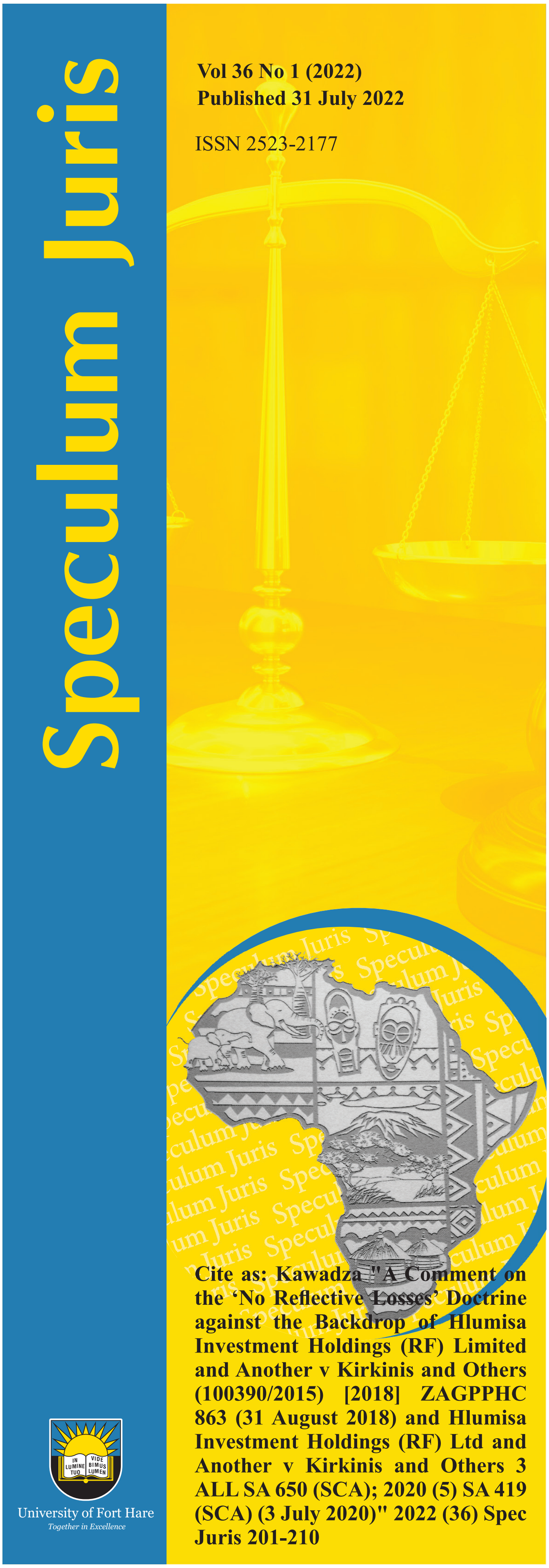

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A Comment on the 'No Reflective Losses' Doctrine against the Backdrop of *Hlumisa Investment Holdings (RF) Limited and Another v Kirkinis and Others* (100390/2015) [2018] ZAGPPHC 863 (31 August 2018) and *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* 3 ALL SA 650 (SCA); 2020 (5) SA 419 (SCA) (3 July 2020)

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Abstract

The tension between various parties in a corporation is an undying issue. A source of that conflict relates to the issue of shareholders' inability to claim compensation for loss arising from a fall in the company's share value, the common-law "no reflective losses" principle. Relying on the judgments in Hlumisa Investment Holdings (RF) Limited and Another v Kirkins and Others (High Court) and Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others (Supreme Court of Appeal) this case note attempts to broaden scholarly discussion relating to remedies for shareholders who suffer prejudice as a result of diminution in the

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firm's equity. More specifically, it considers the inherent clash between the interests of the corporation and the rights of shareholders and argues that much as the no reflective losses doctrine is based on good policy considerations, it however needs to be revisited to address elements of inequitableness which are associated with its operation.

Keywords: shareholders; reflective losses' company; compensation; corporate scandals

1 INTRODUCTION

There comes a time when a long-established legal principle might need to be interrogated or even revised. This phenomenon is not unanticipated; "[w]hat is fundamental in one age or place may not be regarded as fundamental in another age or place."[1] Considerations such as the need to adjust attitudes, the changing political environment, or the need to satisfy social or economic expediencies could spur the transformation of deep-rooted principles. Similarly, the weakening of principles over time might bring a legal conception into question.[2] The same phenomenon seems to be unfolding in the regulation of the corporate and financial sectors.

A corollary of attention-grabbing corporate scandals which recently rocked the South African – and global economies – have culminated in calls for a relook into, *inter alia*, the adequacy of corporate governance, corporate standards, laws, and their enforcement.[3] Perhaps what stakeholders have found objectionable are the revelations that at the core of those fiascos was an entrenched culture of self-indulgence reinforced by hubris and gross mismanagement aided by duplicitous "gatekeepers" including internal and external controls such as auditors.[4]

The staggering falls in the concerned companies' share value have culminated not only in a catalogue reform aimed at revamping the canonical pillars of corporate governance but also in galvanizing shareholders into wanting more protection for their investments. What these scandals underline is the fact that shareholders suffer prejudice when a firm is exposed to harm that affects its profitability or value. Eventually, the dividend payout gets affected.[5] Despite suffering economic loss shareholders face challenges in their attempt to claim compensation for the diminution of their firm's value. The main challenge arises from the "no reflective loss" doctrine which precludes shareholders from seeking personal compensation for losses emanating from wrongs done to the company which decreases the company's value.

It is within this milieu – the realm of shareholder protection – that the ground-breaking judgments in *Hlumisa Investment Holdings (RF) Limited and Another v Kirkins and Others*[6] (High Court judgment) and *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* (Supreme Court of Appeal judgment)[7] are considered. This is a significant decision mainly because it extends the conversation relating to remedies for equity holders who suffer losses arising from a fall in the company's share value. Equally, this judgment exposes the

1 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 298.

2 See generally Pound "The End of Law as Developed in Legal Rules and Doctrines" 1914 *Harvard Law Review* 195; Bentham *Theory of Legislation, Principles of the Civil Code* (1843) pt. I ch 1–7.

3 Kawadza "Reconsidering Criminal Law-Based Liability for Corporations And Directors In South Africa" 2019 *Journal of Financial Crime* 1085; Swanepoel "Adequacy of Law Enforcement and Prosecution of Economic Crimes in South Africa" 2018 *Journal of Financial Crime* 450.

4 Kawadza "Why did Steinhoff Board Fail in its Fiduciary Duty?" *Business Times* 14 January 2018; Naudé and others "Business Perspectives on the Steinhoff Saga" https://www.usb.ac.za/wp-content/uploads/2018/06/USB-Management-Report-Steinhoff-Saga.pdf (accessed 10-02-2021).

5 Charman and Du Toit *Shareholder Actions* (2013).

6 100390/2015 [2018] ZAGPPHC 863 (31 August 2018).

7 (Case no 1423/2018) [2020] ZASCA 83 (03 July 2020).

innate conflict between a company's interests and the rights of shareholders.

This note seeks to impact the development of corporate jurisprudence by examining that tension through the prism of the no reflective losses doctrine and argues that much as that policy is defensible, it is associated with elements of inequitableness which need attention. A critical question that this note seeks to answer is whether, given the prevailing relationships and the need for more accountability in the governance of corporations, and the need for robust penalties for directors, the no reflective losses principle needs to be revisited.

The discussion commences with a discussion of the facts as enumerated in *Hlumisa Investment Holdings* HC. This is followed by a brief exposition of the main findings of the High Court and the Supreme Court of Appeal. The third section revisits the no reflective losses and especially its justification. This is followed by suggestions that could refine the operation of the doctrine. The fifth section concludes.

2 THE FACTS

To set the scene for the subsequent discussion the following subsection outlines the two layers of judgments spawned by this case. Essentially, Hlumisa Investment Holdings (RF) Limited and Eyomhlaba Investment Holding (RF) Limited (hereafter "the plaintiffs") were shareholders of African Bank Investment Limited (hereafter "ABIL"). Except for the one defendant, the auditor (Deloitte) for ABIL and African Bank, the other ten defendants were directors of African Bank Limited and ABIL (hereafter "the defendants"). African Bank Limited is a wholly-owned subsidiary of ABIL.

The plaintiffs sued the directors and the auditor, jointly and severally, for damages for pure economic loss, arising from an alleged diminution in value of the shares they held in ABIL. At the heart of their claim was an allegation that from December 2012 to December 2014, the defendants, as directors, conducted the business of ABIL and African Bank recklessly in contravention of certain sections of the Companies Act 71 of 2008 (hereafter the "Companies Act"). More specifically they cited section 22(1) of the Companies Act; which states that a company must not carry on its business recklessly, with gross negligence, with the intent to defraud any person or for any fraudulent purpose, and section76(3) ; which provides, in part, that when a director exercises his or her power, he or she must do so in good faith, in the best interest of the company and with the degree of care, skill and diligence that may be reasonably expected of a person.

As far as the auditor was concerned, it was alleged that the firm had deliberately, alternatively, negligently failed to take adequate steps to rectify and disclose the true situation at African Bank in the financial statements. The plaintiffs alleged that the breach of these provisions and duties resulted in a significant loss on the part of ABIL and the African Bank. More specifically, this conduct triggered the share price of ABIL to drop to R27.84. To underscore their claim for compensation against the defendants, the plaintiffs cited section 218(2) of the Companies Act which provides that: "[a]ny 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."

Among a long list of allegations proving recklessness and therefore leading to the contraction of their share value the plaintiffs averred that during the relevant period (2012 to December 2014) the ten defendants had authorised the publication of financial statements in respect of ABIL and the African Bank that were false or misleading in material respects.[8] The plaintiffs further, asserted that in August 2013, the defendants authorised the publication of a prospectus that contained financial statements and other financial information that was false or misleading

8 Paragraphs 10.1 – para 11.

in a material respect. They went on to claim that the defendants contravened section 45 of the Companies Act in that while present at the relevant meeting they failed to vote against the provision of "bad loans" by the African Bank to Ellerines Holdings Limited, or its subsidiaries. Additionally, they alleged that the defendants had been applying dubious accounting practices, a flawed credit provisioning model which resulted in under-provisioning for defaulting loans.[9] Additionally, it was alleged that the defendants had been reckless in their appointment of an executive who was not adequately qualified to carry out various roles within the ABIL and the African Bank. As mentioned above, such conduct led to massive losses to the African Bank and ABIL "which in turn caused the share price of the ABIL shares … to drop."[10]

In defence, the defendants contended that the plaintiffs' particulars of claim did not disclose a cause of action against them and that the plaintiffs did not have *locus standi* to initiate that claim because it was the company that suffered the loss and not the plaintiffs.

2 1 The First (High Court) Judgment

Of relevance to this discussion, the Court found that because the plaintiffs had not characterised their prejudice because of the defendants' contravention of the provisions of the Companies Act (but rather on the diminution in the value of their ABIL shares), they could not rely on section 218(2) of the Companies Act.[11] In any case, the attempt to rely on section 218(2) of the Companies Act would have amounted to claiming a reflective loss when there was nothing to show that the section had the effect of altering the common law to allow the inclusion of reflective loss.[12]

More significantly, citing *Itzikowitz v ABSA*[13] the Court revisited the no reflective losses doctrine and reiterated that the "principle 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".[14] From this comes the standard approach "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".[15] In other words, the cause of action for injury to the property of a corporation – the diminution of the value of the corporation's shares or for the destruction of its business – is vested in the corporation and not its shareholders. Similarly, the Court stated that a claim for a breach of section 76(3) under section 218(2) could not be sustained unless the plaintiffs could show that section 218(2) has had the effect of altering the common law to permit a reflective loss. In the absence of that contention, the reflective loss claims could not be brought in terms of the statute.

Therefore, the Court ruled that due to the operation of the no reflective loss doctrine and the "proper plaintiff rule" it was African Bank and not the plaintiffs that suffered the loss sustained because of the alleged misstatements; neither the ABIL (African Bank's parent company) nor the plaintiffs (minority shareholders in ABIL) had suffered legally cognisable loss.[16] Based on the same reasoning the claim that the eleventh defendant, Deloitte, was liable for the losses arising from alleged false unqualified audit opinions was viewed by the Court as a mere reflection of

9 Paragraphs 12–16.

10 Paragraph 17

11 Paragraph 17.

12 Paragraph 39.

13 2016 (4) SA 432(SCA).

14 Paragraph 50.

15 Paragraph 50.

16 Paragraph 63. See also *Sanbonani Holiday Spa Shareblock Ltd* 2016 (6) SA 181 (SCA).

the losses suffered by the company.

Because their loss was a corollary or was reflective of the corporate loss and they could not prove that such loss was separate and distinct from that suffered by African Bank or ABIL, the Court found that the plaintiffs lacked *locus standi* to institute the suit. Accordingly, the claim was dismissed.

2 2 The Appeal (Supreme Court of Appeal) Judgment

Disgruntled with the High Court's ruling, the plaintiffs appealed to the Supreme Court of Appeal. While acknowledging the plaintiffs' (now appellants) contention that there was a contraction in the value of the shares held by the appellants and further, that this diminution arose as a direct consequence of the alleged misconduct of the directors,[17] the Supreme Court of Appeal accepted the High Court's judgment. Having considered the established common-law position in the UK as expounded in myriad cases such as *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2),[18] *Johnson v Gore Wood & Co (a firm)*[19] and *Novatrust Limited v Kea Investments Limited and Others*[20] the Supreme Court of Appeal accepted the High Court's ruling that where wrong is done to a company, it is only the company that has *locus standi* to sue for the prejudice suffered and to recover damages.[21] Since a company is a separate legal person, it follows, therefore, that individual shareholders have no cause of action against the wrongdoer.[22] More specifically, contrary to the averments of the appellants the duties owed by directors in terms of section 76(3) of the Companies Act are owed to the company and not to individual shareholders.[23]

The evidence at hand did not point to the appellants lodging a derivative action on behalf of the company, nor were their suit based on an assertion of oppression by most shareholders. Additionally, they did not allude to the company being encumbered in pursuing a claim against the directors.[24] The appellants' suit against the directors was therefore premised on reflectiing their alleged loss.

Similarly, in the case of the auditor's liability, the Court ruled the duty of the auditors is owed primarily to the company and therefore, the appellants' claim against Deloitte was untenable.[25] In conclusion, therefore, the Supreme Court of Appeal affirmed the High Court's ruling that the claims by the shareholders were merely a reflection of the underlying loss suffered by the Bank and ABIL. As such, the Court dismissed the appeal.

3 THE NO REFLECTIVE LOSSES DOCTRINE

Both the High Court and Supreme Court of Appeal judgments in this matter were premised on enduring fundamental company law principles underpinning the "no reflective loss" principle. The basis of that common-law doctrine approach is the recognition of the proper plaintiff or the operation of the "rule in *Foss v Harbottle*"[26] and the autonomous nature of the company;

17 Paragraph 23.
18 [1982] 1 Ch 204; [1982] 1 All ER 354 (HL).
19 [2000] UKHL 65; [2001] 1 All ER 481; [2002] 2 AC 1 (HL).
20 [2014] EWHC 4061 (Ch).
21 Paragraphs 21, 27 and 48.
22 Paragraph 21.
23 Paragraph 48.
24 Paragraph 38.
25 Paragraphs 55–73.
26 *Foss v Harbottle* (1843) 2 Hare 461.

the fact that upon incorporation, a company becomes a separate legal entity whose existence is distinct from the members. By operation of the concept of limited liability, the debts incurred by the entity are not regarded as those of the members.[27]

Holding shares only gives the shareholder the right to participate in the affairs of the company in accordance with the provisions of the company's memorandum of incorporation.[28] For the reason that the company is the proper plaintiff in case of a breach of duties, a shareholder is not entitled to bring a personal claim against the wrongdoer to recover a sum equal to the diminution in the market value of his or her shares. Consequently, a shareholder is not entitled to bring a personal claim against the wrongdoer to recover a sum equal to the diminution in the market value of his or her shares. The principle was explained as follows in the seminal English case of *Prudential Assurance Co Ltd v Newman Industries Ltd*:

> 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.[29]

It is trite that a defendant can be sued only once for the same loss. Allowing the plaintiff to claim for such loss would result in the possibility of double recovery because the wrongdoer would face a claim from both the company and the shareholder. It would also give rise to a possibility of the shareholder recovering twice for the same loss; in the first instance, the shareholder recovers the loss resulting from the diminution of share value and then if the company's claim succeeds, it is reimbursed to compensate for its loss.[30]

Finally, 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."[31] As such, the South African judiciary has adopted and entrenched an approach outlined in *Johnson*

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27 See generally Mupangavanhu "Diminution in Share Value and Third-Party Claims for Pure Economic Loss: The Question of Director Liability to Shareholders" 2019 S*AMLJ* 107; Chokuda "The Protection of Shareholders' Rights versus Flexibility in the Management of Companies: A Critical Analysis of the Implications of Corporate Law Reform on Corporate Governance in South Africa with Specific Reference to Protection of Shareholders" (published LLD thesis, University of Cape Town, 2017) 80.

28 See for instance Crane, Matten and Moon "Stakeholders as Citizens? Rethinking Rights, Participation, and Democracy" 2004 *Journal of Business Ethics* 107; Shapira "Shareholder Personal Action in Respect of a Loss Suffered by the Company: The Problem of Overlapping Claims and Reflective Loss in English Company Law" 2003 *The International Lawyer* 137.

29 *Prudential Assurance Co Ltd v Newman Industries Ltd* (No.2) [1982] 1 Ch 204 (CA) [1982] 1 All ER 354 at 366j–367.

30 Korzun "Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance" 2018 *U. Pa. J. Int'l L* 189 202–203; *Gardner v Parker* [2003] EWHC (Ch) 1463 [41] (Eng.). In *Garcia v Marex Financial Ltd* [2018] EWCA Civ 1468; [2018] 3 WLR 1412; [2019] QB 173 188–189 the rule against reflective loss was said to be justifiable on the basis of "the need to avoid double recovery by the claimant and the company from the defendant …; (ii) causation, in the sense that if the company chooses not to claim against the wrongdoer, the loss to the claimant is caused by the company's decision not by the defendant's wrongdoing …; (iii) the public policy of avoiding conflicts of interest particularly that if the claimant had a separate right to claim it would discourage the company from making settlements …; and (iv) the need to preserve company autonomy and avoid prejudice to minority shareholders and other creditors."

31 Paragraph 70.3.

v Gore Wood and Co[32] which is to the effect that

> 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, action through its constitutional organs, has declined or failed to make good that loss.

It is worth acknowledging that attempting to award compensation for reflective loss is problematic mainly because such loss is not easily ascertainable. For instance, "it is not possible to calculate the loss of share value resulting from wrongs done to the company because shareholders may never sell their shares in the future. Also, the wrong suffered by the company does not necessarily lead to a reduction of the company's share price even after a company loses a business opportunity".[33]

The no reflective loss doctrine is "justified through various policy considerations and praised for helping courts achieve a good balance between the interests of different parties, including the shareholders, the company, the wrongdoer, and the creditor of the company".[34]

4 RECONSIDERING THE NARRATIVE

As noted above, considerations of efficiency and fairness are said to motivate the application of the no reflective loss principle. Likewise, policy considerations premised on the need to avoidduplication of claims, and the need for consistency and predictability of court decisions are said to warrant the continued use of the doctrine.[35] It is on account of these justifications that the principles surrounding the no reflective loss principle have remained unaltered.

It is on that reality that a small but growing number of scholars have found a voice and moaned the doctrine's lack of evolution. They argue that despite its purported benefits such as pragmatism, clarity, and fairness, the no reflective losses doctrine is fraught with problems. These arguments are elaborated upon below under separate headings.

4 1 The Company May not Always Institute a Claim

One scholar makes the following argument:

> First, the principle is based on the assumption that the company will be able to bring its own claim. Further, it assumes that once the company recovers its losses, the shareholders will recover indirectly. For instance, the indirect recovery may occur through dividend payout; but, it is unclear whether this payout would restore the economic interests of the shareholders and, consequently, put shareholders in a position they would have found themselves in if the loss had never occurred. Furthermore, even if the share price or value is restored, this would not provide recovery to shareholders that sold their shares at a lower price prior to recovery by the company.[36]

In a *dictum* in *Hlumisa Investment Holdings HC*, the High Court reiterated that "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".[37] Based on that account, a

32 [2001]1 All ER 481 at 51C–55G.

33 Chaisse and Li "Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss" 2016 *Stanford Journal of International Law* 51 56.

34 *Ibid* at 53.

35 Korzun 2018 *U. Pa. J. Int'l L* 207.

36 Korzun 2018 *U. Pa. J. Int'l L* 207.

37 Paragraph 70.3.

noteworthy scenario would be a situation where the company could not to bring a claim against the "wrongdoer" before it went into liquidation or ceased to exist. Would that scenario constitute an exception permitting shareholders to bring direct claims for losses suffered by the company? The *dictum* seems to affirm that because the proximate cause of the plaintiff's loss would be the now-nonexistent firms' failure to act, the affected shareholders would be prohibited from claiming compensation even if – owing to the company no longer being in existence – there would be no risk of a double claim. In *Itzikowitz v Absa Bank Ltd* the court stated that the

> fact that a double recovery may not be likely in a particular scenario does not create an entitlement in the hands of a shareholder which he or she did not have in the first place. Where there is only one wrong; that was committed against the company, the risk of double recovery simply does not arise. The fact that the company has chosen not to sue, or is unable to sue does not convert the wrong into a wrong against its shareholders. The risk of double recovery only becomes relevant when both the company and its shareholder(s) have been independently wronged…[38]

4 2 The Lack of a Remedy would be Unfair to a Shareholder

The inability to claim is undoubtedly unfair to the shareholder. By contrast, domestic law in the UK takes a different approach in which "shareholder claims for reflective loss may sometimes be warranted; for instance, where the corporation ceases to exist or is unable to submit a claim".[39] That would be a preferable approach.

Since a company acts through its board of directors (section 66 (1) of the Companies Act), it is common cause that the decision whether to institute proceedings against the "wrongdoer" would fall on the board. Would it be possible to expect such proceedings in circumstances where the wrongdoer – as the facts in *Hlumisa Investment Holdings* and many other scandals such as Steinhoff show – was a director or an executive who was complicit in the corporation's loss? It would be unlikely that the board would pursue the claim. In most cases, the shareholder would end up having to institute a derivative action. However, unless they sue directors in their personal capacity that would not address the issue of the shareholder losses arising from the diminution of the company's value. That problem would be aggravated especially in the case of

> minority shareholders lacking the ability to change the company's board to one amenable to suing on the company's behalf, the route to recovery is unlikely to be smooth, underlying the importance of gaining wherever the benefit of robust contractual rights pursuant to a well-drafted shareholders' agreement and articles of association.[40]

As stated above, one of the compelling reasons for precluding third parties like shareholders from claiming damages for purely economic losses arising from a diminution of shareholding value is the fear of exposing wrongdoers to multiple claims. This however seems to run contrary to the principle of civil law and various statutes that impose delictual liability and resultant punitive damages on wrongdoers. It is trite under South African law that a wrong to multiple victims entitles all the victims to recover against the defendant.[41] As such, a wrongdoer who assumes separate responsibility to the corporation and a shareholder exposes himself to double liability if he defaults on his contractual obligations; "there is little inherently objectionable about allowing double recovery against a defendant who had assumed separate responsibilities

38 *Itzikowitz v Absa Bank Ltd* para 17.

39 Korzun 2018 *U. Pa. J. Int'l L* 200; *Giles v Rhind* [2002] EWCA (Civ) 1428 (Eng.)

40 Arnold and Porter "UK Reflective Loss Rule Impedes Shareholder Recovery" https://www.arnoldporter.com/en/perspectives/publications/2018/07/uk-reflective-loss-rule (accessed 12-02-2021).

41 See generally Neethling, Potgieter and Visser *Law of Delict* (2001); Potgieter and Floyd Visser & Potgieter, *Law of Damages* (2012).

to different parties".[42] Expecting the courts to depart from that standard and disallowing such provisions is not easy to justify.[43]

It will be recalled that the no reflective losses principle founds its roots in the company's juristic personality. A peculiarity of that principle is a recognition that the company should be the sole claimant for the wrongs done to it.[44] The shareholders merely enjoy a right of participation in the company on the terms of the memorandum of incorporation and this right of participation is not directly affected by the wrongdoing. The entrenched view stemming from this is that shareholders suffer no prejudice to rights as they still hold all the shares as their own unencumbered property.[45]

Regrettably, such a constricted or "indefensibly narrow" view[46] is tantamount to a disregard of the economic value or property rights attached to shares. It ignores the fact that shares are intangible pieces of property belonging to the shareholders, which are endowed with economic value.[47]

> Shares are more than contractual rights … a share is a piece of intangible property. With the development of the company as a separate legal concept, shareholders lost direct interest in the assets of the company. Instead, shares emerged as legal property... shares are themselves "things" that can be dealt with - they are not "merely" personal rights.[48]

As such, shareholders should have "an individual cause of action for such loss because the economic value of their shares is part of the property rights attached to the shares".[49]

Furthermore, the *status quo* upon which the no reflective losses doctrine is premised suggests that the diminution of the company's value does not impact on the shareholder's rights and that once the company claims against the wrongdoer the shareholder is also recompensed for the loss. However, in reality, the loss suffered by the company does not always correspond with the diminution of a share's value. As was shown in *Giles v. Rhind*[50] the fact that the company has recovered damages does not always mean that the value of the shares will return to what it was before the infraction. In other words, the value of the shares cannot always be restored; "the diminution in the value of shares would not always be made good if the company enforces its claims." [51]

Similarly, there is an overemphasis on the need to exclude reflective claims to protect other shareholders' interests. However, there should be exceptions to this prohibition for instance, in circumstances where the company only has a single shareholder or where the wrongdoers are

42 Koh "The Shareholder's Personal Claim: Allowing Recovery for Reflective Loss" 2011 *Singapore Academy of Law Journal* 863 at 868; See also *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

43 Mitchell "Shareholders' Claims for Reflective Loss" 2004 *LQR* 457; Korzun 2018 *U. Pa. J. Int'l L 1* 192–254; Barring "Recovery for Diminution in Value of Shares on the Reflective Loss Principle" 2007 *Cambridge Law Journal* 537–558.

44 See for example *Dadoo Ltd & others v Krugersdorp Municipal Council* 1920 AD 530; *Hulse-Reutter v Godde* 2001 (4) SA 1336 (SCA).

45 *Itzikowitz v Absa Bank Ltd*; *Kalinko v Nisbet and others* 2002 (5) SA 766 (W); *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA).

46 Mitchell 2004 *LQR* 459. See also Sterling "The Theory and Policy of Shareholder Actions in Tort" 1987 *MLR* 468 470.

47 *Johnson & Gore Wood.*

48 Chaisse and Li 2016 *Stanford Journal of International Law* 94.

49 Chaisse and Li 2016 *Stanford Journal of International Law*.

50 [2002] EWCA Civ. 1428 (Oct. 17, 2002).

51 Lin "Barring Recovery for Diminution in Value of Shares on the Reflective Loss Principle" 2007 *Cambridge LJ* 551.

in fact, shareholders.[52]

5 CONCLUSION

It is not in doubt that the no reflective losses doctrine is underpinned by sound reasoning. Several policy considerations have sustained its longevity as a crucial concept of company law. Likewise, it has been a fundamental tool in assisting courts to balance the diverse interests of different parties such as the company, shareholders, the wrongdoer, and the creditor of the company.

Despite that, an over-emphasis on policy considerations and the resultant failure to evolve have spurred a growing chorus of critics and an emerging consensus around the need for modest reforms to the current absolute approach. To start with and depending on circumstances, there should be some form of judicial discretion to allow limited recovery of reflective losses. Such discretion would ensure both flexibility and the contexualisation of each case. Further, "to apply a rigid rule regardless of context, therefore, raises the real risk of denying the wronged party appropriate remedy. Whilst consistency and predictability are important in law, pursuing these should not be at the expense of justice."[53]

The surge in front-page corporate scandals means that agitation for new thinking around the prohibition of shareholder compensation is well-founded. Given their incapability to recover reflective loss and in the absence of some reforms in the doctrine, shareholders will need to consider other areas of law that could circumvent the no reflective loss principles and prove effective grounds for recovering their loss.

52 Koh 2011 *Singapore Academy of Law Journal*.

53 Koh 2011 *Singapore Academy of Law Journal* 888.