



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Reportable**

Case no: 053/2023

In the matter between:

**VENATOR AFRICA (PTY) LTD**

**APPELLANT**

and

**LLOYD MASON WATTS**

**FIRST RESPONDENT**

**MARTIN BEKKER**

**SECOND RESPONDENT**

**Neutral citation:** *Venator Africa (Pty) Ltd v Watts and Another* (053/2023) [2024]  
ZASCA 60 (24 April 2024)

**Coram:** MOTHLE, MABINDLA-BOQWANA and MOLEFE JJA and  
BAARTMAN and KEIGHTLEY AJJA

**Heard:** 4 March 2024

**Delivered:** 24 April 2024

**Summary:** Company law – exception – s 218(2) read with s 22(1) of the Companies Act 61 of 2008 – allegation that company carried on its business recklessly – action proceedings by a creditor against directors of company.

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## ORDER

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**On appeal from:** KwaZulu-Natal Division of the High Court, Pietermaritzburg (Bezuidenhout AJ, sitting as court of first instance):

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

2 The order of the high court is confirmed save for paragraph 3 of the order which is substituted as follows:

‘3. The plaintiff is granted leave, if so advised, to file amended particulars of claim within 10 days of the date of this order.’

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## JUDGMENT

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**Mabindla-Boqwana JA (Mothle and Molefe JJA and Baartman and Keightley AJJA concurring):**

### **Introduction**

[1] This appeal, which arises from an exception upheld by the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court), concerns the interpretation of s 218(2) of the Companies Act 71 of 2008 (the Act), which provides for civil liability against any person who contravenes the provisions of the Act, read with s 22(1), prohibiting reckless trading by a company. These must be viewed alongside provisions dealing with fiduciary duties of directors (s 76(3)),

consequential liability (s 77(2)) and the longstanding principle that a company has a legal personality separate from its directors and shareholders.

[2] The high court considered and upheld an exception to the particulars of claim, wherein the question whether a creditor could claim against the directors of a company personally, in terms of s 218(2) read with s 22(1) of the Act, was raised. Section 214(1)(c) of the Act, which provides for criminal offences and an alternative common law claim of fraud against the directors, were tangentially also raised before it. The appeal is with the leave of the high court.

### **Background facts**

[3] The appellant is Venator Africa (Pty) Ltd. It instituted action in the high court against the respondents, Lloyd Mason Watts and Martin Bekker. The respondents were the directors of a company known as Siyazi Logistics and Trading (Pty) Ltd (Siyazi), which conducted business as a clearing and forwarding agent. Siyazi had a contractual relationship with the appellant. In the action, Mr Bekker was cited as the first defendant and Mr Watts as a second defendant, respectively. Mr Bekker however does not participate in this appeal. I shall henceforth refer to the appellant as ‘the plaintiff’ and the respondents as ‘the first and second defendants’, respectively, as in the action.

[4] It was alleged in the particulars of claim:

‘7. As regards the relationship between Plaintiff and Siyazi:

7.1 the *Plaintiff contracted with Siyazi* for the performance of clearing and forwarding duties by Siyazi on behalf of the Plaintiff;

7.2 the said agreement commenced during or around 2016 and was *orally agreed between the duly authorised representatives of Siyazi and the Plaintiff* at Durban;

7.3 the material terms of that agreement were:

7.3.1 from time to time and at the request of the Plaintiff, Siyazi would perform clearing services in respect of the importation of goods by the Plaintiff into the Republic;

7.3.2 in the performance of those services, *Siyazi would issue disbursement accounts to the Plaintiff which represented the amounts due by Plaintiff to the South African Revenue Services (“SARS”)*;

7.3.3 the Plaintiff would pay the amounts reflected on the disbursement accounts to Siyazi; and

7.3.4 *Siyazi would pay* the amounts received against the disbursement account to the respective party entitled to payment (*i.e. SARS*).

8. During the period 2018 and early 2019, *Siyazi* delivered disbursement accounts to *the Plaintiff* in respect of SARS in the total sum of R66,395,006.27.

9. The *Plaintiff* paid the full amount of R66,395,006.27 to *Siyazi*.

10. The disbursement accounts constituted a representation *by Siyazi to Plaintiff* that the amounts reflected thereon were due by Plaintiff to SARS.

11. *Siyazi* caused only an amount of R31,353,697.27 to be paid to SARS on behalf of the Plaintiff.

12. The difference between the amount paid by Plaintiff to *Siyazi* against the disbursements accounts and the amount paid by *Siyazi to SARS* is R34,612,576.19.

13. Consequent upon that short payment, *SARS has raised assessments* as follows:

13.1 VAT due- R34,630,202.00;

13.2 penalties- R2,143,774.00; and

13.3 interest- R4,633,244.00.

14. The total damages suffered by the Plaintiff in consequence of the short payment *by Siyazi to SARS* is therefore R41,407,220.00.

15. The short payment occurred as a result of fraud and/or theft *by Siyazi’s employees and/or the Defendants*.

16. Section 22(1) of the Companies Act 2008 provides:

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

17. *The conduct of Siyazi* was reckless, alternatively grossly negligent, further alternatively the business of Siyazi was conducted with the intention to defraud the Plaintiff or further alternatively for a fraudulent purpose.

18. 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”.

19. As *directors* of Siyazi, the *First and Second Defendants* were:

19.1 the guiding minds behind the fraud; alternatively

19.2 reckless; further alternatively

19.3 grossly negligent;

in controlling the activities of Siyazi.

20. The recklessness or gross negligence manifested in:

20.1 A failure to maintain proper records and books of account;

20.2 A failure to maintain controls in respect of compilation of disbursement accounts;

20.3 A failure to reconcile disbursement accounts and accurately to report them to Applicant; and/or

20.4 A failure to impose controls such that moneys paid against disbursement accounts were paid over to the third parties entitled to same.

21. But for the First and Second Defendants’ fraud, alternatively recklessness, further alternatively, gross negligence, the *Plaintiff would not have been obliged to pay to SARS the amount of R41,407,220.00.*

22. In the premises, the First and Second Defendants are jointly and severally *liable in terms of Section 218(2) read with Section 22(1) of the Companies Act, 2008* for the amount of R41,407,220.00.’ (Emphasis added.)

[5] The first defendant delivered a plea to the particulars of claim. The second defendant, however, filed two exceptions. Only the first is relevant. In its terms:

‘4. Section 22(1) does not regulate what directors, such as the defendants, must do or not do. (There is no allegation in the particulars of claim that section 22 regulates directors’ conduct).

5. Section 22 imposes duties upon the company and not its directors.

6. Section 218(2) finds application where a person breaches a provision of the Act.
7. There is no allegation in the particulars of claim that the defendants breached a provision of the Act.
8. The allegations in paragraph 19 (read with paragraphs 20 and 21) mirror the jurisdictional requirements of section 22(1), with reference to fraud, recklessness and gross negligence. However, section 22(1) does not impose obligations on, and cannot apply to, the defendants as directors.
9. The obligations and duties of directors are set out in section 76 of the Act and the available remedies for breaches in section 77. The plaintiff does not locate a claim in those sections. In substance, the plaintiff seems to contend for a contravention of the obligations of a director articulated in section 76(3) of the Companies Act. But any claim under that section is confined to section 77(2) (and section 218(2) cannot be invoked – where a statute expressly and specifically creates liability for a breach of a section, then a general section in the same statute cannot be invoked to establish a co-ordinate liability). Section 77(3)(b) specifically deals with the liability of directors in respect of section 22. It effectively provides that a director who is a party to the carrying on of the business of the company contrary to section 22 is liable for any loss, damages or costs sustained by the company.
10. The particulars of claim accordingly do not:
  - 10.1 aver a breach by the defendants of an obligation imposed on them by the Act in order to bring them and the alleged loss said to be caused by them within the purview of section 218(2);
  - 10.2 sustain a cause of action.’

[6] The second defendant further contended that, to the extent the claim was predicated on fraud, the allegations in the particulars of claim were insufficient to sustain a case. It is not necessary to detail the second exception as the high court only dealt with the first.

## In the high court

[7] In upholding the first exception, the high court went through a line of cases dealing with the interpretation of s 218(2) read with s 22 and, in some instances, s 214(1)(c) of the Act. The plaintiff's case was based on the decision of *Rabinowitz v Van Graan and Others*<sup>1</sup> (*Rabinowitz*) and related judgments. The court in *Rabinowitz* held:

‘[A] person who is guilty of an offence in terms of the Act, must . . . be found to have “contravened” a provision of the Act. If, therefore, a director is guilty of the offence created by section 214, such director must therefore be found to have contravened a provision of the Act for the purposes of s 218(2).’<sup>2</sup>

It further held, ‘a third party can hold a director personally liable in terms of the Act for acquiescing in or knowing about conduct that falls within the ambit of s 22(1) thereof.’<sup>3</sup>

[8] The court in *Rabinowitz* found it hard to believe that the legislature could, despite the criminal liability contemplated by the Act in terms of s 214(1)(c), the delinquency provided for in s 162(5)(c)(iv)(bb) and the liability created in s 77(3) against the directors, preclude a director from knowingly being a party in s 22 of the Act. It took this view bearing in mind s 66(1) of the Act which brought the company affairs under the direction of the board.<sup>4</sup> *Rabinowitz*'s reasoning was followed in several cases.<sup>5</sup> It is not necessary to discuss these cases as the thrust is largely the same.

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<sup>1</sup> *Rabinowitz v Van Graan and Others* [2013] ZAGPJHC 151; 2013 (5) SA 315 (GSJ). See also *Chemfit Fine Chemicals (Pty) Ltd v Maake* 2017 JDR 1473 (LP); *Maake and Others v Chemfit Finechemical (Pty) Ltd* [2018] ZALMPPHC 71; *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd and Others* [2016] JOL 35613 (WCC); *Meatworld Factory CC v ET Trading House (Pty) Ltd* 2019 JDR 1351 (GJ).

<sup>2</sup> *Ibid* para 17.

<sup>3</sup> *Ibid* para 22.

<sup>4</sup> *Ibid* para 21.

<sup>5</sup> Cases listed in fn 1.

[9] The high court disagreed with *Rabinowitz* and the cases that followed it. It observed the following:

‘One can sense the frustration some judges might feel when it is clear that a director was up to no good and a creditor ended up suffering damages or a huge financial loss. The fact however remains that the Companies Act does not make express provision for such liability. It could never have been the intention of the legislator to provide for liability in a manner that would involve a convoluted manner of interpreting various sections, and then to arrive at a conclusion that is still open to doubt, based on how certain sections are interpreted.’<sup>6</sup>

[10] The court embraced the approach adopted in *De Bruyn v Steinhoff International Holdings N.V. and Others*<sup>7</sup> (*Steinhoff*) which held that:

‘Section 218(2) should not be interpreted in a literal way. Rather, the provision recognizes that liability for loss or damage may arise from contraventions of the Companies Act. And so the statute confers a right of action. But what that right consists of, who enjoys the right, and against whom the right may be exercised are all issues to be resolved by reference to the substantive provisions of the Companies Act.’<sup>8</sup>

[11] The high court also referred to the judgment of this Court in *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others*<sup>9</sup> (*Hlumisa*) where, with reference to ss 77(2)(b) and 77(3)(b) of the Act, the Court held:

‘These provisions of the Companies Act make it clear that the legislature decided where liability should lie for conduct by directors in contravention of certain sections of the Act and who could recover the resultant loss. It is also clear that the legislature was astute to preserve certain common law principles. It makes for a harmonious blend.’<sup>10</sup>

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<sup>6</sup> *Venator Africa (Pty) Limited v Bekker and Another* [2022] ZAKZPHC 50; [2022] 4 All SA 600 (KZP) (High Court judgment) para 86.

<sup>7</sup> *De Bruyn v Steinhoff International Holdings N.V. and Others* [2020] ZAGPJHC 145; 2022 (1) SA 442 (GJ).

<sup>8</sup> *Ibid* para 191.

<sup>9</sup> *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* [2020] ZASCA 83; [2020] 3 All SA 650 (SCA); 2020 (5) SA 419 (SCA).

<sup>10</sup> *Ibid* para 50.



[12] The high court concluded that:

‘ . . .the so-called lacuna created by the legislature in not providing expressly for the liability of directors to other persons, such as creditors, for loss or damage suffered, is a clear indication that it was not its intention to do so, thereby continuing to recognise what has been referred to as a foundation of company law.’<sup>11</sup>

[13] It consequentially upheld the second defendant’s exception, set aside the particulars of claim, and granted leave to the plaintiff, if so advised, to file amended particulars of claim within 10 days from the date of the granting of its order.

### **In this Court**

[14] The plaintiff contends that the high court did not conduct a discrete interpretative analysis of s 218(2). Rather, it opined on the correctness of the judgments it identified and appeared to have adopted a prominent focus on s 22 rather than s 218(2).

[15] It further submits that it was unlikely to have been the purpose of the Act to have intended to exclude liability for fraudulent or reckless trading by directors [to creditors of the company]; this claim was permitted by common law, and it would require clear language in the Act to preclude it. Neither the language of s 218, nor the surrounding matrix of legislation suggest that revocation.

[16] Counsel for the plaintiff further submitted that the Court should prefer an interpretation that promotes access to justice than one that denies any remedy. Thus, it should be slow to accept the interpretation offered by the excipient.

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<sup>11</sup> High Court judgment fn 6 above para 88.

[17] Secondly, he argued that the Court is not dealing with the breach of a fiduciary duty which is owed to the company, but with a breach of a statutory duty. For purposes of a creditor's claim, the phrase '*any person who contravenes the Act*' in s 218(2) must be read to mean the director who is behind the company that contravened s 22(1).

[18] According to the plaintiff, neither *Hlumisa* nor *Steinhoff* stand in the way of this interpretation as these cases had to do with claims of shareholders against the directors of the company, rather than with the claims of creditors; shareholders' claims against directors are not permitted. In this instance, however, where the allegation is that the company was used by the directors to perpetrate a fraud on a creditor, the company neither suffers a loss nor is it likely to seek to recover from the directors.

[19] As to s 214(1)(c), which creates a criminal offence, this was not specifically pleaded. However, it was argued that sufficient facts have been pleaded which, if proved, would render the second defendant guilty of an offence. The plaintiff contends that the interpretation followed in *Rabinowitz* should be adopted in this regard. Lastly, it contends that a common law claim of fraud or theft can be inferred from the facts.

### **The test on exception**

[20] It is trite that it is for an excipient to show that on every reasonable interpretation of the facts, the pleading is excipiable. On interpretation, 'the question is not whether the meaning contended for by the [plaintiff] is necessarily the correct

one, but whether it is a reasonably possible one'.<sup>12</sup> The excipient must satisfy the court that the conclusion of law set out in the particulars of claim is unsustainable on every interpretation that can be put on those facts. It is important to note that 'the facts are what must be accepted as correct; not the conclusions of law'.<sup>13</sup> What is before us is a question of law. Either s 218(2), read with s 22(1), permits what is contended for by the plaintiff, or it does not.

### **Legislative scheme**

[21] It is important to recap the relevant principles underpinning the Act before undertaking the interpretive exercise. Section 1 of the Act defines a company as a juristic person incorporated in terms of the Act. Sections 19(1)(a) and (b), dealing with the legal status of companies provide that a company is a juristic person and that it has all the legal powers and capacity of an individual subject to certain exceptions. Section 19(2) expressly states that:

'A person is not, solely by reason of being an incorporator, shareholder or director of a company, liable for any liabilities or obligations of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.'

[22] The situation is different where a company is a personal liability company. In that case, the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company (s 19(3)). This exception serves to highlight the importance of the director's default immunity.

[23] In the case of unconscionable abuse of the juristic personality of the company as a separate entity, s 20(9) provides that the court may declare the company not to

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<sup>12</sup> *Fairlands Ltd v Inter-Continental Motors Ltd* 1972 (2) 270 (A) at 275G-H.

<sup>13</sup> *Hlumisa* fn 9 above para 22.

be a juristic person in respect of any right, obligation or liability of the company and make any further order it considers appropriate. It has been stated that this provision does not disregard the company as a separate entity. It also does not do away with the requirements for piercing the corporate veil. It ‘broadens the bases upon which the courts in this country... have hitherto been prepared to grant relief that entails disregarding corporate personality. Section 20(9), therefore does not replace the common law, it supplements the common law.’<sup>14</sup>

[24] These provisions emphasise the long-standing legal principles that the company’s legal persona cannot be ignored at the choosing of a party. As this Court said in *Hlumisa*, the separate personality is ‘no mere technicality. It is foundational to company law.’<sup>15</sup> A party cannot simply disregard the ‘corporate veil’; it must be permitted by law to do so. Against these principles as the backdrop, I turn to the interpretation of s 218(2) read with s 22(1).

### **Interpretation of the relevant provisions**

[25] The plaintiff’s case is based on a statutory duty. Interpretation of statutes ‘is an objective unitary process where consideration must be given to the language used in the light of ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. The inevitable point of departure is the language used in the provision under consideration.’<sup>16</sup>

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<sup>14</sup> *Ex Parte Gore and Others NNO (Gore)* 2013 (3) SA 382 (WC); [2013] 2 All SA 437 (WCC) (*Gore*) para 31, cited with approval by this Court in *Butcher Shop and Grill CC v Trustees for the time being of the Bymyam Trust* [2023] ZASCA 57; [2023] 3 All SA 40 (SCA); 2023 (5) SA 68 (SCA) para 40.

<sup>15</sup> *Hlumisa* fn 9 above para 42 referring to this Court’s judgment in *Itzikowitz v Absa Bank Ltd* [2016] ZASCA 43; 2016 (4) SA 432 (SCA).

<sup>16</sup> *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16 para 8.

[26] Section 218 (2) says:

‘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.’ (Emphasis added.)

This section creates a right to recovery if there has been a breach of a provision of the Act. ‘When a wrongdoer “contravenes” the Act and causes loss to a person, the wrongdoer is liable to that person...the word “contravenes” in s 218(2) includes a breach or an infringement of any provision of the Act, “which is by nature prescriptive or which in some way regulates conduct”.’<sup>17</sup>

[27] This section does not itself create liability. It imposes liability in the event of a contravention of some other provision of the Act. As was held in *Steinhoff*:<sup>18</sup>

‘[T]he statute confers a right of action. But what that right consists of, who enjoys the right, and against whom the right may be exercised are all issues to be resolved by reference to the substantive provisions of the Companies Act.

Such an interpretation answers another difficulty that the literal interpretation of s 218(2) does not. As *Hlumisa*<sup>19</sup> observed, can s 218(2) be understood to impose liability without the regulating concepts of fault, foreseeability and remoteness; and an undifferentiated conception of permissible plaintiffs. Such an understanding would require an interpretation of s 218(2) that gives rise to wholesale liability at the instance of all persons who sustained loss or damage as a result of the contravention. That is to place a burden of liability and hence risk upon directors so great that it is hard to imagine who would accept office on these terms. And if that is what the legislature intended it would be expected to have made the imposition of so great a burden clear. The better interpretation is that the legislature intended that the specific requirements of any liability are to be found in the substantive provisions of the Companies Act. Section 218(2) has a different function. It determines the question posed in *Steenkamp*:<sup>20</sup> contraventions do permit a right of

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<sup>17</sup> *Hlumisa* fn 9 above para 45.

<sup>18</sup> *Steinhoff* fn 7 above paras 191 and 192.

<sup>19</sup> *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others* [2018] ZAGPPHC 676; 2019 (4) SA 569 (GP). This is the judgment that was later confirmed by this Court on appeal in *Hlumisa* fn 9 above.

<sup>20</sup> *Steenkamp v Provincial Tender Board of the Eastern Cape* [2005] ZASCA 120; [2006] 1 All SA 478 (SCA); 2006 (3) SA 151 (SCA) paras 21 and 22.

action. Whether there is a right of action, who enjoys the right, and on what basis of all matters regulated by the substantive provision of the Companies Act.’

[28] The plaintiff relies on s 22(1) as the provision that it asserts has been contravened and triggers the operation of s 218(2). Section 22(1) stipulates:

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

This section plainly imposes a duty on the company, and not its directors, to refrain from carrying on its business recklessly, among other things. To construe s 22(1) as being capable of infringement by the directors is to read into the section a prohibition that is not there.

[29] Sections 22(2) and 22(3) create remedies for the Commission<sup>21</sup> when reckless trading is suspected. These provisions as well, are directed at the company. The section that deals expressly with directors’ liability is s 77(3)(b), which states:

‘(3) A director of a company is liable for any loss, damages or costs *sustained by the company* as a direct or indirect consequence of the director having—

...

(b) acquiesced in the carrying on of the company’s business despite knowing that it was being conducted in a manner prohibited by section 22(1)’ (Emphasis added.)

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<sup>21</sup> The sections stipulate: ‘(2) If the Commission has reasonable grounds to believe that a company is engaging in conduct prohibited by subsection (1), or is unable to pay its debts as they become due and payable in the normal course of business, the Commission may issue a notice to the company to show cause why the company should be permitted to continue carrying on its business, or to trade, as the case may be.

(3) If a company to whom a notice has been issued in terms of subsection (2) fails within 20 business days to satisfy the Commission that it is not engaging in conduct prohibited by subsection (1), or that it is able to pay its debts as they become due and payable in the normal course of business, the Commission may issue a compliance notice to the company requiring it to cease carrying on its business or trading, as the case may be.’

[30] In *Gihwala and Others v Grancy Property Ltd and Others*<sup>22</sup> this Court, referring to s 77(3), held that:

‘That section . . . does not involve a declaration by the court, but *creates a statutory claim in favour of the company against a director*, imposing liability on the latter for any loss, damages or costs incurred by the company in certain circumstances, including whether the director acquiesces in the company engaging in reckless trading. *It is not a provision that can be invoked to secure payment to a creditor or shareholder in respect of their claim against the company or a director.*’ (Emphasis added.)

[31] Section 76(3) imposes duties upon the directors to, inter alia, act in good faith and in the best interests of the company. These are common law principles which have now been entrenched in the Act.<sup>23</sup> These duties are owed to the company. In the event of a wrong done to the company in terms of any of the provisions of the section, the company can sue to recover damages. ‘The company would be the proper plaintiff. It is no coincidence, then, that s 77(2)(a) provides that a director of a company may be held liable for breaches of fiduciary duties resulting in any loss or damage sustained by the company.’<sup>24</sup> Section 77(2)(b) similarly provides that a director of a company may be held liable in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of the duty contemplated in s 76(3)(b); any provision of the Act, not otherwise mentioned in the section; or any provision of the company’s Memorandum of Incorporation.

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<sup>22</sup> *Gihwala and Others v Grancy Property Ltd and Others* [2016] ZASCA 35; [2016] 2 All SA 649 (SCA); 2017 (2) SA 337 (SCA) para 120.

<sup>23</sup> P Delpont *Henochsberg on the Companies Act 71 of 2008* at 298(12M)-298(12N).

<sup>24</sup> *Hlumisa* fn 9 above para 48.

[32] As stated in *Hlumisa*, these provisions make it clear that ‘the legislature decided where liability should lie for conduct by directors in contravention of certain sections of the Act and who could recover the resultant loss. It is also clear that the legislature was astute to preserve certain common law principles. It makes a harmonious blend.’<sup>25</sup> Further, the Act abounds with provisions for recovery of loss resulting from misconduct on the part of directors. There must clearly be a link between the contravention and the loss allegedly suffered.<sup>26</sup>

[33] The plaintiff has been unable to identify a provision that has been contravened by the directors in order to invoke s 218(2). As the court in *Steinhoff* observes:

‘The statutory scheme of liability under the Companies Act does not attach a singular consequence for a contravention of the Act. Rather, the Companies Act attaches a regime of liability for particular contraventions. I have already observed that this is so in respect of the contravention of s 76 and s 22. This is a systemic feature of the Companies Act. A breach of duty may exact compliance by the Commission (s22(3)); a breach may be an offence (s32(5)); and a breach may give rise to liability to make good a loss as a consequence of the breach (s77). Certain breaches are visited with more than one permissible consequence. Thus, s 22 permits the Commission to issue a compliance notice. In addition, a director may be held liable to the company for reckless trading (s22(1) read with s 77(3)(b)).

The more general point of interpretation is that the legislature has been careful to stipulate what form of liability, civil, criminal, or regulatory, may result from different contraventions. There is no coherent reading of the Companies Act that would subordinate this specification of differentiated liability for the recognition under s 218(2) of general liability of all persons who contravene the Companies Act in favour of all who suffer loss as a result thereof.’<sup>27</sup>

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<sup>25</sup> *Hlumisa* fn 9 above para 50.

<sup>26</sup> *Hlumisa* fn 9 above para 51.

<sup>27</sup> *Steinhoff* fn 7 above paras 213 and 214.



[34] In the circumstances, *Rabinowitz* and other high court cases were wrongly decided. It is irrelevant that *Hlumisa* and *Steinhoff* concerned claims brought by shareholders against directors. While those facts are important to note, the relevant principles in those decisions as well as *Gihwala* are instructive for present purposes.

[35] For these reasons, the high court cannot be faulted for upholding the first exception. The appeal must, accordingly, fail. Counsel for the second defendant requested that the order allowing the amendment, be substituted to provide for a new operative date. I agree.

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

- 1 The appeal is dismissed with costs including the costs of two counsel, where so employed.
- 2 The order of the high court is confirmed save for paragraph 3 of the order which is substituted as follows:  

‘3. The plaintiff is granted leave, if so advised, to file amended particulars of claim within 10 days of the date of this order.’

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N P MABINDLA-BOQWANA  
JUDGE OF APPEAL

## Appearances

For the appellant: F Snyckers SC  
Instructed by: Shepstone & Wylie Attorneys, Durban  
Symington De Kok Attorneys, Bloemfontein

For the first respondent: A Annandale SC with J Miranda  
Instructed by: Grant and Swanepoel Attorneys, Pietermaritzburg  
Kramer Wiehmann Attorneys, Bloemfontein.