesses; (b) their reliability; and (c) the probabilities.⁷ In evaluating credibility, the court has regard, among other things, to: the witness's candour and demeanour; internal contradictions in the evidence; external contradictions with pleaded facts or established documents; the probability or improbability of particular aspects of the version; and the calibre and cogency of the performance overall. Reliability depends on opportunities to observe the relevant events and the quality of recall. The probabilities require analysis and evaluation of each party's version on each disputed issue. Applying those criteria, Mr Motlhabane was, in this court's assessment, a credible and generally reliable witness on the financial facts. His in-court concessions regarding the bank transactions were candid and appropriate, and, in re-examination, he restored the proper contextual significance of his evidence. His retraction of the fraud allegation reflected an honest acknowledgment of the limits of his personal knowledge, not a fundamental concession on the legal merits. The first defendant's evidence, by contrast, was characterised by explanations that were not adequately

⁷*Ozinsky NO v Lloyd* (above) at 414G–H; *S v Harper* 1981 (2) SA 638 (D) at 681A–D.

supported by documentary corroboration, by vague references to unproduced emails and minutes, and by a pattern of attributing responsibility to external events while not adequately accounting for transactions that he was in the best position to explain.

(b) *Factual findings established by the evidence*

[51] The evidence establishes the following facts, which are either common cause or not genuinely contested. First, 3E Control was voluntarily liquidated by special resolution on 27 August 2021. In cross-examination, Mr Letsie accepted that 3E Control was factually insolvent on the date of liquidation, with its liabilities exceeding its assets by a shortfall of R2 118 841 before administration costs and creditor payments. Second, Mr Letsie had actual, direct knowledge of 3E Control's financial difficulties and its inability to meet its obligations to Yokogawa from at least November 2019, when he personally signed the payment plan acknowledging accumulated debt of approximately R6 521 341. This is not a matter of inference. His own signature on the document establishes it.

[52] Third, 3E Control continued to place purchase orders with Yokogawa after November 2019, generating 59 invoices totalling R2 832 601,73 between December 2019 and April 2021. These goods were supplied. None of the invoices has been paid. Fourth, in category (c) of the payment plan, it is expressly acknowledged that the end-user had already paid 3E Control for Yokogawa products, but that 3E Control had not remitted those funds to Yokogawa. As at November 2019, this category totalled approximately R2 200 878. The first defendant was personally the signatory to this acknowledgement.

[53] Fifth, the letter of 2 August 2021 (POC6) admits in plain terms that 3E Control was unable to settle the outstanding invoices within 30 days and that its turnover was insufficient to pay for orders in advance. These are unambiguous admissions of commercial incapacity. Sixth, both defendants failed to deliver 3E Control's books of account to the liquidators as required by section 284 of the Companies Act. The evidence did not explain this failure. An adverse inference arises that the documentation, had it been produced, would not have supported the explanations advanced for the questioned transactions.

[54] Seventh, the new distributor's agreement with Yokogawa was concluded on 3 February 2022. Even on Mr Letsie's own evidence, the first notification of a competing channel partner occurred at the June 2021 meeting. The debt of R2 832 601,73 had been accumulating since December 2019, some 18 months before any distributor issue arose.

(c) *The defence of the new distributor*

[55] Mr Letsie's principal defence is that the introduction of a new channel partner by Yokogawa is the proximate cause of 3E Control's financial failure. This defence fails for three independent reasons. First, clause 12 of the distribution agreement expressly provides that the arrangement is non-exclusive and that Yokogawa retains

the right to appoint other distributors or sell directly in the territory without incurring any liability to 3E Control. Mr Letsie acknowledged this clause in cross-examination. His contention that the parties' actual conduct created a de facto exclusive arrangement is inadmissible against the express written terms, particularly in light of the entire agreement clause (clause 26.9.1). The emails and correspondence upon which he said this de facto exclusivity would be demonstrated were not in the discovered bundle and were not produced in evidence. The defence accordingly lacks evidential foundation.

[56] Second, even if the new distributor's appointment caused commercial harm to 3E Control from June 2021, the debt of R2 832 601,73 was incurred between December 2019 and April 2021, a period ending approximately two months before 3E Control even became aware of any competing channel partner. The appointment of a new distributor cannot retrospectively explain a trading pattern and debt accumulation spanning 18 months. Third, the financial admissions in the letter of 2 August 2021 (POC6) acknowledge an inability to pay and an inability to fund orders that preceded the new distributor announcement. Mr Letsie's own evidence was that the new distributor did not "immediately" impact the business. The financial distress evidenced in POC6 is therefore not attributable to the new distributor.

(d) *Reckless trading by the third defendant*

[57] 3E Control carried on its business recklessly within the meaning of s 22(1) of the Companies Act throughout the trading period from December 2019 to August 2021. The evidence is compelling and overwhelming.

[58] In November 2019, Mr Letsie signed the payment plan acknowledging debt in excess of R6 521 341 and undertaking to service it through client payment redirections and the Anglo-Zimele loan facility. At that point, he had actual knowledge that 3E Control was unable to pay its debts in the ordinary course. Despite that knowledge, between December 2019 and April 2021, 3E Control placed a further 59 purchase orders with Yokogawa on 30-day credit terms, generating the full amount of the claim. The Anglo-Zimele funding was never secured. Despite numerous commitments to Yokogawa, no payments were made on the post-November 2019 invoices. By August 2021, Mr Letsie acknowledged in writing that the company could not meet the 30-day demand and could not fund orders in advance. On 27 August 2021, 3E Control was voluntarily liquidated with a shortfall of R2 118 841 before administration costs. This is a textbook example of a company incurring debts with no reasonable prospect of repayment.⁸

[59] Mr Letsie's argument that the R32 million to R35 million in total business paid over the life of the relationship demonstrates good faith trading does not answer the charge of recklessness. The question is not the proportion of total business paid. It is whether, at the relevant time, the directors knew the company could not meet its

⁸*Gihwala and Others v Grancy Property Ltd and Others* [2016] ZASCA 35; 2017 (2) SA 337 (SCA) para 119.

obligations as they fell due and nonetheless continued to incur those obligations. The prior payment history does not retroactively justify trading in known insolvency. If anything, the pattern of past performance could explain why Yokogawa was prepared to continue extending credit. It cannot explain why 3E Control was entitled to continue incurring obligations it could not discharge.

[60] The COVID-19 defence likewise does not assist Mr Letsie. The invoices were being incurred from December 2019, before the pandemic reached South Africa in March 2020. The trading pattern constituting the recklessness, continuing to order on credit with knowledge of inability to pay, was established before the pandemic. COVID-19 may have added to the company's difficulties from March 2020 onward. Still, it does not displace the recklessness already in motion, nor does it explain the failure to remit client payments already received.

(e) *Mr Letsie's contravention of section 214(1)(c)*

[61] I find that Mr Letsie contravened s 214(1)(c) of the Companies Act. His liability flows both from his knowing participation in the reckless trading of 3E Control in breach of s 22(1), and from his being knowingly a party to conduct calculated to defraud Yokogawa as creditor.

[62] The most compelling evidence of conduct calculated to defraud is the legacy invoices. Category (c) of the payment plan expressly acknowledges that Yokogawa products had been supplied, the mine had paid 3E Control, but 3E Control had not remitted the funds to Yokogawa. As at November 2019, this category stood at approximately R2 200 878. Mr Letsie was personally a signatory to this acknowledgement. Conduct consisting of receiving client payment for a supplier's goods and retaining those funds while continuing to order further goods on credit from the same supplier is, on its face, conduct that has the objective tendency to cause financial prejudice to the supplier. Mr Letsie could not have been unaware of this, since he acknowledged the position in writing.

[63] The loan repayments to Mr Letsie from the 3E Control business account are a further material indicator. The amounts are substantial. Individual payments of R60 000 and R80 000, and numerous further amounts in the discovery bundle, aggregating considerably more than the R240 000 Mr Letsie acknowledged as outstanding at liquidation. No board resolution authorising these payments under s 45 of the Companies Act was produced. No written loan agreement was disclosed in the liquidation process or placed before the court. The bookkeeper-prepared statement was not corroborated by independent documentation and conflicts with the instruction that directors must authorise board authorisation before the company may provide financial assistance.

[64] The R450 000 overdraft transfer dated 24 June 2021 made five days before Mr Letsie's purported withdrawal from the distribution agreement and only approximately two months before voluntary liquidation also requires explanation. Mr Letsie could not provide one. In circumstances where Yokogawa was 3E Control's sole main supplier

operating on a credit basis, where the company was commercially insolvent, and where no creditors other than Yokogawa have been identified, an outgoing transfer of this size from the company's business account at this critical juncture is consistent with the knowing preference of the director's interests or associated parties over those of the company's principal trade creditor.

[65] The effect of the failure to deliver books of account to the liquidators as required by s 284 of the Companies Act reinforces these inferences. A director who causes a company to accumulate substantial unsecured trade credit and then fails, upon its winding up, to provide the records from which the causes and extent of the insolvency might be investigated, adds a material element to the pattern of conduct.⁹

[66] Taking the evidence as a whole, this court is satisfied that the conduct of Mr Letsie crosses the threshold into conduct knowingly calculated to defraud Yokogawa within the meaning of s 214(1)(c) in at least two respects:

(a) The retention of client payments already received for Yokogawa products, and the continuation of ordering on credit thereafter, without remitting the funds already collected. This constitutes conduct calculated to defraud Yokogawa as a creditor, and Mr Letsie had actual knowledge of it from at least November 2019.

(b) The preferential repayment of director loans from the company's business account, in the absence of board resolutions or written loan agreements as required by section 45, while Yokogawa's invoices remained entirely unpaid. This constitutes a knowing and unsanctioned preference of the director's interests over those of the company's principal trade creditor.

[67] This court accordingly finds that Mr Letsie contravened s 214(1)(c) of the Companies Act, and is liable to Yokogawa under s 218(2) thereof for the full quantum of Yokogawa's loss.¹⁰

(f) The second defendant

[68] Ms Letsie, the second defendant, did not testify. Yokogawa bears the onus of establishing her personal liability. The adverse inference arising from her failure to testify must be assessed in the context of the affirmative evidence against her.¹¹

[69] The affirmative evidence relating to Ms Letsie is limited but is not negligible. She was a director of 3E Control from its formation, as Mr Letsie confirmed in cross-examination. The liquidator's report attributes the failure to deliver books of account to the directors without distinguishing between them. The particulars of claim allege that she was at all material times in control of the business of 3E Control, actively

⁹*Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* 2020 (5) SA 419 (SCA) para 45.

¹⁰*Rabinowitz v Van Graan and Others* 2013 (5) SA 315 (GSJ) para 17; *Grancy Property Ltd and Another v Gihwala and Others InRe;Grancy Property Limited and Another v Gihwala and Others* [2014] ZAWCHC 97 para 69.

¹¹*Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie SA and Others* [2002] JOL 10175 (SCA) para 5.

participated in its carrying on, and was aware of its financial position. The plea did not specifically traverse these allegations, beyond a general denial.

[70] On the other hand, all operative correspondence, the payment plan, the distributorship agreement, and the letters of 2 August and October 2021 were signed by Mr Letsie alone. Mr Letsie described his role as sales, marketing, and day-to-day operational management. He did not describe Ms Letsie as playing any particular operational role. Mr Motlhabane's evidence did not establish direct knowledge of any specific act of Ms Letsie.

[71] Notwithstanding these limitations, this court finds that Ms Letsie is liable for reckless trading. She was a director throughout the entire period. As a director, she owed the obligations imposed by s 76 of the Companies Act. As co-director and co-owner of a closely held company, she was in a position to know, or to make herself aware of, the company's financial affairs, including the existence of the payment plan, the accumulated indebtedness, and the failure to service that debt. Mr Letsie's evidence does not suggest that she was kept in ignorance of these matters. The opposite may reasonably be inferred from the fact that she was a director from the beginning of the business and from the closely held, two-person directorial structure of the enterprise. In the absence of her own evidence to the contrary, this court must necessarily draw the adverse inference that she was aware of the reckless trading and acquiesced in its continuation.

[72] This court accordingly finds that Ms Letsie was knowingly a party to the reckless trading of 3E Control within the meaning of s 22(1) of the Companies Act, and is liable to Yokogawa under s 218(2) of the Companies Act.

[73] On the s 214(1)(c) allegation against Ms Letsie, I approach this cautiously and with circumspection. The evidence does not establish that she personally participated in the specific acts found to constitute conduct calculated to defraud. The retention of client payments and the unsanctioned director loan repayments are, on the evidence, attributable primarily to Mr Letsie. In the absence of evidence connecting her directly to those acts, this court declines to make a finding of a s 214(1)(c) contravention against Ms Letsie. Her liability rests solely on s 22 read with s 218(2) of the Companies Act.

(g) *The alternative claim under section 424(1)*

[74] Having found that the primary claims under the Companies Act succeed, it is strictly unnecessary to determine the alternative claim in full. For completeness, I, however, note that the requirements of s 424(1) of the old Companies Act are also satisfied in respect of both defendants:

- (a) 3E Control is in the course of being wound up.
- (b) Its business was carried on recklessly. It continued to trade while commercially insolvent, accumulated further credit obligations it could not discharge, and retained client payments properly belonging to Yokogawa.

- (c) Mr Letsie was knowingly a party to the carrying on of the business in that manner, as established above.
- (d) Ms Letsie was knowingly a party within the meaning of section 424(1), for the reasons stated in the analysis of her liability under section 22.
- (e) 3E Control is unable to pay its debts and Yokogawa's recovery is imperilled, which is the condition precedent for a s 424(1) declaration.
- (f) There is a sufficient causal link. All 59 invoices were incurred after November 2019, the date at which the first defendant had actual knowledge of 3E Control's insolvency, and the entire quantum represents goods supplied and unpaid.

(h) *Causation and quantum*

[75] Reckless trading is established from December 2019, being the date of the first invoice in the claim. Mr Letsie's actual knowledge of the company's inability to pay is established as at November 2019. Every one of the 59 invoices in the claim was placed and accepted after that date. The causal nexus accordingly covers the full quantum of R2 832 601,73.

[76] Yokogawa's entitlement to interest at the contractual rate of 2% above the First National Bank overdraft rate per annum, calculated monthly as provided for in clause 10.1.2 of the distribution agreement, is established. Interest will run from 13 July 2021, being the date of the first letter of demand, to the date of final payment.

Conclusion

[77] For the reasons stated above, I make the following findings. Firstly, that Mr Letsie contravened s 214(1)(c) of the Companies Act 71 of 2008 by being knowingly a party to 3E Control's conduct, which was reckless in contravention of s 22(1) and calculated to defraud Yokogawa as a creditor, and is personally liable to Yokogawa under s 218(2) of the Companies Act. Secondly, that Ms Letsie contravened s 218(2) of the Companies Act read with s 22(1) thereof by knowingly acquiescing in 3E Control's reckless trading, and is personally liable to Yokogawa thereunder.

Costs

[78] Mr and Ms Letsie are jointly and severally liable for Yokogawa's costs. Yokogawa seeks costs at scale C, contending that the complexity of the matter warrants an enhanced costs award. The defendants also sought costs on scale C in the event of success. Having considered the submissions on costs, I am not persuaded that scale C is appropriate. While the matter involved important questions of company law, the trial was concluded in a single day, the witnesses were limited to two, and the legal principles governing the claims are well settled in the appellate authorities, including *Philotex*, *Hlumisa*, *Venator* and *Gihwala*. The appropriate costs order is at scale B, which adequately reflects the significance of the litigation and Yokogawa's substantial success. Costs are accordingly awarded to Yokogawa, to be

paid by Mr and Ms Letsie jointly and severally, including the fees of counsel on scale B.

Order

[79] In the result, the following order is made:

1. It is declared that the first defendant, Theko Letsie, contravened section 214(1)(c) of the Companies Act 71 of 2008 by being knowingly a party to acts and omissions of the third defendant, 3E Control and Instrumentation (Pty) Ltd, which were reckless in contravention of section 22(1) of that Act and which were calculated to defraud the plaintiff as a creditor of the third defendant.
2. It is declared that the second defendant, Makabele Belinah Letsie, contravened section 218(2) read with section 22(1) of the Companies Act 71 of 2008 by knowingly permitting the third defendant to carry on its business recklessly.
3. In terms of section 218(2) of the Companies Act 71 of 2008, the first and second defendants are, jointly and severally liable to the plaintiff, the one paying the other to be absolved, for the loss suffered by the plaintiff as a result of the contraventions declared in paragraphs 1 and 2 above in the sum of R2 832 601,73 plus interest on the sum of R2 832 601,73 at the rate of 2% above the First National Bank overdraft rate per annum, calculated monthly, from 13 July 2021 to the date of final payment.
4. The first and second defendants are liable for the plaintiff's costs of suit, including the fees of counsel, on Scale B.



AH PETERSEN
ACTING DEPUTY JUDGE PRESIDENT
NORTH WEST DIVISION, MAHIKENG

Appearances:

For the Plaintiff:	Adv S Mathiba (with M Kekae as pupil)
Instructed by:	Werksmans Attorneys c/o M.E. Tlou Attorneys & Associates, Mahikeng
For the First and Second Defendants:	Adv A Mabentsela
Instructed by:	G Nkomo Incorporated c/o Steenkamp Incorporated, Mahikeng