THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 74/2024

In the matter between:

AFRICA AGRICULTURE AND TRADE INVESTMENT FUND **APPELLANT**

and

FRANCOIS VIENINGS **RESPONDENT**

Neutral citation: *Africa Agriculture and Trade Investment Fund v Vienings* (74/2024) [2026] ZASCA 19 (24 February 2026)

Coram: MOKGOHLOA, GOOSEN, KATHREE-SETILOANE and KOEN JJA and MODIBA AJA

Heard: 19 August 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down of the judgment is deemed to be on 24 February 2026 at 11h00

Summary: Company Law – Companies Act 61 of 1973 – whether conduct of business rescue practitioner constituted recklessness within the meaning of s 424(1) or gross

negligence within the meaning of s 140(3)*(c)*(ii) of the Companies Act 71 of 2008 which rendered him personally liable for the debts of the company in business rescue.

ORDER

On appeal from: Eastern Cape Division of the High Court, Makhanda (Noncembu J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Mokgohloa JA (Goosen, Kathree-Setiloane and Koen JJA and Modiba AJA concurring):

[1] The appellant, Africa Agriculture and Trade Investment Fund (AATIF), appeals a decision of the Eastern Cape Division of the High Court, Makhanda (the high court), which dismissed its application to declare the respondent, a business rescue practitioner, Mr Francois Vienings (Mr Vienings), personally liable for all the debts of Cape Concentrate (Pty) Ltd (in liquidation) (Cape Concentrate) due to AATIF. The application was based on the provisions of s 424(1) of the Companies Act 61 of 1973 (the old Act), read with item 9 to Schedule 5 to the Companies Act 71 of 2008 (the new Act) and s 140(3)*(c)*(ii) thereof.

The facts

[2] Cape Concentrate carried on the business of manufacturing and selling tomato paste. It sourced raw tomatoes from its sister company Rumibyte (Pty) Ltd (Rumibyte), which was also subsequently liquidated, which conducted a tomato farming operation. Cape Concentrate and Rumibyte shared the same board of directors.

[3] Rumibyte started to experience difficulties in securing a continuous flow of tomatoes and was placed under business rescue. Mr Vienings was appointed as its business rescue practitioner. Rumibyte's distressed status affected the business of Cape

Concentrate and caused it to suffer financial distress. It too was placed under business rescue with Mr Vienings appointed as its business rescue practitioner.

[4] The business rescue proceedings of Cape Concentrate commenced on 16 May 2013. The first meeting of creditors and employees of both Cape Concentrate and Rumibyte was held on 24 May 2013. At the meeting, Mr Vienings expressed the view that the possibility existed that both companies could be rescued. He stated that he was in negotiations with possible funders to obtain capital for both Cape Concentrate and Rumibyte.

[5] In early December 2013, Mr Vienings became involved in the establishment of the Tyefu Community Farming Trust (the Trust), comprising a number of community farmers whose beneficiaries were various cultural co-operatives and community organisations in the area in which Rumibyte is located. This was done in order to procure funding from the Department of Agriculture, Forestry and Fisheries and the Land Bank.

[6] During March or April 2014, Mr Vienings held discussions with the Humansdorp Cooperation Ltd (HDC), a local agricultural co-operative, to obtain funding for the commercial farmers and the Trust. This culminated in HDC's willingness to provide funding and facilities for purposes of preparing fields to plant tomatoes.

[7] AATIF became involved around November 2013. Negotiations were held between AATIF and Cape Concentrate of a possible AATIF investment in the business rescue process of Cape Concentrate. During February 2014, AATIF conducted a due diligence on Cape Concentrate business. This included among others: the inspection of the factory operation and farming operations and a staff assessment for both Rumibyte and Cape Concentrate; the challenges faced by both companies in securing a sufficient supply of tomatoes for the factory operations; the financial statements of both companies and how the historical financiers had become involved and how the funding was allocated; and the financial model, cash flow and shareholding. The information on the proposed funding from HDC was also disclosed to AATIF.

[8] There were interactions between AATIF and HDC in which AATIF provided input on the proposed HDC funding terms. On 14 August 2014 AATIF and HDC concluded an Investment Partner Agreement in terms of which HDC undertook to make facilities available to qualifying commercial farmers for the production of tomatoes, and to ensure that these farmers are able to repay their respective obligations without becoming over indebted. Four days later, on 18 August 2014, AATIF and Cape Concentrate concluded the Facility Agreement in terms of which AATIF undertook to loan US$8 million to Cape Concentrate. The agreement specified when and how the loan would be repaid. The recital in the agreement recorded that: 'The Lender has agreed to grant a loan to the Borrower for the financing of its tomato farming and processing operations in the Eastern Cape region, South Africa.'

[9] AATIF advanced the loan as agreed. Thereafter, HDC demanded that Cape Concentrate provide guarantees for its loan. Mr Vienings provided the guarantees to HDC. On 7 May 2015, HDC called up the demand guarantees for an amount of R22 268 848.85. This amount was paid from the loan granted by AATIF to Cape Concentrate. On 19 May 2015, Mr Vienings resigned as Cape Concentrate's business rescue practitioner and was replaced by Mr Daniel Terblanche (Mr Terblanche). About six months later, Mr Terblanche informed the creditors of Cape Concentrate that there were no reasonable prospects of rescuing Cape Concentrate and it was placed under liquidation.

In the high court

[10] On 11 June 2019, AATIF brought an application in the high court in which it claimed the following relief:

(a) An order declaring that Mr Vienings be personally liable without limitation of liability, for all the debts of Cape Concentrate due to AATIF in terms of s 424(1) of the old Act read with item 9 of Schedule 5 and s 140(3)*(c)*(ii) of the new Act.

(b) An order directing Mr Vienings to pay an amount of R134 543 413.99 to AATIF, together with interest.

[11] AATIF claimed that Mr Vienings' conduct of not discontinuing the business rescue proceedings between August 2014 to January 2015, and not placing Cape Concentrate under liquidation rather than allowing it to incur further debts; and, utilizing the loan funds from AATIF to pay HDC, constituted a reckless exercise of the powers and functions of a business rescue practitioner in terms of s 140(3)*(c)*(ii) of the new Act. It claimed further that Mr Vienings' conduct rendered him personally liable to the liability of Cape Concentrate to AATIF in terms of s 424(1) of the old Act.

[12] Mr Vienings argued that the belief that reasonable prospects existed to rescue Cape Concentrate was shared by AATIF. He kept AATIF informed on the progress of the business rescue process. He submitted that he held meetings with AATIF's delegates where further progress was discussed and there was never a stage where AATIF suggested that the business rescue should be discontinued. He further submitted that AATIF knew of the rand-for-rand security through the use of AATIF loan capital since 2014. This issue, according to Mr Vienings, was discussed in detail in January 2015 when the representatives of AATIF visited South Africa.

[13] The high court dismissed the application with costs. It held that as a reasonable business rescue practitioner, Mr Vienings may well have terminated the rehabilitation process between August 2014 and January 2015. It found that since AATIF was appraised and had knowledge of the progress of rehabilitation and had no issue with the progress, it cannot be said that Mr Vienings' conduct amounted to negligent or reckless conduct which warrant the extreme punishment provided for in s 424 of the old Act.

[14] The High Court found that reports were submitted to AATIF on 30 September 2014 and 30 December 2014, informing AATIF that the budgeted funding for the purchase of tomatoes had been used as security for the HDC debt. Further, Mr Vienings held meetings with AATIF where the issue of payment of rand-for-rand guarantees to HDC were discussed and efforts were made to minimise this risk. While the reports do not indicate that Mr Vienings acted in accordance with the terms of the facility agreement in

tendering and paying for the guarantees, it does take away the notion that his action was not known to AATIF.

[15] The high court held that Mr Vienings put Cape Concentrate's rehabilitation at risk when he used the funding provided by AATIF to secure guarantees of the Trust to HDC, and such conduct amounted to negligence. It, however, found that since it was a known factor that the Cape Concentrate needed both working capital and raw materials for it to be rehabilitated and to succeed, it could not be said that Mr Vienings' conduct amounted to gross negligence. The high court held that without the support of HDC, there would be no farming and consequently no raw materials to be purchased by Cape Concentrate. Finally, the high court found that Mr Vienings' conduct cannot be said to amount to gross negligence or reckless conduct that warrants the consequences provided for in s 424.

In this Court

[16] Before us, the same arguments that were raised in the high court were reiterated on behalf of AATIF and Mr Vienings. AATIF persisted that the respondent acted recklessly in providing the guarantees of R22 million of Cape Concentrate's funds to HDC when he knew that was not permitted. It contended that Mr Vienings acted recklessly by not discontinuing the business rescue proceedings between August 2014 to January 2015, when he noticed that there no longer remained a prospect for rescuing Cape Concentrate. AATIF contended further that Mr Vienings should be declared personally liable for Cape Concentrate's debt and be ordered to pay an amount of R110 333 170.76 which is AATIF's outstanding debt.

[17] Mr Vienings submitted that AATIF was not only advised of the business rescue progress but also that its agricultural specialist conducted a technical visit to the farming operation in January 2015 to inspect the status and progress. The report of the agricultural specialist was favourable, and the specialist was pleased with the farming side, the hectarage that had been planted, including the potential harvest, and the projected yield at that stage. With regard to the HDC's guarantees, he submitted that AATIF was informed of the guarantees. According to Mr Vienings, AATIF contacted HDC

in an effort to find a solution for the security requirements. In April 2015, AATIF, HDC, and Mr. Vienings held a meeting at which HDC was requested to release the guarantees, but it refused.

[18] Mr Vienings submitted further that AATIF came to know of the use of its funding to secure HDC's credit in September/October 2014. At no stage subsequent thereto did AATIF claim that Cape Concentrate breached the terms of the funding agreement or acted contrary to the investment objectives. Neither did AATIF suggest that he acted recklessly nor that he caused Cape Concentrate to breach its obligations under the agreement. In fact, so went the submission, AATIF did nothing to undo the guarantees for months after it had knowledge thereof.

[19] Mr Vienings further submitted that in the event it is found that he acted recklessly, then AATIF's claim has prescribed. He contended that the issue of the HDC's security and the rand-for-rand demand guarantees provided were discussed in detail with AATIF in the week preceding 19 January 2015. This, according to Mr Vienings, is when the claim arose. AATIF issued the application on 11 June 2019, four years after it had knowledge of Mr Vienings' identity and the facts upon which it relies for the debt.

[20] The issue in this appeal is whether Mr. Vienings' conduct of: (a) failing to discontinue the business rescue proceedings and convert them into liquidation proceedings between August 2014 and January 2015; and (b) authorizing and/or using the loan funds advanced by AATIF to pay guarantees for HDC, breached the funding agreement and constituted reckless conduct and/or gross negligence justifying punishment or liability under s 424 of the old Act.

[21] Section 424 is a provision of the old Act. The old Act was repealed by the new Act, but s 424 was retained and continues to apply in respect of the winding up and liquidation of companies. The relevant portion of s 424(1) reads:

'**Liability of directors and others for fraudulent conduct of business**

(1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.'

[22] In *Ebrahim and Another v Airport Cold Storage (Pty) Ltd*[1] this Court, dealing with the provisions of s 424 stated that:

'The section retracts the fundamental attribute of corporate personality, namely separate legal existence, with its corollary of autonomous and independent liability for debts, when the level of mismanagement of the corporation's affairs exceeds the merely inept or incompetent and becomes heedlessly gross or dishonest. The provision in effect exacts a *quid pro quo*: for the benefit of immunity from liability of its debts, those running the corporation may not use its formal identity to incur obligations recklessly, grossly negligent or fraudulently. If they do, they risk being made personally liable'.

[23] The test for recklessness was described in *Fourie NO and Another v Newton* (*Fourie*)[2] as follows:

'The test for recklessness has both objective and subjective elements. It is objective, to the extent that the Defendant's actions are measured against the standard of conduct of a notional reasonable person. Accordingly, a defendant's honest but mistaken belief as to the prospects of payment of a claim by the company when due is not determinative of whether he was reckless; if a reasonable person or businessman in the same circumstances would not have held that belief, the Defendant's bona fides is irrelevant. The test is subjective, to the extent that it must be postulated that the notional person belongs to the same group or class as the Defendant, moving in the same sphere and having the same knowledge or means of knowledge.'

[24] The Court went further and warned that:

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[1] *Ebrahim and Another v Airport Cold Storage (Pty) Ltd* [2008] ZASCA113; 2008 (6) SA 585 (SCA) para 15.

[2] *Fourie NO and Another v Newton* [2010] ZASCA 150; [2011] 2 All SA 265 SCA (*Fourie*) para 28.

'In evaluating the conduct of directors, courts should not be astute to stigmatise decisions made by businessmen as reckless simply because perceived entrepreneurial options did not in the event pan out. What is required is not the application of the exact science of hindsight, but a value judgment bearing in mind what was known or ought reasonably to have been known, by individual directors at the time the decisions were made.'[3]

[25] In *Philotex (Pty) Ltd and Others v Snyman and Others*[4] this Court held that:

'Participation in business necessarily involves taking entrepreneurial risks but s 424 only penalizes the subjection of third parties to where (apart from the case of fraudulent trading) it is grossly unreasonable. If, therefore, in a given case there is some ground for thinking that creditors will be paid but a reasonable businessman would nonetheless, because of circumstances creating a material but not high risk of non-payment, refrain from running that risk, the director who does run that risk by incurring credit, and thus falls short of the standard of conduct of the reasonable businessman, trades unreasonably and therefore negligently vis-à-vis creditors. That departure from the reasonable standard could not fairly be described as gross, however, and the director concerned would not be hit by the section. By contrast, an instance that manifestly would fall foul of the section is where the reasonable businessman would realise that in all circumstances payment would not be made when due. To incur credit in that situation would, as a matter of degree, be so plainly serious a departure from the required standard than the conduct in the first example that one has no difficulty categorizing it as grossly unreasonable and therefore grossly negligent.'

[26] It is clear from the above cases that for Mr Vienings to be held personally liable for the debts of Cape Concentrate, it has to be found that he carried on the business of Cape Concentrate recklessly, grossly negligent or with intent to defraud the creditors of the company. AATIF does not allege fraud on the part of Mr Vienings.

[27] The business rescue process was introduced in the new Act. The new Act came into effect on 1 May 2011. Its purpose is to facilitate the rehabilitation of a company that is financially distressed by providing for the temporary supervision of the company and of the management of its affairs, business, and property. It is to prevent the demise of such a company through winding-up by making provision for its possible rescue, to ensure that a better return for the company's creditors or shareholders than payment under the law relating to winding-up is achieved.

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[3] Ibid para 45.
[4] *Philotex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) at 146H–147A.

[28] Section 140(3) deals with the duties and responsibilities of a business rescue practitioner. The relevant portion reads:

'(3) During a company's business rescue proceedings, the practitioner–

(a) . . .

(b) has the responsibilities, duties, and liabilities of a director of the company, as set out in sections 75 to 77;[5] and

(c) other than as contemplated in paragraph *(b)*–

(i) …

(ii) may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the function of practitioner.'

Analysis

[29] Under s 129 of the new Act, the board of a company may resolve that the company begin business rescue proceedings and be placed under supervision. It may do so if it has reasonable grounds to believe that (a) the company is financially distressed and (b) there appears to be a reasonable prospect of rescuing the company. Mr Vienings had the belief that there was a reasonable prospect that Cape Concentrate could be rescued.

[30] On 30 April 2013, the board of directors of Cape Concentrate resolved to commence business rescue proceedings because it was financially distressed. It required to secure a substantial capital injection to keep it afloat. To this end, Mr Vienings approached various financiers including AATIF, which bought into the business rescue process. Cape Concentrate provided AATIF with the background, operational and financial information it required to consider its investment in Cape Concentrate. AATIF conducted an on-site due diligence process of the business of Cape Concentrate. It was consulted regarding the business rescue process and plan, and it provided conditions to

[5] Section 77 deals with the liability of directors and provides in s 77(2)*(a)* that a director of a company may be held liable in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as consequence of any breach by the director of a duly contemplated in ss 75, 76(2) or 76(3)*(a)* or *(b)*.

be included in the plan and gave its final approval thereof. On 14 August 2014 AATIF concluded an Investment Partner Agreement with HDC. Four days later, on 18 August 2014, a Funding Agreement was concluded between AATIF and Cape Concentrate.

[31] During January 2015 AATIF's agricultural expert visited the farmland and was pleased with the farming and the hectarage which had been planted as well as the potential harvest. During the same month, AATIF released a press statement and recorded that:

'According to Mr Mark Harris, Cape Concentrate CFO: "We are delighted by AATIF's decision to invest in Cape Concentrate, which provides important confirmation of the company business model and key support for the agricultural industry in South Africa. The company will be looking to capitalize on the support of AATIF and offer a consistent world class product to our customers while exploring opportunities to expand our operations".

Thomas Duve, Chairman of AATIF said "The investment in Cape Concentrate fully matches AATIF's objective as it supports a venture that not only benefits local (small-scale) farmers but also fosters value generation by engaging in processing. Moving upstream along the agricultural value change generates additional income and reduces South Africa's dependence on imports".'

[32] This leads to the inescapable conclusion that AATIF shared Mr Vienings' belief that reasonable prospects existed that the business of Cape Concentrate could be rescued. It participated in the business rescue process having been given the full background of Cape Concentrate business, its challenges and what it needed to stay in business. Moreover, AATIF retained this belief even after Mr Vienings resigned as the business rescue practitioner of Cape Concentrate on 19 May 2015. This is evidenced by its continued participation in the business rescue process until 24 December 2015 when Mr Terblanche concluded that there were no longer reasonable prospects of the company being rescued and decided to terminate the business rescue process and to place Cape Concentrate under liquidation.

[33] Counsel for AATIF submitted that from June to August 2014, Cape Concentrate had not received any income from trading as there were no tomatoes for it to process. Consequently, it suffered a loss. He submitted that by January 2015, there was no

prospect of Cape Concentrate receiving the required quantity of tomatoes to conduct its business for the next six months. Mr Vienings, according to counsel, was well aware that Cape Concentrate would not be able to service its interest obligations in terms of the funding agreement.

[34] This may be true in my view. But one must not lose sight of the fact that a business rescue process is risky. Mr Vienings continued to hold the belief that tomatoes would still be delivered. It may be that Mr Vienings, acting as a reasonable business rescue practitioner, could have terminated the business rescue process, but with the anticipated funding of HDC and AATIF, he continued to hold the genuine belief that Cape Concentrate could be rescued.

[35] I am mindful of the warning in *Fourie* that courts should not be quick to regard decisions made by a business practitioner as reckless simply because the decision he took did not work out. In my view, AATIF failed to show any reason why Mr Vienings was expected to discontinue the business rescue proceedings between August 2014 and January 2015. If there was any reason, AATIF, as creditors of Cape Concentrate, with full knowledge of the company's background and prospects of it being rescued, had every right to make an application to a court to stop the business rescue.

[36] As alluded to earlier, AATIF was involved in HDC's contribution to the business rescue process. It held meetings with Mr Vienings and HDC and provided input into HDC's funding terms. This led to the conclusion of the Investment Partner Agreement between AATIF and HDC, which was a condition precedent to the conclusion of the Funding Agreement. The issue of HDC's guarantees was known to AATIF before it concluded the investment partner agreement. It was included in HDC's facilities letter dated 29 April 2014 that they be advanced according to their standard terms and conditions. AATIF had knowledge that neither Cape Concentrate nor the Trust had assets that could serve as security for any credit extended by HDC.

[37] HDC's rand-for-rand security requirements were reported to AATIF in the monthly report for the period ending in September 2014. This was the first report after Mr Vienings had issued guarantees to HDC. It recorded that:

'The strategic farming partner (HDC) has applied commercial security requirements for all forms of operating and capital development finance. This has resulted in Cape Concentrate underwriting, in full, all costs associated to the farming operations in the Tyefu region. This placed significant strain on free cash and will impact planting capacities in the region.

Cape Concentrate has approached a number of entities in support of securing a commercial guarantee to limit the amount of exposure faced by Cape Concentrate. Funding budgeted for the purchase of the tomatoes in the first season has been used as a security instrument to underwrite current progress.'

[38] After the above report had been made to AATIF, Mr Vienings requested and obtained a further draw-down from the loan facility from AATIF. In terms of Clause 5.1 of the Funding Agreement, a draw-down would only be permitted if all conditions set out in the agreement had been met, including conditions set out in Clause 4.2, which provides that:

'Subject to Clause 4.1 (Initial conditions precedent), the Lender will only be obliged to comply with Clause 5.1 (Lender's disbursement) in relation to the Loan, if on the actual Disbursement Date for the Loan:

(a) No default is continuing or would result from the Loan;

(b) . . .

(c)

(i) the Lender has received evidence in form and substance satisfactory to it of the Investment Partner's funding commitment in an amount of at least ZAR 65,000,000 (or its equivalent in another currency or currencies in respect of the Project; and

(ii) there is no beach of the Investment Partner's obligations under the Investment Partner Agreement;

(d) the Lender has received evidence in form or substance satisfactory to it that the relevant drawdown amount will be used in accordance with the relevant roll-out progress of the Project and for the specific purpose set out in Clause 3.1 (Purpose) of this Agreement; and

(e) all Repeating Representation to be made by the borrower are true and correct.'

[39] If Mr Vienings had breached the funding agreement by using AATIF's loan to provide guarantees to HDC as alleged, then AATIF would not have provided a further draw-down in terms of the above clause. The fact that a draw-down was provided leads to the inescapable conclusion that AATIF knew and was satisfied, after having been notified that its funds were used to satisfy HDC's security requirements, that the requirements in Clause 4.2 were met. In any event, without the support of HDC, there would have been no tomatoes for Cape Concentrate to purchase.

[40] In my view, the high court's finding that Mr Vienings' conduct cannot be said to amount to gross negligence or reckless conduct cannot be faulted. The appeal has to fail.

[41] I make the following order:

The appeal is dismissed with costs, including the costs of two counsel where so employed.

F E MOKGOHLOA

JUDGE OF APPEAL

Appearances:

For appellant:	C M Eloff SC with J Brewer
Instructed by:	Weber Wentzel, Sandton
	Webbers Attorney, Bloemfontein
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