REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

31 August 2018 .....
DATE SIGNATURE

CASE NO: 100390/2015

In the matter between:

HLUMISA INVESTMENT HOLDINGS (RF) LIMITED	First Plaintiff
EYOMHLABA INVESTMENT HOLDINGS (RF) LIMITED	Second Plaintiff
and	
LEONIDAS KIRKINIS	First Defendant
NITHIANANTHAN NALLIAH	Second Defendant
MOJANKUNYANE FLORENCE GUMBI	Third Defendant
MORIS MTHOMBENI	Fourth Defendant
MUTLE CONSTANTINE MOGASE	Fifth Defendant

NOMALISA LANGA-ROYDS	Sixth Defendant
NICHOLAS ADAMS	Seventh Defendant
SAMUEL SITHOLE	Eight Defendant
ANTONIO FOURIE	Ninth Defendant
ROBERT JOHN SYMMONDS	Tenth Defendant
DELLOITE & TOUCHE	Eleventh Defendant

JUDGMENT

MOLOPA-SETHOSA J

[1] This is a consolidation of two exceptions by the first to tenth excipients and the eleventh excipient respectively against the respondents' particulars of claim.

[2] The first to tenth excipients are the first to tenth defendants in the main action, the eleventh excipient is the eleventh defendant in the main action, and the respondents are the plaintiffs in the main action. The parties will be referred to as they are referred to in the main action. Accordingly:

[2.1] The first to tenth excipients will be referred to as *"the first to tenth defendants"*;

[2.2] The eleventh excipient will be referred to as *"the eleventh defendant" or "Deloitte"*; and

[2.3] The respondents will be referred to as the "*plaintiffs*".

[3] The plaintiffs were shareholders of African Bank Investment Limited ("ABIL") each owning 1.73% and 3.24% of ABIL shares respectively.

[4] The first to tenth defendants were directors of ABIL and African Bank.

[5] The eleventh defendant was a professional services firm, [the auditor] which provided auditing services to ABIL and African Bank.

[6] ABIL had, as its wholly owned subsidiary, African Bank.

[7] African Bank carried on the business of a bank.

[8] The plaintiffs issued summons against the 1st-11th defendants for the following orders set out in paragraph 37 of the plaintiffs' particulars of claim:

[8.1] Against the first to tenth defendants:

1. Payment of the amount of R721 384 512.00;
2. interest on the aforesaid amount *a tempore morae* until date of payment;
3. Costs of suit;
4. Further and/or alternative relief

[8.2] Against the eleventh defendant:

1. Payment of the amount of R1 341 224 294 40;
2. Interest on the aforesaid amount *a tempore morae* until date of payment;
3. Costs of suit;
4. Further and/or alternative relief

[9] The plaintiffs' claim against **the first to the tenth defendants** is founded in claim A. The plaintiffs rely on the provisions of s 218(2) read with sections 76(3) and 22(1) of the Companies Act 71 of 2008 ("The Companies Act"). They allege that the devaluation of their shares in ABIL qualifies as 'any loss or damage' contemplated by s 218(2) and that the directors/first to tenth defendants' conduct set out below, constitutes a contravention of breach S22(1) and a breach of S76(3). This, so the allegation goes, permits them to recover the devaluation directly from the directors/first to tenth defendants.

Section 218(2) reads as follows:

> *"Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention."*

Section 22(1) *reads:*

> *"A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose."*

Section 76 (3) reads*:*

> "*Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director –*
>
> *(a) in good faith and for proper purpose;*
>
> *(b) in the best interests of the company; and*
>
> *(c) with a degree of care, skill and diligence that may reasonably be expected of a person –*
>
> *i. carrying out the same functions in relation to the company as those carried out by that director; and*
>
> ii. *having a general knowledge, skill and experience of that director.*"
>
> …"

[10] The basis of the claim against **the first to tenth defendants** as set out in paragraph 19 of the amended particulars of claim is as follows:

[10.1] The plaintiffs allege that during the period December 2012 to December 2014 the first to tenth defendants, in their capacities as directors;

[10.1.1] Authorised the publication of financial statements in respect of ABIL and African Bank that were false or misleading in material respects;

[10.1.2] In August 2013, authorised the publication of a prospectus containing details of a proposed rights issue of R5.5 billion for ABIL which prospectus contained financial statements and other financial information that was false or misleading in material respects;

[10.1.3] Whilst present at meetings or participating in the making of decisions in terms of Section 74 of the Companies Act, 2008 (*"the Companies Act"*), failed to vote against the provision of loans by African Bank to Ellerines Holdings Limited ("EHL"), or its subsidiaries, including Ellerines Furnishers, in circumstances where such loans were made in contravention of the provisions of Section 45 of the Companies Act or where it was foreseen or ought to have been foreseen by the 1st t0 tenth defendants/directors that Ellerines Holdings Limited or its subsidiaries would be unable to repay the loans;

[10.1.4] Failed to exercise their powers, and perform their functions, in good faith and for a proper purpose, and in the best interests of ABIL or African Bank, and with a degree of care and skill and diligence reasonably expected of a person carrying out the same functions in relation to a company as those carried out by the directors, and having

the general knowledge, skills and experience of those directors

[10.2] The manifestation of the directors' conduct which the plaintiffs set out in paragraph 19 of the amended particulars of claim is set out in paragraph 20 of the amended particulars of claim as follows:

[10.2.1] The retention of Antonio Fourie as an executive director of African Bank after his appointment as chief executive officer of Ellerines Holdings Limited;

[10.2.2] The appointment of Thamsanqa Mtunzi Sokutu as an executive director of ABIL and African Bank, Managing Director of Retail Lending of African Bank and Chief Risk Officer of African Bank, under circumstances where he had no technical banking skills, and accordingly he was not sufficiently qualified to carry out his duties as director of African Bank or as managing director of Retail Lending for African Bank; he was not sufficiently qualified to carry out duties as Chief Risk Officer for African Bank in that, *inter alia*, he lacked technical skills and had an insufficient understanding of the underlying processes and principles of risk management in a bank, and he acted merely as a conduit for the input of his subordinates.

[10.2.3] Failing to make adequate provision for the losses sustained, and to be sustained by African Bank due to the bad business decisions made by African Bank's board of directors and management from time to time;

[10.2.4] Facilitating advances by African Bank to Ellerines Holdings Limited in an aggregate amount of R1.4 billion without making provision for security therefor, under circumstances where there were no reasonable prospects of the loan being repaid, and without proper compliance with section 45 of the Act.

[10.2.5] Utilising a flawed credit provision model which resulted in under-provisioning for defaulting loans because the model, *inter alia* tended to overestimate cash collections;

[10.2.6] Pursuing accounting practices which were, when compared to common banking practices and to the prudent practices expected of a registered bank, aggressive to the point of recklessness and which contributed to ABIL's difficulties in failing to ensure adequate provisions for defaulting assets;

[10.2.7] On 5 August 2013 the first to tenth defendants, on behalf of ABIL, announced a rights offer for R5.5 billion which was intended to raise capital for ABIL, stating as follows:

"The aim of the capital raising is to align ABIL's financial position with its strategy and the current challenging market backdrop. The capital raising will strengthen ABIL's balance sheet and is intended to provide a robust financial position for the coming years. The proceeds of the capital raising will serve to improve ABIL's Basel III capital ratios and provide additional capital in the event of economic headwinds and consequential impact on the credit enviroment. ABIL's board of directors believes that the capital raising is in shareholders' best interests and, by substantially enhancing the capital position of African Bank, will also serve to benefit funders and other stakeholders."

[10.2.8] The directors publicly represented to, *inter alia*, the plaintiffs that:

[10.2.8.1] the consequences of the succesfull rights offer would be that ABIL and African Bank would both enjoy the status of a going concern;

[10.2.8.2] the auditors would be entitled, on the basis of the proposed rights offer, to reasonably reflect an opinion to the effect that both ABIL and African Bank constituted going concerns;

[10.2.8.3] the amount sought by the rights offer would be suficient to fully and properly recapitalise ABIL and African Bank.

[10.2.9] The representations were, to the knowledge of the directors, false in that they anticipated capital amount to be raised as a consequence of the rights offer was wholly insufficient to result in either ABIL or African Bank enjoying the status of going concerns; or properly and adequately recapitalising ABIL or African Bank; or the auditors being entitled, on the basis of the proposed rights offer, to reasonably reflect an opinion to the effect that both ABIL and African Bank constituted going concerns.

[10.2.10] The first to tenth defendants prepared and signed financial statements of African Bank which failed to adequately disclose any of the risks.

[11] The plaintiffs thus allege that during the period December 2012 to December 2014 the first to tenth defendants, in their capacities as directors of ABIL, conducted the businesses of ABIL and African Bank recklessly in contravention of sections 22(1) of the Companies Act and in breach of section 76(3) of the Companies Act.

[12] The plaintiffs allege that the breach of these provisions resulted in significant losses on the part of African Bank and ABIL, which in turn caused the share price per ABIL share to drop by R27.84. That the plaintiffs have suffered a diminution in value of their ABIL shares, and that in terms of section 218(2) of the Companies Act the first to tenth defendants are liable to compensate the plaintiffs for the loss they suffered as a result of diminution in value of their ABIL shares.

[13] The damages that the plaintiffs claim from the first to tenth defendants are set out in paragraph 22 and 24 of the amended particulars of claim, and are as follows:

[13.1] First plaintiff – 25 911 800 shares x R27.84 = R721 384 512.

[13.2] Second plaintiff – 48 176 160 shares x R27.84 = R1 341 224 294.

[14] In essence the plaintiffs contend that by reason of S218 (2) of the Companies act, the directors, (first to tenth defendants), are liable to compensate the first and second plaintiffs for damages they allege to have suffered.

[15] The first to tenth defendants have taken exception to the plaintiffs' amended particulars of claim on three grounds:

[15.1] Firstly that the plaintiffs' claim against the first to tenth defendants lack averments necessary to sustain a cause of action [1st exception].

[15.2] In the result the amended particulars of claim do not contain allegations entitling the plaintiffs to rely on Section 218(2) of the Companies Act and the particulars of claim [2nd exception]

[15.3] The plaintiffs' particulars of claim do not contain sufficient averments to sustain a cause of action based on the representations allegedly made by the defendants [3rd exception]

[16] The first to tenth defendants go on to elaborate in what respect are the amended particulars of claim excipiable. This is contained in the first to tenth defendants' exception dated 20 January 2017 (pp 199-202 of the papers) as follows:

"EXCEPTION 1

7 The plaintiffs' claim is premised on the defendants, in their capacities as directors of ABIL and African Bank, having conducted themselves in a particular manner (paragraphs 20.1 and 20.9 of the amended POC).

8 The directors' conduct is alleged to have resulted in losses on the part of African Bank and ABIL "which in turn caused the share price of the ABIL shares … to drop …"

9 The loss which the plaintiffs claim is the reduction in the value of the shares in ABIL.

10 On the basis advanced by the plaintiffs the entities which suffered loss as a result of the directors' conduct were African Bank and ABIL (paragraph 21.2 of the amended POC).

11 The loss in respect of which the plaintiffs claim is a loss which is reflected in the share price of ABIL, as a result of the loss sustained by ABIL and African Bank in consequence of the directors' conduct.

12 The plaintiffs have not set out facts, or alleged any basis, entitling them to recover the losses suffered by them in consequence of the diminution in the share price of ABIL.

13 In the result the plaintiffs' claim against the defendants lack averments necessary to sustain a cause of action.

EXCEPTION 2

14 The plaintiffs rely on Section 218(2) of the Companies Act (para 24 of the amended POC).

15 Section 218(2) of the Companies Act provides:

"Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention."

16 The only provisions of the Companies Act identified by the plaintiffs are Section 76(3) and Section 22(1) (para 21.1 of the amended POC) and Sections 74 and 45 (paragraph 19(3) and 20.4.3).

17 The plaintiffs have not alleged that the damages which they claim were suffered "as a result of" the contravention of Sections 45, 74, 76(3) or Section 22(1) of the Companies Act. Instead the plaintiffs allege that the damages which they suffered are the consequence of a diminution in the value of the ABIL shares, which diminution resulted from losses sustained by African Bank and ABIL.

18 In the result the amended particulars of claim do not contain allegations entitling the plaintiffs to rely on Section 218(2) of the Companies Act and the particulars of claim are accordingly excipiable.

EXCEPTION 3

19 In the amended particulars of claim the plaintiffs allege that the defendants authorised th publication of a prospectus containing false or misleading information (paragraph 19.2 of the amended POC).

20 In the amended particulars of claim the plaintiffs set out certain details in respect of the false and misleading information in the prospectus (paragraph 20.8 of the amended POC).

21 The authorisation of the prospectus is alleged to be a misrepresentation (paragraph 20.8.3 of the amended POC).

22 The plaintiffs do not allege that they relied on the representation allegedly made by the defendants, or that they acted on the strength of the representation allegedly made by the defendants, or that they have suffered damages as a result of the representation allegedly made by the defendants.

23 In the result the plaintiffs' particulars of claim do not contain sufficient averments to sustain a cause of action based on the representations allegedly made by the defendants and the particulars of claim are accordingly excipiable."

[17] Generally, the first to tenth defendants/directors contend that the plaintiffs rely on the conduct of the first to tenth defendants having caused losses to African Bank and to ABIL *"which in turn caused the share price of the ABIL shares … to drop"*. No allegation of conduct by the first to tenth defendants against the plaintiffs is made. The loss which the plaintiffs claim is the reduction in the value of their ABIL shares, and therefore reflects the loss

suffered by ABIL and African Bank. The basis of the first exception is therefore that the plaintiffs' claim lacks averments necessary to sustain a cause of action because a claim for reflective loss is not sustainable in our law. Further that the plaintiffs rely on section 218(2) of the Companies Act which provides that any person who contravenes any provision of the Companies Act "*is liable to any other person for any loss suffered by that person as a result of that contravention*". The provisions of the Companies Act alleged to be contravened are section 76(3), 22(1), 74 and 45. The plaintiffs do not allege that the loss they claim was suffered as a result of the contravention of these provisions of the Companies Act; instead the plaintiffs allege that they suffered a loss as a result of diminution in the value of their ABIL shares. Accordingly, the amended particulars of claim lack necessary averments entitling them to rely on section 218(2) of the Companies Act.

[18] Also, that the plaintiffs allege that the first to tenth defendants authorised the publication of a prospectus containing false or misleading information, which is alleged to be a misrepresentation. The plaintiffs do not allege that they relied on the representation allegedly made by the first to tenth defendants, or that they acted on the strength of the representation allegedly made by the first to tenth defendants, or that they have suffered damages as a result of the representation allegedly made by the first to tenth defendants. On this basis, the particulars of claim do not contain sufficient averments to sustain a cause of action based on the representation allegedly made by the first to tenth defendants. **[My underlining.]**

[19] In paragraph 21 of the amended particulars of claim the plaintiffs identify the acts of the first to tenth defendants, in their capacities as directors of ABIL

and African Bank, which allegedly renders those defendants liable to compensate the plaintiffs for the losses they have suffered as a result of the diminution of the market value of their shares in ABIL. Those actions are the alleged breach by the defendants of section 76(3) of the Companies Act.

[20] The plaintiffs do not allege that the first to tenth defendants breached section 22 of the Companies Act. S22 imposes duties upon the company and not its directors.

[21] Counsel for the first to tenth defendants submitted that if the board of a company has caused or permitted the company to breach section 22, the appropriate remedy against them lies in section 76(3). What the plaintiffs allege is that the conduct of the defendants resulted in the business being carried out recklessly or with gross negligence in contravention of section 22. Thus the only breaches upon which the plaintiffs rely for the purposes of section 218 is section 76(3).

[22] In paragraph 38 of their heads of argument the plaintiffs allege:

"*Section 218(2) of the Companies Act provides a general remedy to any person, which would obviously include the company, a shareholder or a creditor, etc. to hold any person, who contravenes any provision of the Companies Act liable for any loss or damage suffered as a result of the contravention.*"

[23] The plaintiffs contend, and it was argued on their behalf that a third party can hold a director liable for conduct that falls within the ambit of Section 76(3) of the Act and then say:

> "*Third parties, under Section 218(2) of the Companies Act, therefore have a claim against the directors of a company for each breach of their statutory fiduciary duties to the company even though these duties are owed to the company and not to them.*"

[24] In order for the plaintiffs to succeed they must demonstrate that:

> [24.1] The plaintiffs' reliance on Section 218(2) and a breach of Section 76(3) gives the plaintiffs a claim against the first to tenth defendants; and
>
> [24.2] Section 218(2) has altered and extinguished the common law, which does not permit a claim for a reflective loss. I deal with this aspect below.

[25] Section 218(2) of the Companies Act, already set out above, provides that:

> "*Any person who contravenes any provision of this Act is liable to any other person for any loss or damage <u>suffered by that person</u> as a result of that contravention.*" [my underlining]

[26] Section 218(2) is worded widely in respect of individuals who fall within its ambit, however, it is restricted in its application and applies only to "*damage <u>suffered by that person</u> as a result of that contravention.*" This restriction requires a particular person to have suffered damage as a result of a particular

contravention. What this means is that the particular person who has suffered damage must be a person who is able to invoke a claim for damage as a result of a particular contravention of the Companies Act. In paragraph 21 of the amended particulars of claim, the plaintiffs' recourse to Section 218(2) is articulated as follows:

> "*21. The director's conduct as aforesaid:*
>
> *21.1 constituted a breach of the provisions of Section 76(3) of the Companies Act and resulted in the business of ABIL and African Bank being carried out recklessly or with gross negligence, in contravention of the provisions of Section 22(1) of the Act,"*

[27] Section 76(3) already set out above, provides as follows:

> "*Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director –*
>
> *(d) in good faith and for proper purpose;*
>
> *(e) in the best interests of the company; and*
>
> *(f) with a degree of care, skill and diligence that may reasonably be expected of a person –*
>
> *iii. carrying out the same functions in relation to the company as those carried out by that director; and*
>
> iv. *having a general knowledge, skill and experience of that director*."

[28] Section 76(3), establishes a standard of care expected of directors but does not deal with the liability of a director. The liability of a director for a breach of Section 76(3) is dealt with in Section 77 of the Companies Act which provides as follows:

> "*The liability of directors and prescribed officers –*
>
> …
>
> *(2) A director of a company may be held liable –*
>
> *(a) 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 a consequence of any breach by the director of a duty contemplated in Sections 75, 76(2) or 76(3)(a) or (b).*"

[29] Therefore, a claim that alleges that directors are liable for damages as a result of a breach of Section 76(3) must be brought in terms of Section 77(2) which specifically creates the liability for a breach of Section 76(3).

[30] Where a statute expressly and specifically creates liability for the breach of a section then a general section in the same statute cannot be invoked to establish a co-ordinate liability, see *Gentiruco AG v Firestone SA (Pty) Limited* 1972(1) SA 589 (A) at 603. This is the result of the *generalia specialibus non derogant* maxim in terms of which general provisions do not derogate from special provisions.

[31] Even if the plaintiffs can advance a claim for a breach of Section 76(3) under Section 218(2) they must show that Section 218(2) has altered the

common law to allow a reflective loss. This would be a drastic departure from a core principle of company law.

[32] One of the well-established principles of statutory interpretation is that a statute does not alter the existing common law more than is necessary. This presumption enhances legal certainty, discourages destabilisation or unsettling of the law and manifests recognition of the worth of the common law.

[33] In *Casserley v Stubbs* 1916 TPD 310 at 312 Wessels J said:

> *"It is a well known cannon of construction that we cannot infer that a statute intends to alter the common law. The statute must either explicitly say that it is the intention of the legislature to alter the common law, or the inference from the ordinance must be such that we can come to no other conclusion than that the legislature did have such an intention."*

See also *Dhamabakium Appellant v Subramanian and Another Respondent* 1943 AD 160 at 167, quoting *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 823. *"It is a sound rule to construe the statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the common law."*

[34] The presumption requires that legislation must be interpreted in light of the common law and must, as far as possible, be reconciled with the common law and be read as coexisting with the common law.

[35] The common law is however not an "impenetrable obstacle", and the presumption is therefore rebuttable the rebuttal of the presumption is to be deduced from the wording of the statutory provision which must be read in the context of the statute as a whole. See *Kruger v Santam Versekeringsmaatskappy Beperk* 1977 (3) SA 310 (at 320G-H).

[36] In our modern constitutional democracy, the presumption that a statute affects the common law as little as possible must be viewed in the context of the supremacy of the Constitution. Undoubtedly the Constitution can trump the common law, and the Constitution expressly requires that the common law be developed to promote the spirit, purport and objects of the Bill of Rights; Section 39(2) of the Constitution Act 108 0f 1996. I may state that no constitutional rights are relied on by the plaintiffs.

[37] The Constitutional Court considered the presumption in *Ngqukumba v Minister of Safety and Security and Others* 2014 (7) BCLR 788 CC. In this case the court was concerned with the provision of the National Road Traffic Act 1993 of 96 which dealt with the possession of a vehicle having a false engine or chassis number "without lawful cause". Ngqukumba was in possession of a motor vehicle that he used as a taxi. The police suspected that the vehicle had been stolen and seized it without a warrant. On inspection, it was found that the engine number and chassis numbers had been tampered with. The police refused to return the taxi to Ngqukumba and he brought an application to spoliate the taxi. The High Court found that the provisions of the National Road Traffic Act precluded the return of the taxi to Ngqukumba. An appeal to the Supreme Court of Appeal failed. An appeal to the Constitutional Court was

successful and in a unanimous judgment the Constitutional Court set aside the orders of the Supreme Court of Appeal and the High Court and ordered the vehicle to be returned to Ngqukumba. In the course of the judgment the Constitutional Court dealt with the relevant sections of the Road Traffic Act and said:

> *"With this in mind, I take the view that [the sections of the Road Traffic Act] must, as far as possible, be read in a manner that is harmonious with the mandament van spolie. This is in accordance with the principle that, to the extent possible, statutes must be read in conformity with the common law. Of course, where a harmonious reading is not possible, statutes must trump the common law.*
>
> …
>
> *Nothing tells me that [the Road Traffic Act] is plainly intended to alter the common law. There would be disharmony between these sections, on the one hand, and the availability of the mandament van spolie … the sections must be read not to oust the normal operation of the mandament van spolie. This reading promotes the spirit, purport and objects of the Bill of Rights and, therefore, conforms to the provisions of Section 39(2) of the Constitution."*

[38] The Constitutional Court again applied the presumption in *Mhlongo v S; Nkosi v S* 2015 (8) BCLR 887 (CC) when dealing with the admissibility of extra curial statements of an accused implicating a co-accused in a criminal trial. This involves consideration of the admissibility of hearsay evidence in terms of Section 3 of the Law of Evidence Amendment Act 45 of 1988. When interpreting the Law of Evidence Amendment Act the Constitutional Court said:

> *"The court in Ndhlovu seemed not to have regard to whether the evidence Amendment Act altered the common law. In interpreting a statute it cannot be inferred that it alters the common law unless there is clear intention to do so. A statute must be interpreted in a manner that makes the least inroads into the common law. Together with Section 3(2), another indicator that the Evidence Amendment Act did not alter the common law is to be found in Section 3(1) which provides that:*
>
> > *'Subject to the provisions of any other law hearsay evidence shall not be admitted as evidence unless certain stipulated requirements are met.'"*

The Evidence Amendment Act altered the common law in relation to hearsay evidence but it did not alter or intend to alter the common law in relation to the admissibility of extra curial statements made by an accused against a co-accused.

[39] It cannot be said that there is anything in Section 218(2) to indicate that the legislature intended to alter the common law and allow reflective loss claims to be brought under that section.

[40] When Section 218(2) is read in context, particularly where a breach of Section 76(3) is relied upon by a plaintiff to establish the defendant's liability to compensate it for damages under section 218(2), the provisions of Section 77(2) must be considered. Section 77(2) expressly requires a claim for a breach of

Section 76(3) to be brought "***in accordance with the principles of the common law*"**. [My emphasis].

[41] The result of the reference to the common law in Section 77(2) is that a reflective loss claim cannot be brought under Section 77(2) because the common law does not permit such a claim. What the plaintiffs' argument involves is a finding that the Companies Act allows a reflective loss claim which the common law prohibits if the clam is brought under Section 76(3). This anomalous result is untenable and demonstrates why the plaintiffs are wrong.

[42] Section 77(3)(b) deals explicitly with losses suffered by the company as a consequence of a director having acquiesced in a breach of section 22(1), which 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'*. Such a loss may only be recovered by the company since it is a loss to the company. To the extent therefore that the plaintiffs seek to hold the defendants liable because their conduct resulted in a breach by African Bank of section 22(1), section 77(3)(b) demonstrates that such action is not available. [My emphasis]

[43] In an attempt to construct a claim, the plaintiffs suggest that the phrase *"as a result of"* in section 218(2) of the Companies Act does not import a legal causative requirement. On this basis the plaintiffs must contend for a form of strict liability in terms of Section 218(2). This suggestion must then be linked to the plaintiffs' suggestion that section 218(2) operates in respect of any third

party, for any breach of the Companies Act. The practical result of what the plaintiffs allege section 218(2) means is that:

> [43.1] There is no requirement of fault for liability to follow – even an innocent breach of the Companies Act will result in liability;
>
> [43.2] There is no limit on which third party may claim – any third party no matter how distant or removed has a claim;
>
> [43.3] There is no restriction on which provisions of the Companies Act will found a claim if breached.

[44] Basically the plaintiffs suggest in their interpretation of section 218(2) is that all of the requirements of the common law relating to fault, foreseeability, causation and the proper plaintiff should be discarded and this cannot be so.

[45] The plaintiffs' suggested interpretation of section 218(2) will result in a situation where a director of a company is potentially liable to parties who he, or she, has not met, has not heard of, and is entirely unaware of. This is an enormous departure from the clearly established legal principles, and would, we submit, have required express and clear language in the statute. If this had been intended then the statute would have said something along the following lines *"notwithstanding anything in the common law"*, or words to that effect- See in this regard section 103(5) of the National Credit Act, 2005 which uses the phrase "notwithstanding any provision of the common law … to the contrary …". There are no such words in the statute. On the contrary, the statute expressly refers to the common law when considering liability of directors for a breach of section 76(3).

[46] There is no indication that the section 218(2) was intended to change the common law at all, not least to the degree suggested by the plaintiffs.

[47] The plaintiffs' attempt to avoid the causative element of section 218(2) by referring to the interpretation of "*as a result of*" in Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd 2007 (6) SA 199 is unhelpful. That case was concerned with the Restitution of Land Rights Act, Act 22 of 1994 – a remedial statue to address land imbalances as a result of apartheid. It is well established that when interpreting a remedial statute the remedy must be extended as far as the words will permit; See Kinekor Films (Pty) Ltd v Dial-A-Movie 1977 1 SA 450 (A) at 461B-D; Slims (Pty) Ltd v Morris 1988 1 SA 715 (A) at 734D-F. This approach was followed in the Goedgelegen case, and at paragraph [55] Moseneke DCJ states:

> *"It is indeed so that the Restitution Act is an enactment intended to express the values of the Constitution and to remedy the failure to respect such values in the past, in particular, the values of dignity and equal worth. To achieve this remedial purpose, as it is shown later in this judgment, the history and context within which land rights were dispossessed and in particular the manner in which labour tenancy operated and was terminated must be considered. The causal enquiry required by section 2(1) of the Restitution Act must be understood in the light of this purpose and the full context of the dispossession of land rights in issue."*

[48] The Companies Act cannot be said to be a remedial act, and in my considered view there is no warrant for applying the same meaning afforded to the words "*as a result of*" in the Goedgelegen case. The more traditional

meaning of "*as a result of*" should be applied, which requires a legally recognised causative link.

[49] The "*traditional"* approach to interpreting "*as a result of*" was considered, and applied in the Burco Civils v Stolz and another, unreported 26201/15 ZAGPPHC, where the court said:

> "*[47] In my view, to succeed on the basis of section 218(2), it must not only be shown that a person contravened any provisions of the Act, and that another person suffered damage. It must also be shown that such damage suffered was as a result of that contravention. In other words, there must be proof of a causal link or connection.*
>
> *[48] The section, in my view is not some backdoor for businessmen and women, through which to seek to use as an escape route and derive an unfair advantage of getting others to personally carry the cost of their business risk, which risk they must naturally and ordinarily carry under the circumstances caused by the loss of money or some interest as a result of external business pressures. In my view, what is envisaged in the section, is any contravention, whether it amounts to an offence or not, which has an adverse effect on the creditors' claims.*

[50] As appears from the discussion of the reflective loss doctrine in Itzikowitz v ABSA 2016 (4) SA 432(SCA) at paragraphs [8]-[17], one of the principles that underpins that doctrine is the fact that in law a company has a legal personality distinct from its shareholders and that accordingly a loss to the company which causes a fall in its share price is not a loss to the shareholder. To use the words of section 218, the shareholder cannot be said to have suffered

a loss as a result of a breach of duties owed to the company simply because *"as a result"* its share price has fallen. In short, our courts have determined that there is an insufficient causal link between harm suffered by a company as a result of a breach of a duty owed to it and any loss suffered by its shareholders in consequence of a fall in the company's share price. There is no reason to suppose that the legislature intended, by enacting section 218, to depart from that judicially sanctioned approach.

[51] In my considered view the plaintiffs' reliance on Section 218(2) of the Companies Act to found a reflective loss claim does not establish a claim that can be sustained in law, and does not avoid the exception that the first to tenth defendants have taken. I deal further below with this aspect.

[52] The plaintiffs' claim against **the eleventh defendant/Deloitte** constitutes claim B in the amended particulars of claim. The plaintiffs' claim B, against the eleventh defendant is founded in delict, based upon allegedly negligent misstatements. The basis of the claim is the allegedly negligent audit by the eleventh defendant/Deloitte of certain annual financial statements of African Bank.

[53] The plaintiffs allege that they relied on the alleged misstatements by the eleventh defendant/Deloitte that the annual financial statements presented the financial position of African Bank fairly, to refrain from taking steps to remove the directors of ABIL or to take other steps to prevent losses to African Bank.

[54] The basis of the claim against the eleventh defendant is that the failures of the eleventh defendant/Deloitte resulted in significant losses on the part of African Bank and hence ABIL, which in turn caused the share price of their ABIL shares to drop from R28. 15 per ABIL share in April 2013 to 31 cents per ABIL share in August 2014, when the listing of the ABIL share was suspended by the Johannesburg Stock Exchange ("JSE").

[55] The basis of the claim against the eleventh defendant as set out amongst others, in paragraphs 26, 27, 32, 33 and 34 of the amended particulars of claim is as follows:

[55.1] ABIL "*tasked*" the eleventh defendant/Deloitte to "*audit and report upon the financial standing of ABIL and African Bank"*

[55.2] The eleventh defendant/Deloitte knew that any acts or omissions by third parties causing patrimonial loss to African Bank would result in ABIL suffering patrimonial loss by virtue of its shareholding in African Bank

[55.3] The eleventh defendant/Deloitte also knew that the plaintiffs were shareholders of ABIL and therefore owed them "a duty care … as shareholders in ABIL … not to make negligent misstatements in relation to ABIL or African Bank".

[55.4] The eleventh defendant/Deloitte audited, and issued unqualified audit opinions in respect of, the African Bank AFS for the years ending December 2012 and December 2013, and *that:*

[55.4.1] These unqualified audit opinions were false;

[55.4.2] The eleventh defendant/Deloitte had a duty not to issue these false statements because they knew of certain alleged failures and breaches by the directors of ABIL and African Bank pleaded in paragraph 19 and 20 of the amended particulars of claim;

[55.4.3] The falsity of unqualified audit opinions arose out of:

[55.4.3.1] A deliberate or negligent failure on the part of Deloitte to that sufficient steps to rectify and disclose to the investors and shareholders of African Bank and ABIL (including the plaintiffs) the true state of affairs at African Bank in the AFS;

[55.4.3.2] A deliberate failure by Deloitte to qualify the contents of the AFS; and

[55.4.3.3] The negligent performance by Deloitte of their audit duties.

[56] In regard to the annual financial statements, the plaintiffs allege that the eleventh defendant/Deloitte had knowledge or deemed knowledge that:

[56.1] The directors of ABIL would use them to induce the plaintiffs:

[56.1.1] not to take any steps to convene a meeting of shareholders to remove the directors;

[56.1.2] not to take any steps to prevent any further losses from being sustained by ABIL and/or African Bank, alternatively not take steps to mitigate the losses;

[56.2] The plaintiffs would rely on the contents of the annual financial statements to act or refrain from acting "*in some way*".

[57] The plaintiffs allege that they relied on the contents of the eleventh defendant/Deloitte's reports on the annual financial statements and, in so doing, did not take any steps to convene a meeting of shareholders of ABL to remove the directors or to mitigate any losses.

[58] The failures of the eleventh defendant/Deloitte resulted in significant losses on the part of African Bank and ABL, which in turn caused the share price of their ABIL share to drop from R28. 15 per ABIL share in April 2013 to 31 cents per ABIL share in August 2014, when the listing of the ABIL share were suspended by the JSE.

[59] The plaintiffs therefore quantify their alleged loss as the diminution of the value of their shares between April 2013 and August 2014.

[60] The eleventh defendant has taken exception to the plaintiffs' amended particulars of claim on the basis that it does not contain the necessary allegations to set out a cause of action against the eleventh defendant/Deloitte.

[61] The eleventh defendant/Deloitte go on to elaborate in what respect are the amended particulars of claim excipiable. This is contained in the eleventh defendant/Deloitte's exception dated 25 November 2016 (pp 189-192 of the papers) as follows:

> ***"FIRST EXCEPTION: THE ALLEGED WRONG WAS COMMITTED AGAINST AFRICAN BANK, NOT AGAINST THE PLAINTIFFS***
>
> *10 The plaintiffs are shareholders of ABIL, the holding company of African Bank.*
>
> *11 According to the Plaintiffs, ABIL and African Bank (POC para 26).*
>
> *12 ABIL's shareholders have no claim over any assets of ABIL and/or African Bank and merely have a personal right to participate in ABIL on the terms of its memorandum of incorporation.*
>
> *13 Consequently, any culpable failure by Deloitte to discharge its duties pursuant to its appointment as African Bank's statutory auditor:*

13.1 Constitutes a breach of its duties to ABIL and/or African Bank, not to individual shareholders of ABIL in their capacity as such;

And

13.2 May have caused a loss for African Bank – not for ABIL or for ABIL's shareholders, in their capacity as such.

14 Shareholders of ABIL have no claim in law against a third party which caused any loss which Afican Bank may have suffered. The diminution of the value of the shares held by ABIL in African Bank and by the plaintiff's in ABIL is merely a reflection of the loss suffered by African Bank.

15 In the premises, Claim B (the claim against Deloitte) lacks allegations necessary to sustain a cause of action.

SECOND EXCEPTION: DELOITTE OWED NO LEGAL DUTY TO THE PLAINTIFFS AS INDIVIDUAL ABIL SHAREHOLDERS

16 The plaintiffs' claim against Deloitte is a delictual claim for pure economic loss.

17 The plaintiffs' claim is based upon negligent misstatements

allegedly made by Deloitte in expressing audit opinions in respect of the financial statements of African Bank.

18 At common law, a statutory auditor of a company owes its legal duties to the company itself and to the shareholders in general meeting; it owes no legal duty to individual shareholders in their capacity as such.

19 Further, the purpose of statutory audit of financial statements is to enable shareholders acting as a collective to oversee management; not to enable individual shareholders from acting or refraining to act in any way' whether in connection to their oversight over management or otherwise.

20 The plaintiff rely on section 46(3) of the Auditing Profession Act, 26 of 2005 (the "APA") to found a legal duty to them, based on the alleged knowledge of Deloitte that the directors would use the AFS to induce them refrain from exercising their rights as shareholders in a specific way.

21 Section 46 – the heading of which is "limitation of liability" – does not change the common-law position and provides in subsection (4) that:

"Nothing in subsections (2) or (3) confers upon any person a right of action against a registered auditor which, but for the provisions of those subsections, the person would not have had,"

*22 In the premises, Claim B (the claim against Deloitte) lacks allegations necessary to sustain a cause of action.***"**

[62] The eleventh defendant/Deloitte contends that the plaintiff's claim against the eleventh defendant/Deloitte is legally untenable for two reasons set out in their exceptions.

[63] Firstly, that on the facts pleaded by the plaintiffs, it was African Bank and not the plaintiffs that suffered the loss sustained because of the alleged misstatements; neither ABIL (African Bank's parent company) nor the plaintiffs (minority shareholders in ABIL) suffered legally cognisable loss. The principle underlying this ground of exception, the so-called "*proper plaintiff rule*", is trite and has recently been reaffirmed in judgments of the Supreme Court of Appeal ("SCA"); See Itzikowitz *supra; Sanbonani Holiday Spa Shareblock ltd 2016 (6) SA 181 (SCA).* This principle applies to both claim A (against the first to tenth defendants/directors) and claim B (against the eleventh defendant/Deloitte).

[64] Secondly, that the facts pleaded by the plaintiffs do not sustain the allegation that the eleventh defendant/Deloitte owed the minority shareholders of ABIL a legal duty in relation to their own investment decisions. The second ground of exception applies specifically to the auditors of a company in relation to which shareholders' claims are brought. It is based on general principles of delictual liability for pure economic loss in South African law, which were echoed in the specific context of auditors' liability by the highest courts of England and Wales and Canada. The judgment of the House of Lords in the House of Lords in *Caparo Industries plc v Dickman [1990]*

*UKHL 2; [1990] 2 AC 605 (HL); [1990] 1 All ER 568 (HL)*case in particular has been quoted with approval and applied in many leading South African cases on the law of delict and auditors' liability. See *Standard Chartered Bank of Canada v Nedperm 1994 (4) SA 747 (A);* Sea harvest Corp (Pty) Ltd v Duncan Dock Cold storage (Pty) Ltd 2000 (1) SA 827 (SCA); Thoroughbred Breeders Association v Price Waterhouse 2001 (4) SA 551 (SCA); Fourway Haulage SA (Pty) Ltd v SANRAL 2009 (2) SA 150 (SCA).

[65] The eleventh defendant/Deloitte contends, and it was argued on its behalf, correctly so, that the plaintiffs have no claim for losses suffered by African Bank.

[66] The particulars of claim make it clear that, on the facts pleaded, it is African Bank that suffered a loss, for which it could assert a claim against the eleventh defendant/Deloitte. The plaintiffs' alleged loss is a result of matters twice removed from African Bank's loss: their shareholding in ABIL and ABIL's shareholding, in turn, in African Bank. It is a bedrock principle of company law in South Africa, and other countries sharing a common-law heritage in relation to company law, that shareholders have no personal claim for damages in these circumstances; only the company suffering the loss has a claim against the third party.

[67] The plaintiffs plead against the eleventh defendant/Deloitte that:

> [67.1] Deloitte falsely stated that, in its opinion, the AFS of African Bank presented fairly, in all material respects, the financial position of African Bank Limited as at 30 September 2012 and as at 30

September 2013.

[67.2] The plaintiffs relied on these false statements and as a consequence did not take any steps to convene a meeting of shareholders of ABIL for the purposes removing the directors from the board of ABIL and resolving that ABIL remove the directors from the board of African Bank; or to prevent any further losses from being sustained by ABIL, alternatively, take steps to mitigate such losses.

[67.3] Their failure to take these steps resulted in ABIL shareholders collectively suffering losses of R40.6 billion, and losses for the plaintiffs proportional to their shareholding.

[68] The plaintiffs' pivotal allegation is that:

> "*In consequence of ABIL being the sole shareholder of African Bank, any acts or omissions by third parties causing patrimonial loss to African Bank would consequently result in ABIL suffering patrimonial loss.*"

[69] It is clear that the plaintiffs sue for a loss caused by a third party (Deloitte) to African Bank which allegedly resulted in an equivalent loss to ABIL. By parity of this reasoning, ABIL's minority shareholders would then also have suffered patrimonial loss due to ABIL's loss.

[70] This analysis is not correct. African Bank suffered the loss and it is the proper plaintiff. In circumstances where African Bank has a claim against the third party, the shareholders of African Bank (or of its shareholder) have no claim in their own name. The fundamental reasons for this rule are four-fold:

[70.1] First, African Bank is deemed to be compensated for its loss by the fact that it has a claim, in a corresponding amount, against those third parties who caused it loss. In truth, therefore, neither ABIL nor the plaintiffs suffered any loss because African Bank's claim is co-extensive with its loss.

[70.2] Second, the proper plaintiff rule is an instance of the general principle of legal policy that *"A cannot, as a general rule, bring an action against B to recover damages … on behalf of C for any injury done by B to C". C is the* proper plaintiff, *"because C is the party injured, and therefore the person in whom the cause of action is vested*"; See *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) [1982] 1 All ER 354. An underlying reason for this rule in company law is that, if the right to sue were to be given to B (i.e. the shareholder), there is a possibility that C's creditors would be prejudiced: in accordance with the normal rules of company law, the monetary damages ought to be available first for distribution among the company's creditors and only then accrue to the shareholders upon liquidation. A further underlying reason for the proper plaintiff rule is the avoidance of a multiplicity of actions.

[70.3] Third, the proper plaintiff rule is an application of the principles of causation. In circumstances where a shareholder suffers loss from a diminution of the value of its shares, because its company did not pursue its claim against the wrongdoer, the real cause of its loss is not the wrongdoer; the real cause of its loss is the company's decision not to pursue its remedy.

[70.4] Fourth, the proper plaintiff rule also results from the very nature of the limited liability company in our law where:

> [70.4.1] A company has a legal personality distinct from its shareholders. This is no mere technicality – a company is an entity separate and distinct from its members and property vested in a company is not and cannot be regarded as vested in all or any of its members. It is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity. A company's property belongs to the company and not its shareholders. A shareholder's general right of participation in the assets of the company is deferred until winding-up, and then only subject to the claims of creditors.
>
> [70.4.2] Since the shareholder's shares are merely the right to participate in the company on the terms of the memorandum of incorporation, which right remains unaffected by a wrong done to the company, a personal claim by a shareholder against the wrongdoer to recover a sum equal to the diminution in the market value of his or her shares, or equal to

the likely diminution in dividend, is misconceived.

[70.4.3] Therefore, a loss claimed by a shareholder as a result of a wrong done to the company "*is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only 'loss' is through the company, in the diminution in the value of the net assets of the company. . . . The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property.*"

[70.4.4] Therefore, a claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, *even if the company, acting through its constitutional organs, has declined or failed to make good that loss*.

[71] Put simply, a shareholder of a company benefits from limited liability. Unless very exceptional circumstances are present, a shareholder is not liable for debts incurred by its company. The corollary of this limited liability is limited rights. Because a shareholder is normally not exposed to the liabilities of a company, it is also normally not the beneficiary of claims accruing to the company (such as a claim in delict against a wrongdoer causing loss to a company).

[72] The proper plaintiff rule is sometimes called the "rule in *Foss v Harbottle*"- Foss v Harbottle (1843) 2 Hare 461. As the SCA pointed out in *Itzikowitz*, however, the rule in *Foss v Harbottle* is strictly speaking irrelevant where the plaintiff has not sought to bring a derivative action, i.e. an action on behalf of the company. The key question is rather whether the plaintiff had been independently wronged by the defendant.

[73] It is also sometimes argued that the proper plaintiff rule is based upon the exclusion of the possibility of double recovery; i.e. a shareholder should not have a claim against a wrongdoer in circumstances where the company may also have such a claim, because that would present the possibility of recovering twice for the same loss- Golf Estates (Pty) Ltd v Malherbe 1997 (1) SA 873.

[74] In Itzikowitz *supra* Ponnan JA held that a shareholder had no claim for a loss of value in his shares flowing from an injury done to the company.

[75] In Johnson v Gore Wood & Co (firm) [2001] 1 All ER 481 (HL) Lord Bingham stated as follows in this regard:

> *"(1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. So*

much is clear from Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] 1 Ch 204, particularly at 222-223…

*(2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding…***[this cannot apply to African bank, since it would have a cause of action against any wrongdoer if it sought to sue]**

(3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by a breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other…" **[It is not the plaintiffs' case that they suffered a loss separate and distinct from that suffered by the company.**

In paragraph 15 on the plaintiffs' amended particulars of claim the plaintiffs clearly allege that:

> *"In consequence of ABIL being the sole shareholder of African Bank, any acts or omissions by third parties causing patrimonial loss to African Bank would consequently result in ABIL suffering patrimonial loss"*

[76] The plaintiffs do not allege that any acts or omissions by third parties causing patrimonial loss to African Bank would consequently result in plaintiffs

suffering patrimonial loss. The plaintiffs' claim fall squarely within the category alluded to by Lord Bingham.

[77] In *Prudential Assurance Co Ltd v Newman Industries Ltd (No.2) [1982] 1 Ch 204 (CA) [1982] 1 All ER 354)* at 366j-367 it was stated that:

> *"Such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only loss is through the company in the diminution in the value of the net assets of the company…The plaintiff's shares are merely in a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property."*

Further at 222h-223b the following is stated:

> *"But what [a shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3% shareholding. The plaintiff's shares are merely a right of participation in the company in terms of the article of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to*

rob the company. A simple illustration will prove the logic of this approach. Suppose that the sole asset of a company is a cash box containing £100 000. The company has an issued share capital of 100 shares, of which 99 are held by the plaintiff.

The plaintiff holds the key to cash box. The defendant by a fraudulent misrepresentation persuades the plaintiff to part with the key. The defendant then robs the company of all of its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is (i) to denude the company of all its assets; and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching £100 000 to nil. There are two wrongs, the deceit practised on the plaintiff causes the plaintiff and the robbery of the company. But the deceit on the plaintiff causes the plaintiff no loss which is separate and distinct from the loss to the company. The deceit was merely a step in the robbery. The plaintiff obviously cannot recover personally some £100 000 damages in addition to the £100 000 damages recoverable by the company."

[78] The common law position in delictual claim for pure economic loss, as where a shareholder is suing for diminution in the value of his shareholding is settled; as already stated above, a wrong is committed against a company, not a shareholder; a shareholder is not entitled to recover loss from an alleged wrong doer. The plaintiffs seek to hold the first to tenth defendants/ liable for diminution of their shares in ABIL in terms of S218(2) of the Companies Act.

[79] As already stated, the plaintiffs contend that by virtue of the words 'as a result of…' in section 218(2) they, as shareholders in ABIL, are entitled to sue

the directors for devaluation/diminution of the shares of ABIL. As shown above, this cannot correct.

[80] Counsel for the plaintiffs submitted that by virtue of the fact that in paragraph 19 of the particulars of claim it is alleged that "*the directors' conduct as aforesaid constituted a breach of the provisions, resulted in significant losses*", then these words encompasses the breach of all provisions, even those not stated/set out in paragraphs 21.1 and 24 of the amended particulars of claim which specifically mentions sections 76(3), and 22(1) read with section 218 (1).

[81] The plaintiffs' counsel submitted that though those words may not have been used, but it is clear that what is being sought to be relied on was a breach of the provisions of the Act and constituted the directors' conduct for the purposes of section 218 and resulted in losses.

[82] This is untenable; an opponent needs to know what case to meet. It cannot be correct that the plaintiffs can just argue for generalised contravention of provisions of the act, after they had set out specific provisions of the Act which they allege were contravened by the first to tenth defendants/directors.

[83] When considering exceptions, even those that allege the lack of a cause of action, it is instructive to consider the requirements of Uniform Rules 18 and 22.

[84] Rule 18(4) require that:

> "Every pleading shall contain a clear and concise statement of the *material facts upon which the pleader relies* for his claim, defence or answer to any pleading, as the case may be, *with sufficient particularity to enable the opposite party to reply thereto*."

[85] Rule 18(4) therefore has two separate requirements. The first is that the pleader must set out the material facts upon which it relies for its claim, and the second is that these material facts must be set out with sufficient particularity to enable the opposite party to reply thereto.

[86] The "*material facts*" required to be pleaded in a claim are those primary facts (or *facta probanda*) which must be established in order to disclose a cause of action or a defence. In *McKenzie v Farmers' Co-operative Meat Industries Limited 1929 (2) AD 16 at 23*, the Appellate Division defined a "cause of action" as:

> *"…every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."*

[87] Accordingly, a pleader, in order to ensure that he discloses a cause of action:

> *" moet toesien dat die wesenlike feite (d,w.s die facta probanta en nie die facta probantia of getuienis ter bewys van die facta probanda nie) van sy eis met voldoende duidelikheid en volledigheid uiteengesit moet word dat, indien die bestaan van sodanige feite aanvaar word, dit sy regskonklusie staaf en hom in regte sou moet laat slaag t.a.v. die regshulp of uitspraak wat hy aanvra"*.

See Makgae v Sentraboer (Kooperasie) (Beperk) 1981 (4) SA 239 (T) at 245D-E

[88] As regards the particularity with which the facta probanda must be pleaded for purposes of Rule 18(4), there is no exhaustive test to determine whether a pleading contains "*sufficient particularity to enable the opposite party to reply thereto*". This is a question of fact in each case which will be established if "*die pleitstuk die geskilpunte identifiseer en omlyn op so 'n wyse dat die teenparty weet wat die geskilpunte is*".

[89] The principle underlying the requirement of particularity in Rule 18(4) has been explained as follows:

> *"It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not to be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made…"* (emphasis added).

[90] The plaintiffs further contend that there is no need for them to have pleaded that they relied on misrepresentation since their cause of action is not relying on the common law; that they are relying on s218 of the Companies Act for the contravention of the provisions the Act resulting in loss. In this regard, as already stated, the plaintiffs would have to show that s218 has altered the common law.

[91] As already set above, the first to tenth defendants contend that S218 does not alter/replace the common law, correctly so. I reiterate that in interpreting the provisions of statute, where there is a special remedy provided for in the statute at issue, that special remedy must be followed in preference to the general remedy. .-S218 provides a general remedy and s77(2) provides a special remedy for contravention of s76(3), which on its own pertains to a director's fiduciary duty *vies a vie* a company, not shareholder. On the facts pleaded by the plaintiffs, S218 clearly does not apply. The plaintiffs must bring themselves within S77 (2) of the Companies Act.

[92] The case pleaded by the plaintiff cannot sustain the cause of action and is therefore excipiable.

[93] In so far as claim B, against the eleventh defendant/Deloitte is concerned, counsel for the plaintiffs submitted that their cause of action in terms of S218 of the Companies Act applies to the eleventh defendant/Deloitte; that it is not necessary to specify S218 '*as long as it can be inferred from the facts alleged by the litigant that the section is relevant*'. The authorities are clear in this regard, in every case pleadings must clearly and concisely state all material

facts upon which a party relies; where a statutory provision is relied upon, where it is not specified**, it must be clear** [not inferred] from the facts alleged by the litigant that the section is relevant and operative. See Bato Star *Fishing (Pty) Ltd v Minister of Enviromental Affairs* 2004 (4) SA 490 (CC). Refer also Rule 18(4) *supra* read with Rule 22(2) of the Uniform Rules of Court. [My emphasis]. The same cannot be said of the facts alleged by plaintiffs in the amended particulars of claim

[94] The cause of action pleaded in claim B of the particulars of claim is purely for delict. The principles set out in Itzikowitz v ABSA clearly indicate that on what is pleaded by the plaintiffs in claim B of the amended particulars of claim, the plaintiffs do not have a case against the eleventh defendant.

[95] The principles in Itzikowitz *supra*, set out above are clear that a shareholder has no claim for a loss of value in his shares flowing from an injury done to the company. Refer also Johnson v Gore Wood & Co (firm) *supra.*

[96] Clearly seeing the insurmountable problem with its pleaded case, the plaintiffs for the first time on the day of the hearing advanced this absurd argument that it should be 'inferred from the facts alleged' by them that S218 (2) is relevant and applies to the eleventh defendants as well. This new cause of action sought to be advanced by the plaintiffs in their supplementary heads affidavits is clearly not the case advanced in their amended particulars of claim. The loss sued for remains the loss for the company, in this case African Bank; on the principles set out in Itzikowitz *supra*, and cases cited therein, the plaintiffs cannot sue for African Bank's loss in terms of s218 (2) even if it were

pleaded, which is not. If one has regard to the principle of 'the proper plaintiff', the plaintiffs are not 'the proper plaintiff, but African Bank would be.

[97] The plaintiffs contend that their course of action find application in categories **2** and **3** in *Johnson v Gore Wood supra*.

[98] Counsel for the plaintiffs submitted that the Itzikowitz case (*supra)* is distinguishable to their case in that their [plaintiffs'] claim fall into either or both of categories 2 and 3 in the Johnson Gore Wood case whereas Itzikowitz' s case fall squarely within the first category in the Johnson case. This submission cannot hold water.

[99] Category 2 referred to states:

> '2. *Where a company suffers loss <u>but has no cause of action to sue</u> to recover that loss, the shareholder in the company may sue in respect of it…*'

Clearly category 2 will apply only if the company that suffered a loss has no cause of action to sue. On the facts before this court there is no indication that African Bank, 'the proper plaintiff' has no cause of action to sue.

[100] The same applies to category 3 which states:

> '3. *Where a company suffers loss caused by a breach of duty to it, and <u>a shareholder suffers a loss separate and distinct</u> <u>from that suffered by the company</u>…*'

[101] From the facts before this court it cannot be said that the plaintiffs, as shareholders suffered 'a loss separate and distinct from that suffered' by African Bank, and or ABIL.

[102] In the circumstances, I am of the view that a proper case was made out by the defendants. I am satisfied that both claims A and B as pleaded, do not disclose a cause of action against first to eleventh defendants and that the exceptions raised by the first to tenth, and the eleventh defendants respectively must be upheld.

[103] Due to the complexity of the legal issues raised in this matter, all parties in the matter were represented by three counsel. However, both counsel for the first to tenth and eleventh defendants indicated that the court should only order that the plaintiffs pay the costs of two counsel respectively in the event they were successful. In the order I handed down on 30 August 2018 I made an error in paragraph 3 thereof by stating that the costs to be paid by the plaintiffs should include the costs of three counsel in respect of the 11th defendant, instead of two counsel. The order should read that

> *'The plaintiffs are ordered to pay the costs of these exceptions, including the costs of two counsel in respect of the 1st-10th defendants, and two counsel in respect of the 11th defendant.'*

[104] In terms of Rule 42(1) (b)of the Uniform Rules of Court I hereby correct the error aforesaid, and substitutes prayer 3 of the order to read as follows

> ‘3. *‘The plaintiffs are ordered to pay the costs of these exceptions, including the costs of two counsel in respect of the 1st-10th defendants, and **two** counsel in respect of the 11th defendant.’*

[105] In so far as the costs of the 1st exception are concerned, the first exception was served by the first to tenth defendants on the plaintiffs on 15 April 2016. On 31 August 2016 the first to tenth defendants filed their heads of argument [having indexed and paginated the court file; at this stage they had not yet received the plaintiffs’ amendment. The plaintiffs did not file heads of arguments. The first to tenth defendants filed their enrolled the first exception for hearing on18 April 2017. It was not disputed that they had reserved counsel. The plaintiffs only delivered their notice of intention to amend on 31 October 2016, and the amended pages on 23 November 2016 [more than seven months after first exception was delivered. By this time the first to tenth defendants had already incurred costs. They had already indexed and paginated, and had already set the matter down. In the circumstances it is only fair that they get costs for the first exception as well.

[106] In the result the following order is made:

1. The first to eleventh defendants’ exceptions on both Claims A and B respectively, are upheld.
2. The plaintiffs are granted a period of 30 days from date of the upholding of the exceptions to amend their particulars of claim if so advised.

3. The plaintiffs are ordered to pay the costs of these exceptions, including the costs of two counsel in respect of the 1st-10th defendants, and two counsel in respect of the 11th defendant.

4. The plaintiffs are ordered to pay the first to tenth defendants' costs of the first exception

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT