

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 8800/2021P

In the matter between:

VENATOR AFRICA (PTY) LIMITED

PLAINTIFF

and

MARTIN BEKKER

FIRST DEFENDANT

LLOYD MASON WATTS

SECOND DEFENDANT

ORDER

The following order is granted:

1. The second defendant's first exception dated 4 November 2021 is upheld, with costs.
2. The plaintiff's particulars of claim are set aside.
3. The plaintiff is granted leave, if so advised, to file amended particulars of claim within ten days from the date of the granting of this order.

JUDGMENT

BEZUIDENHOUT AJ

Introduction

[1] The plaintiff, Venator Africa (Pty) Limited, issued summons against the first defendant, Mr Martin Bekker, and the second defendant, Mr Lloyd Mason Watts, on 8 October 2021, claiming payment in the sum of R41 407 220 against the two defendants, jointly and severally, the one paying the other to be absolved.

[2] The first defendant filed a plea on or about 18 February 2022. The second defendant filed his first exception on 4 November 2021, and his second exception on 29 November 2021. It is these two exceptions which came before me as an opposed motion.

[3] The first exception is taken on the basis that the particulars of claim fail to disclose a cause of action. In the second exception, it is contended that the particulars of claim are vague and embarrassing.

The plaintiff's claim

[4] It is pleaded in paras 4 and 6 of the particulars of claim that at all material times, the defendants were directors of Siyazi Logistics and Trading (Pty) Limited (Siyazi). Siyazi conducted business as a clearing and forwarding agent.

[5] It is pleaded in para 7 that during or about 2016, Siyazi contracted with the plaintiff for the performance of clearing and forwarding duties by Siyazi on the plaintiff's behalf. It was *inter alia* agreed that Siyazi would issue disbursement accounts to the plaintiff, which represented the amounts due by the plaintiff to the South African Revenue Services (SARS). The plaintiff would pay the amounts reflected on the disbursement accounts to Siyazi, who in turn would pay the amounts received from the plaintiff to SARS.

[6] It is further pleaded in paras 8 to 14 that Siyazi delivered disbursement accounts to the plaintiff totalling R66 395 006.27, which the plaintiff paid to Siyazi.

The disbursement accounts constituted a representation by Siyazi to the plaintiff that the amounts reflected were due to SARS by the plaintiff. It is the plaintiff's case that Siyazi only paid R31 353 697.27 over to SARS, which resulted in SARS raising assessments against the plaintiff for VAT due in the amount of R34 630 202 and penalties in the amount of R2 143 774. The plaintiff pleads that it suffered damages totalling R41 407 220 due to Siyazi's short payment to SARS.

[7] The plaintiff pleads further in para 15 that the short payment occurred as a result of fraud and/or theft by Siyazi's employees and/or the defendants.

[8] With reference to section 22(1) of the Companies Act 71 of 2008 (the Companies Act), the plaintiff pleads in paras 16 and 17 that Siyazi was reckless, alternatively grossly negligent, further alternatively that the business of Siyazi was conducted with the intention to defraud the plaintiff or further alternatively for a fraudulent purpose.

[9] Section 22 of the Companies Act, with the heading 'Reckless trading prohibited', falls under Chapter 2 which is titled 'Formation, Administration and Dissolution of Companies' and reads as follows:

'22. Reckless trading prohibited.—(1) A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.

(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.’

[10] The plaintiff pleads further in paras 18 and 19, with reference to section 218(2) of the Companies Act, that the defendants, as the directors of Siyazi, were the guiding minds behind the fraud, alternatively reckless, and further alternatively grossly negligent in controlling the activities of Siyazi.

[11] It was further averred in para 20 that the recklessness or gross negligence manifested in *inter alia* a failure to maintain proper records or books of account, a failure to maintain controls and to reconcile disbursement accounts and/or a failure to impose controls that monies paid against disbursement accounts were paid to the third parties entitled to it.

[12] Section 218, with the heading ‘Civil actions’, falls within Chapter 9 of the Companies Act, which deals with *inter alia* offences and miscellaneous matters. It reads as follows:

‘218. **Civil actions.**—

(1) . . .

(2) 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.

(3) The provisions of this section do not affect the right to any remedy that a person may otherwise have.’

[13] The plaintiff pleads further in paras 21 and 22 that but for the defendants’ fraud, alternatively recklessness, further alternatively gross negligence, the plaintiff would not have been obliged to pay SARS the amount of R41 407 220. It accordingly holds the defendants liable, jointly and severally, in terms of section 218(2), read with section 22(1), of the Companies Act for the aforementioned amount.

The first exception – no cause of action

[14] The second defendant alleges that section 22(1) regulates companies, which are distinct juristic persons, and therefore does not regulate what directors, such as the defendants, must do or not do, nor does it impose duties on directors. It is alleged that there is no allegation in the particulars of claim that section 22 regulates directors' conduct.

[15] It is alleged that section 218(2) finds application where a person breaches a provision of the Companies Act. There is however no allegation in the particulars of claim that the defendants breached a provision of the Companies Act.

[16] It is also alleged that the allegations in the particulars of claim, with reference to fraud, recklessness and gross misconduct, mirror the jurisdictional requirements of section 22(1) but that section 22(1) does not impose obligations on, and cannot apply to the defendants as directors.

[17] It is also alleged that the obligations and duties of directors are set out in section 76 of the Companies Act, with the available remedies for breaches set out in section 77. The plaintiff, apparently, is contending for a contravention of section 77(3) of the Companies Act, but any claim under that section is confined to section 77(2) of the Companies Act. Section 77(3)(b) specifically deals with the liability of directors in respect of section 22, and effectively provides for a director who carries on the business of the company contrary to section 22, to be liable for any loss, damages or costs sustained by the company. It is further alleged that section 218(2) cannot be invoked because when 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.

[18] Section 76(3) of the Companies Act reads as follows:

‘(3) 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 director—

(a) in good faith and for a proper purpose;

- (b) in the best interests of the company; and
- (c) with the 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 the general knowledge, skill and experience of that director.'

[19] Section 77(2) of the Companies Act reads as follows:

'(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 section 75, 76 (2) or 76 (3) (a) or (b); or

(b) 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—

(i) a duty contemplated in section 76 (3) (c);

(ii) any provision of this Act not otherwise mentioned in this section;
or

(iii) any provision of the company's Memorandum of Incorporation.'

[20] Section 77(3)(b) of the Companies Act reads as follows:

‘(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—

(a) . . .

(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).’

[21] The second defendant alleges that the particulars of claim do not aver any breach by the defendants of an obligation imposed on them by the Companies Act, in order to bring them and the alleged loss said to have been caused by them within the purview of section 218(2), and accordingly does not sustain a cause of action.

[22] It is further alleged that any conduct or omissions on the part of the defendants could not, on the pleaded case, have caused a loss to the plaintiff as it is *inter alia* pleaded that there was an agreement between the plaintiff and Siyazi, in terms of which Siyazi would pay over the amount for the disbursements to SARS. It was also pleaded that Siyazi only paid the amount of R31 353 697.27 to SARS, and that the damages suffered by the plaintiff arise from the alleged breach of the agreement by Siyazi. It was alleged that Siyazi was accordingly the cause of the alleged loss.

[23] It was also alleged that to the extent that the claim is predicated on fraud, it was not properly pleaded. The more serious the allegation, the greater the need is for particulars to be given which explain the basis of the allegation, especially when allegations of bad faith and dishonesty are made. A general allegation of fraud is not sufficient to infer liability, and must be supported by particulars.

[24] It was further alleged that the allegations of recklessness or gross negligence on the part of the second defendant as director do not sustain a cause of action as there is no basis in law for the second defendant, as a separate person from Siyazi, to have prepared accounts, maintained controls and the like. The plaintiff did not

plead any legally recognisable obligation on the second defendant as director to have maintained *inter alia* books of account and controls. At best for the plaintiff, the defendants were required to ensure that Siyazi conducted itself in this way.

[25] It was also alleged that the allegations pleaded cannot constitute gross negligence. As far as fault is concerned, it was argued that there is a legal continuum, commencing with negligence, proceeding to gross negligence, recklessness, and culminating in *dolus eventualis*, which all embody different standards of conduct. The particulars of claim do not make out a case for any of the aforementioned.

The second exception – vague and embarrassing

[26] It is alleged that the plaintiff pleads with reference to section 22(1) of the Companies Act, and in particular pleads the elements of the section, namely fraud, recklessness and negligence. It is unclear how section 22(1) is actionable in consequence of omissions of the defendants as directors, as section 22(1) relates to a company and not to directors. There is no allegation that section 22(1) regulates a director's conduct. It is also alleged that section 22(1) does not impose obligations on the defendants as directors but the claim is set out on the basis that it does, which renders the claim vague. The second defendant is embarrassed and prejudiced by the pleading.

[27] It is further alleged that the plaintiff pleaded that Siyazi delivered disbursement accounts during the period 2018 and early 2019, after which the plaintiff paid the full amount to Siyazi. The particulars of claim contain no allegation as to when the plaintiff made the payments to Siyazi. It was necessary for the plaintiff to specifically particularise when payments were made as the summons was issued in October 2021. It is alleged that the second defendant is prejudiced as it is not possible to discern from the pleading when the plaintiff contends it made payments, and therefore the second defendant cannot properly consider whether to plead prescription.

[28] It is also alleged that the allegation that the disbursement accounts constituted a representation by Siyazi to the plaintiff is vague and embarrassing as it is unclear how it forms part of the cause of action. The plaintiff's claim seems to be based on statutory liability, and not on an actionable representation or misrepresentation. There is also no averment that Siyazi intended the plaintiff to rely on the representation or that the plaintiff did so, as would be expected when a representation is pleaded. The second defendant is thus prejudiced by the pleading.

[29] The lack of particularity with regard to the allegations of fraud was again raised, it being alleged that it is vague and that it is insufficient to make a general allegation of fraud. The vagueness is compounded by the allegation that the fraud and/or theft was on the part of the employees and/or the defendants. It should *inter alia* have been alleged whether the second defendant conspired or acted in common purpose with employees, as the second defendant should be able to understand the case he is required to meet. The second defendant is embarrassed and prejudiced in pleading.

Legal principles – exceptions

[30] Before I proceed to deal with the contentions made on behalf of both parties, it may be useful to consider the approach taken by courts when considering exceptions.

[31] In *Living Hands (Pty) Ltd v Ditz*,¹ the court provided an overview of the general principles, as distilled from case law:

‘(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

(b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an

¹ *Living Hands (Pty) Ltd and another v Ditz and others* 2013 (2) SA 368 (GSJ) para 15.

expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

(c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.

(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

(f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.

(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.' (Footnotes omitted)

[32] Where an exception arises in respect of the interpretation of statutory provisions, it was held in *Fairlands (Pty) Ltd v Inter-Continental Motors (Pty) Ltd*² that 'the question is not whether the meaning contended for by the appellant is necessarily the correct one, but whether it is a reasonably possible one'.

[33] Counsel for the plaintiff, Mr Wallis SC, referred to *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer*³ in his heads of argument, where it was held that as long as sufficient facts are pleaded from which it can be concluded that a specific statutory provision applies, it is not necessary to expressly refer to the section.

² *Fairlands (Pty) Ltd v Inter-Continental Motors (Pty) Ltd* 1972 (2) SA 270 (A) at 275G-H.

³ *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 725H-726B.

The second defendant's contentions

[34] Counsel for the second defendant, Ms Annandale SC, submitted that the plaintiff could easily have sued on the basis of Siyazi's breach of its contract with the plaintiff. Instead, the plaintiff placed a convoluted reliance on section 218(2) read with section 22(1) of the Companies Act, as the basis for its cause of action. No other sections of the Companies Act were disclosed or relied upon. It was submitted that the plaintiff should at least also have pleaded, and made reference to the provisions of section 214(1) of the Companies Act. Section 214, with the heading 'False statements, reckless conduct and non-compliance' reads as follows:

'(1) A person is guilty of an offence if the person—

(a) . . .

(b) with a fraudulent purpose, knowingly provided false or misleading information in any circumstances in which this Act requires the person to provide information or give notice to another person;

(c) was knowingly a party to an act or omission by a company calculated to defraud a creditor or employee of the company, or a holder of the company's securities, or with another fraudulent purpose. . . '

The plaintiff failed to plead any misrepresentation made to it or to SARS or that it was provided with false information by Siyazi.

[35] The main thrust of the argument on behalf of the second defendant however centred around whether a director of a company can be held liable under section 218(2) if the company breaches section 22(1) of the Companies Act. It was submitted that two principles were relevant:

(a) There is a distinction between a company and its director. A director is not personally liable for the wrongs of the company; and

(b) When a section in the statutes specifically imposes a liability on a person, liability in respect of that person cannot also arise under a more general section. Reliance was placed on *Hlumisa Investment Holdings RF Ltd and another v Kirkinis and others*⁴ where the following was held:

[29] Therefore, a claim that alleges that directors are liable for damages as a result of a breach of s 76(3) must be brought in terms of s 77(2), which specifically creates the liability for a breach of s 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) Ltd* 1972 (1) SA 589 (A) (1971 BIP 58) 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.'

[36] It was submitted that obligations are imposed on directors under section 76, whilst the remedies for a breach thereof are set out in section 77 of the Companies Act, and that it is where liability must be established – not under sections 22 and 218. The plaintiff has however not relied on sections 76 and 77, and cannot now invoke reliance on them. The duties owed by a director in terms of section 76 are furthermore owed to the company, and not to third parties, and it was submitted that even if it wanted to, the plaintiff could not invoke reliance on these sections.

[37] Reference was made to Professor P Delpont's *Henochsberg on the Companies Act 71 of 2008*,⁵ where it was stated that

'... it is clear from s 22 and s 77 (3) (b) that a creditor should not be able to institute a claim under s 22, as is the case with s 424, and the possibility for such claim under eg s 218 (2) as contemplated in *Rabinowitz* case *supra* para 22 ... was excluded in *Hlumisa* ...'

I will deal with *Rabinowitz*⁶ later on as it forms part of a line of cases relied upon by the plaintiff to support its reliance on sections 22(1) and 218(2) as its cause of action.

⁴ *Hlumisa Investment Holdings RF Ltd and another v Kirkinis and others* 2019 (4) SA 569 (GP).

⁵ P Delpont *Henochsberg on the Companies Act 71 of 2008* (May 2022 - SI 28) at 118(3).

[38] The reference to section 424, was a reference to the repealed Companies Act 61 of 1973 (the 1973 Companies Act). Section 424 with the heading 'Liability of directors and others for fraudulent conduct of business' falls within Chapter XIV, which continues to apply in respect of the winding-up and liquidation of companies.⁷ It reads as follows:

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

[39] According to *Henochsberg*,
'the law relating to s 424 of the 1973 Act is relevant when interpreting s 22, but only in respect of, eg, the meanings attached to "fraudulent purpose", "recklessly" or "intent to defraud" because the ambit of s 22 is otherwise totally different from that of s 424 of the 1973 Act . . . the effect of a company trading in terms of the prohibited conduct is the possibility of the Commission requiring the company to cease carrying on its business or trading [whereas the] effect in terms of s 424 of the 1973 Act is personal liability for all or any of the debts or other liabilities of the company. A director is liable [in terms of s 77(3)(b)] to the company for any loss, damage or costs arising as a direct or indirect consequence of allowing trading as prohibited in s 22 (1) . . . In terms of s 22, the Commission will make the relevant finding, whereas the Court will do so in terms of s 424.'⁸

⁶ *Rabinowitz v Van Graan and others* 2013 (5) SA 315 (GSJ).

⁷ Paragraph 9 of Schedule 5 of the Companies Act 71 of 2008.

⁸ P Delpont *Henochsberg on the Companies Act 71 of 2008* (May 2022 - SI 28) at 118(2)-118(3).

[40] Second defendant's counsel also referred me to the provisions of section 214(1)(c) of the Companies Act, as it read before it was substituted by section 119(a) of the Companies Amendment Act 3 of 2011, which came into operation on 1 May 2011. It read as follows:

'A person is guilty of an offence if the person-

(c) was knowingly a party to-

(i) conduct prohibited by section 22(1). . .'

It was submitted that it underscores the legislature's intention to exclude personal liability of a director under section 22. In contrast to this position, section 424(3) of the 1973 Companies Act ordains that a person who knowingly is a party to the carrying on of the business of a company recklessly or with intent to defraud, shall be guilty of an offence.

[41] It was submitted that a further indication of the legislature's intention is the fact that section 64 of the Close Corporations Act 69 of 1984 expressly makes provision for the liability of its members for the reckless or fraudulent carrying on of the business of the close corporation. There is no equivalent express provision in the Companies Act. This supports the submission that for a director to be held liable, there must be an express provision to that effect. There is furthermore no analogous provision in the Companies Act to section 424 of the 1973 Companies Act. It was submitted that the plaintiff seeks to invoke a section 424 style liability, but cannot do so.

[42] It was also submitted that the language used in section 22(1) does not impose any obligation or duties on the directors, and that they therefore cannot be held liable in terms of this section. Sections 76 and 77 set out the obligations of the directors and when they can be held liable. Section 77 in turn only provides a remedy to the company.

[43] I was referred to *De Bruyn v Steinhoff International Holdings NV and others*⁹ where Unterhalter J made certain obiter remarks regarding sections 22(1) and 218(2) of the Companies Act. In this matter (as in *Hlumisa supra*) the shareholders sought relief against certain directors, which of course differs from the position in the present matter. With reference to claims by third parties against directors, the following was said:

[184] Two cases were cited in support of the proposition that s 218(2) does impose liability upon directors for contraventions of the Companies Act at the instance of third parties. In *Rabinowitz* the court, citing the interpretations of two commentaries on the Companies Act, found, on exception, that the directors can be held personally liable in terms of s 218(2) for acquiescing in or knowing about conduct that falls within the ambit of s 22(1) — the prohibition against reckless trading. In *Sanlam* it was held that a person induced to enter a transaction could sue for damages in terms of s 218(2) as a result of the contraventions by directors of s 76(3).

. . .

[190] . . . Section 22 states that a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. A company contravenes s 22 only if it carries on its business with one or other of the specified species of fault. Any liability that arises under s 22 is determined under the disciplining concepts of fault to be found in this provision. No coherent interpretation would suggest that because s 218(2) provides for liability without reference to fault, s 22 can be read to impose strict liability. On the contrary, fault is constitutive of the contravention.

[191] Section 218(2) should not be interpreted in a literal way. Rather, the provision recognises 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.

⁹ *De Bruyn v Steinhoff International Holdings NV and others* 2022 (1) SA 442 (GJ).

[192] Such an interpretation answers another difficulty that the literal interpretation of s 218(2) does not. As *Hlumisa* 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*: contraventions do permit of a right of action. Whether there is a right of action, who enjoys the right, and on what basis are all matters regulated by the substantive provisions of the Companies Act.’ (Footnotes omitted.)

[44] Second defendant’s counsel also made brief submissions on the issues of fraud, fault and causation in line with what was set out in the exceptions.

The plaintiff’s contentions

[45] Plaintiff’s counsel submitted in his heads of argument that on its plain and unambiguous meaning, section 218(2) encapsulates a claim by a creditor of the company, being ‘any other person’ for damage caused by ‘any person who contravenes any provision of this Act’, which must include a director who contravenes the Act.

[46] It was submitted that the exceptions raised by the second defendant were not novel, having been raised in a number of cases where actions were instituted for damages on a similar basis as in the present matter.

[47] I was referred to *Rabinowitz*¹⁰ where the court agreed with the proposition made on behalf of the plaintiff, namely, that if 'a director is guilty of the offence created by s 214, such director must therefore be found to have contravened a provision of the Act for purposes of s 218(2)'.

[48] Earlier on in *Rabinowitz* the following was held:

'The offence created by s 214(1)(c) is, inter alia, in respect of a director who was knowingly a party to conduct of the company prohibited under s 22. The section precludes a director from knowingly being party to a company carrying on its business with intent to defraud or for any fraudulent purpose. This is one of the matters provided for in s 22 and is the primary complaint of the plaintiff.'¹¹

[49] The court referred to *Henochsberg* and *Contemporary Company Law* where opinions were expressed that section 218(2) provided a remedy in terms of which *inter alia* creditors would be entitled to redress from the company or its directors for fraudulent or reckless trading.¹²

[50] The court found 'that 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)'.¹³ In reaching this conclusion, the court relied on, and agreed with a submission made, that 'despite the express liability created in s 77(3) thereof, the legislature did not intend to preclude a director from knowingly being a party to conduct specified in s 22 of the Act'.¹⁴ It was held that the Companies Act 'specifically contemplates that the business and affairs of a company are to be managed by or under the direction of its board, it is hard to conceive of any basis upon which the legislature intended to prevent a company from acting in the manner

¹⁰ *Rabinowitz v Van Graan and others* 2013 (5) SA 315 (GSJ) para 17.

¹¹ *Ibid* para 13.

¹² *Ibid* para 18.

¹³ *Ibid* para 22.

¹⁴ *Ibid* para 21.

provided for in s 22, but did not intend to prevent the directors responsible for the management of the company from acting in that manner'.¹⁵

[51] I was also referred to *Chemfit Fine Chemicals (Pty) Ltd v Maake*¹⁶ where the court followed the approach in *Rabinowitz* and held the directors personally liable to the creditors of the company. The court dealt with the matter where the company apparently traded under insolvent circumstances as set out in section 22(1)(b) of the Companies Act (before it was amended in 2011), and found that the directors had been trading under insolvent circumstances, which was a contravention and which attracted personal liability of the directors within the meaning of section 218(2).¹⁷ The court then held that '[a]ny conduct that contravenes a provision of the Act, catapults any person, including the directors to personal liability'.¹⁸

[52] *Chemfit* was overturned on appeal before a Full Bench in *Maake and others v Chemfit Finechemical (Proprietary) Limited*,¹⁹ but only on a factual basis, not in respect of its legal approach. The court held that:

[27] Section 218 of the CA imposes liability on any person who contravenes any provision of the Act and who in so doing caused another person to suffer a loss or damage. (See *Rabinowitz v Van Graan* 2013 (5) SA 315 (GST) and *Sanlam Capital Markets v Mettle Manco* [2014] 3 ALL SA 454 (GT). Any person who can sue for loss or damage in our view will include a creditor of the company.

[28] Section 218 of the CA provides a general remedy to any person who suffers loss or damages as a result of contravention of the Act. However, it does not specify which contravention the person may sue for. A creditor may sue a director of a company in his/her personal capacity for the loss or damage it has suffered as a result of that director(s) actions. Since the section does not specify which actions may be regarded as contravention of the CA, it follows that the creditor who sues must specify which

¹⁵ Ibid.

¹⁶ *Chemfit Fine Chemicals (Pty) Ltd v Maake* 2017 JDR 1473 (LP).

¹⁷ Ibid para 25.

¹⁸ Ibid para 36.

¹⁹ *Maake and others v Chemfit Finechemical (Proprietary) Limited* [2018] ZALMPPHC 71.

contravention were attributed to the director(s) and the exact losses or damages with sufficient particulars. Sufficient facts should be pleaded to enable the director(s) to know which case they would meet.’

[53] The court found on the facts of the case that the directors did not carry on the business of the company recklessly or with gross negligence (the respondents having relied on a contravention of section 22(1) of the Companies Act).²⁰

[54] Counsel for the plaintiff also referred me to *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Limited and others*.²¹ The court dealt with an exception on the basis that the plaintiff was not entitled, as a third party creditor, to rely on the provisions of sections 22(1), 77(3)(b) and 77(6) of the Companies Act to hold the directors personally liable for a debt due to it by the company. The court found that a company ‘cannot incur losses, damages or cost without the actions of its directors’.²² Although section 77(3)(b) envisages the directors being accountable to the company, the court found that the directors acted recklessly with the possibility of intent to defraud the plaintiff and could not escape liability. The court held *inter alia* that to find that directors were not liable would lead to absurd results.²³ Such an approach would create a lacuna, which the legislator would never have intended.

[55] I was also referred to *Meatworld Factory CC v ET Trading House (Pty) Ltd*.²⁴ It was submitted that the court upheld, at the trial stage, claims for liability in respect of the director’s acquiescence, and a breach of, section 22 of the Companies Act. In this matter, the plaintiff instituted action against the company as well as its sole director, who was also the only shareholder and in charge of its management. The court however granted an order, absolving the second defendant (the director) from the instance, thus the aforementioned submission is not entirely accurate.

²⁰ Ibid para 37.

²¹ *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Limited and others* [2016] JOL 35613 (WCC).

²² Ibid para 30.

²³ Ibid paras 31-32.

²⁴ *Meatworld Factory CC v ET Trading House (Pty) Ltd* 2019 JDR 1351 (GJ).

[56] The court dealt with *Rabinowitz* and *Chemfit* and expressed reservations about the soundness of the conclusion in *Rabinowitz* but held itself bound to it, and proceeded to deal with the matter before it

‘on the basis of an assumption that s 22(1) and/or s 77(3) impliedly prohibits a director from acquiescing or participating in the reckless conduct by a company of its business and that such acquiescence or participation would constitute a contravention of the implied prohibition potentially giving rise to liability in terms of s 218(2)’.²⁵

[57] Prior to reaching this conclusion, the court also referred to *Gihwala v Grancy Property Limited*²⁶ where Wallis JA dealt *inter alia* with a claim in terms of section 424 of the 1973 Companies Act, but in respect of which a claim in terms of section 77(3) of the Companies Act was advanced in the alternative. The following was held in *Gihwala* with reference to section 77(3):

‘That that section, in this departing from s 424, 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 where 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. So the attempt to rely on s 77(3) must also fail.’²⁷

[58] After analysing the purpose of the Companies Act, the court in *Meatworld Factory* held as follows:

‘That the imposition of personal liability on those controlling a company which trades recklessly would be a legitimate manner in which to promote the aim of good corporate governance, and to protect those dealing with a company, is no doubt

²⁵ Ibid para 37.

²⁶ *Gihwala and others v Grancy Property Ltd and others* [2016] ZASCA 35; 2017 (2) SA 337 (SCA).

²⁷ Ibid para 120.

so. It is however not the only manner in which this object can, rationally, be achieved.’²⁸

It was stated, with reference to *Ebrahim v Airport Cold Storage (Pty) Ltd*,²⁹ that ‘The rationale for the imposition of personal liability on those in charge of an artificial person is considered, with reference to s 64(1) of the Close Corporations Act, 69 of 1984, in *Ebrahim v Airport Cold Storage (Pty) Ltd*. . .’³⁰

[59] The court then proceeded to refer to the remedies available in terms of section 424 of the 1973 Companies Act, where the right of recourse against the company’s director will occur in the context of liquidations, and in terms of section 141(2)(c)(ii)(bb) of the Companies Act, where a business rescue practitioner, who finds evidence of reckless trading or fraud, is required to direct management to take the necessary steps to rectify the matter. Although not referred to in the judgment, it is important to note that in terms of section 141(2)(c)(ii)(aa), a business rescue practitioner must forward the evidence to the appropriate authority (presumably the Commission) for further investigation and prosecution. The third remedy referred to was the possibility of declaring a director delinquent if he or she acquiesced in the company trading recklessly.

[60] The judge held as follows:

‘In these circumstances the omission of the legislature to expressly prohibit a director from participating or acquiescing in reckless trading by a company, on pain of personal liability in terms of s 218, may very well have constituted a deliberate policy choice.’³¹

[61] Counsel for the plaintiff lastly referred me to *Metro Minds (Pty) Limited v Pienaar*³² where the court had to decide whether the defendant should be held liable for a debt owed to the plaintiff by the contracting company (of which the defendant

²⁸ *Meatworld Factory CC v ET Trading House (Pty) Ltd* 2019 JDR 1351 (GJ) para 34.

²⁹ *Ebrahim and another v Airport Cold Storage (Pty) Ltd* [2008] ZASCA 113; 2008 (6) SA 585 (SCA) para 16.

³⁰ *Meatworld Factory CC v ET Trading House (Pty) Ltd* 2019 JDR 1351 (GJ) fn 16.

³¹ *Ibid* para 35.

³² *Metro Minds (Pty) Limited v Pienaar* [2020] JOL 49546 (GP).

was a director), as a consequence of the defendant acquiescing in reckless, grossly negligent or fraudulent conduct of company business as contemplated in section 22(1), read with section 218 of the Companies Act. The court also had to decide whether the defendant should be declared delinquent for acting in such reckless, grossly negligent or fraudulent manner in terms of section 162(5)(c)(iv)(aa) and/or (bb) of the Companies Act.

[62] The court held as follows:

‘[22] Generally, directors of companies do not act in their personal capacity but as agents for their company. Where a director enters into a contract with a party, it acts on behalf of the company and not in his personal capacity. In order to prevent the abuse of the separate legal personality of a company, the Companies Act provides in sections 22(1) (read with section 218(2)) and 77(3)(b) for the personal liability of a director towards a company for reckless or fraudulent trading. Directors may also be personally held liable for any loss, damage or costs sustained by a “third party” as a direct or indirect consequence of the director having acquiesced in carrying on the company’s business despite knowing that it is being conducted in a manner prohibited by section 22(1) of the Companies Act. Where a director acquiesced in such reckless or fraudulent behaviour as contemplated in section 22, a court must declare a director acting in the manner contemplated in s 77(3)(b) to be a delinquent director in terms of section 162(5)(c)(iv)(bb) [see s 214(1)(c)]. . .

[23] Thus, a third party may in terms of section 22 read with section 218(2) and section 77(3)(b) of the Companies Act hold a director personally liable for acquiescing in reckless, grossly negligent or fraudulent conduct of company business where such conduct causes damage to such third party. . .

[63] The court referred to *Ebrahim and another v Airport Cold Storage (Pty) Ltd*³³ and stated that the SCA had made ‘important observations regarding the abuse of juristic personality in circumstances where a controlling member (in the present

³³ *Ebrahim and another v Airport Cold Storage (Pty) Ltd* [2008] ZASCA 113; 2008 (6) SA 585 (SCA).

matter the defendant in his capacity as director) recklessly use the corporation instrumentality to promote its own interests. . .'.³⁴ It is important to note that *Ebrahim* was decided in the context of a close corporation, and the SCA held *inter alia* that the members of the close corporation were correctly found to be personally liable in terms of section 64(1) of the Close Corporations Act 69 of 1984, which expressly provides for such liability.

[64] The court in *Metro Minds* then found that

‘the defendant caused the contracting company to act in a manner prohibited by the provisions of section 22(1) of the Companies Act. Moreover, at all material times the defendant acted in his representative capacity as director on behalf on the contracting company when he conducted business in the way that contravenes the provisions of section 22(1) of the Companies Act.’³⁵

The court then proceeded to hold that this was confirmed by the court in *Rabinowitz*, with reference to para 18 of that judgment – where reference was made to *Contemporary Company Law* and *Henochsberg on the Companies Act 71 of 2008*, as referred to above.

[65] The court concluded that the defendant was personally liable to the plaintiff and also declared the defendant delinquent in terms of section 162(5)(c)(i) and (iv)(aa) and (bb) of the Companies Act (although it is not clear on what basis the plaintiff had standing to apply for such relief, bearing in mind the provisions of section 162(2) of the Companies Act).

[66] Counsel for the plaintiff submitted that it is clear from the cases relied upon by the plaintiff that the courts have accepted that a creditor enjoys a right as against directors where there are circumstances of fraud and recklessness. It was also submitted that the plaintiff has a reasonably arguable cause of action. He was also

³⁴ *Metro Minds (Pty) Limited v Pienaar* [2020] JOL 49546 (GP) para 30.

³⁵ *Ibid* para 32.

critical of the cases relied upon by the second defendant, as both *Hlumisa* and *Steinhoff* dealt with the position of shareholders' claims against directors.

[67] Counsel for the plaintiff made a number of further submissions regarding the second exception relating to the particulars of claim being vague and embarrassing but I will deal with this later if it becomes necessary.

The second defendant's contentions in reply

[68] Second defendant's counsel submitted that the line of cases relied upon by the plaintiff was inconsistent with a principle of law that has been established and followed by our courts and in the Supreme Court of Appeal over a number of years.

[69] Reference was made to *Metro Minds* and *Meatworld*. It was submitted that in *Meatworld*, the court attempted to cure a 'gap' in the Companies Act and what was held as being a lacuna, is in fact a clear indication of the legislator's intention to exclude personal liability of directors.

[70] It was also submitted that in some of the cases referred to, the court had not been made aware of amendments to the Companies Act, with reference to *inter alia* the amendment to section 214(1)(c) of the Companies Act.

Discussion

[71] Section 19 of the Companies Act deals with the legal status of companies. In terms of section 19(2) a person is not solely by reason of being *inter alia* a director of a company, liable for any liabilities or obligations of the company, except where the Companies Act and Memorandum of Incorporation provide otherwise. It is considered to be one of the cardinal principles and cornerstones of company law that

a company is considered to be a legal persona, distinct from its members, with its own separate legal existence.³⁶

[72] Section 19(3) of the Companies Act ordains in very express terms that '[i]f a company is a personal liability company the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company'.

[73] There is no equivalent provision in the Companies Act in such express terms dealing with the liability of directors of a private company for any of its debts and liabilities towards third parties.

[74] Section 77, and in particular section 77(3), deals with the liability of directors, and sets out the circumstances under which a director is liable for any loss, damages or debts sustained by the company. Just from a plain reading of section 77(3), it is clear that no liability is accorded to a director in favour of third parties such as creditors for debts and liabilities of the company. This much is clear from what was held in *Gihwala*,³⁷ namely that section 77(3) cannot be invoked to secure payment to a creditor. This is perhaps why the plaintiff in the present matter before me places no reliance on section 77(3), as was done in some of the cases being relied upon such as *Blue Farm Fashion* and *Metro Minds*.

[75] Section 424 of the 1973 Companies Act provides in express terms that directors 'shall be personally responsible' for all or any of the debts or liabilities of the company when the business of the company had been carried on recklessly or with intent to defraud creditors. It also expressly provides that the court has to make such a declaration, and it can only be done when the company is being wound-up or is under judicial management.

[76] Section 22 of the Companies Act, read as a whole, ordains that '[a] company must not carry on its business recklessly, with gross negligence, with intent to

³⁶ See *Dadoo Ltd and others v Krugersdorp Municipal Council* 1920 AD 530 at 550–551; *Salomon v Salomon & Company Limited* [1897] AC 22 (HL) at 42–43; *Hlumisa Investment Holdings RF Ltd and another v Kirkinis and others* [2020] ZASCA 83; 2020 (5) SA 419 (SCA) para 42.

³⁷ *Gihwala and others v Grancy Property Ltd and others* [2016] ZASCA 35; 2017 (2) SA 337 (SCA).

defraud any person or for any fraudulent purpose', and if the Commission has reasonable grounds to believe a company is engaging in such conduct, it will take the steps prescribed in subsections (2) and (3) of section 22.

[77] Section 22 contains no express provision that a director will be held liable for acting in the manner described in subsection (1). A remedy for holding a director liable for a loss sustained for acquiescing in the carrying on of the company's business in a manner as set out in section 22(1) is available in terms of section 77(3)(b) but, as mentioned before, this remedy is not available to creditors – it is only available to the company itself.

[78] As mentioned above, section 214 of the Companies Act sets out certain actions by a person which would make that person guilty of an offence – one of them being if the person is knowingly a party to an act calculated to defraud a creditor. Section 24(1)(c) previously made reference to conduct prohibited by section 22(1), which reference was removed by the legislator as long ago as 1 May 2011 already, the same day the Companies Act itself came into operation.

[79] In *Rabinowitz*, the court clearly considered section 22(1)(c) in its original form and referred to this pertinently in para 13, and then proceeded in para 17 to agree with the submission that if the director is guilty of the offence created in section 214, such director must be found to have contravened section 218(2). The court then relied on *Contemporary Company Law*,³⁸ as authority that directors are personally liable to creditors if section 22(1) is breached. The remark by the author of *Contemporary Company Law* is made in the context of section 218(2) but after having discussed the amendment to section 214(1)(c) where the legislator removed the reference to section 22(1). The statement made that '[c]reditors, in particular, will be entitled to redress from the company or its directors for fraudulent or reckless trading'³⁹ is done with no reference to any authorities or any in-depth analysis or discussion.

³⁸ F H I Cassim et al *Contemporary Company Law* 2 ed (2012).

³⁹ Ibid at 587.

[80] The court in *Rabinowitz* also relied on submissions made regarding the declaration of a director as delinquent in terms of section 162(5)(c)(iv)(bb) if he or she acted in a manner contemplated in section 77(3)(a), (b) or (c). The court found that

‘it is hard to conceive of any basis upon which the legislature intended to prevent a company from acting in the manner provided for in s 22, but did not intend to prevent the directors responsible for the management of the company from acting in that manner’.⁴⁰

The court then simply proceeded to find that ‘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’.⁴¹

[81] I respectfully disagree with this finding and am of the view that the court failed to consider the fact that if the legislator had wanted to make a director criminally liable for being a party to conduct prohibited by section 22(1), it would not have amended the Companies Act by removing the reference to section 22(1) in section 214(1)(c). More importantly, if the legislator intended to hold a director liable to a third party for acquiescing in the carrying on of the company’s business as prohibited by section 22(1) or in any other respects for that matter, it would have said so expressly as it has done in section 424 of the 1973 Companies Act, and section 19(3) of the Companies Act. The express provisions in section 64(1) of the Close Corporations Act also comes to mind in this regard.

[82] *Rabinowitz* set in motion a number of decisions, accepting it as correct that a creditor can hold a director personally liable in terms of section 22(1). In each case liability is found by relying, in a convoluted manner, on sections 22(1), 218(2), and 214(1)(c) (in its original form), and in most cases also with reference to section 77(3) of the Companies Act.

[83] The court in *Chemfit* relied on versions of section 22(1) and 214(1)(c) which had been amended as far back as 1 May 2011. The court found that the provision of

⁴⁰ *Rabinowitz v Van Graan and others* 2013 (5) SA 315 (GSJ) para 21.

⁴¹ *Ibid* para 22.

section 214(1)(c) was 'of cardinal importance',⁴² but section 214(1)(c) was referred to as it was in its original version in terms of which a person was guilty of an offence if he was knowingly a party to conduct prohibited by section 22(1). It was also found that liability in terms of section 218(2) ensues as a result of any contravention and therefore that '[s]uch liability ensues as a result of any contravention, and therefore such ordinary common law requirements for liability as fault or wrongfulness are dispensed with'.⁴³

[84] The court then proceeded to find 'refuge' in the dictum of Du Plessis AJ in *Rabinowitz*,⁴⁴ and proceeded to find that '[a]ny conduct that contravenes a provision of the Act, catapults any person, including the directors to personal liability any conduct that contravenes a provision of the Companies Act.'⁴⁵

[85] I respectfully disagree with the court's findings and conclusions. It is unfortunate that counsel involved did not bring the amendments to the Companies Act to the court's attention, as I am of the view that the reliance placed on the particular sections as they were, played a major part in the court reaching the conclusions it did. As far as the findings on appeal by the Full Court in *Maake* is concerned, I respectfully disagree. Although it is a judgment by a Full Court, it was delivered in another geographical division of the High Court. Although such decisions carry persuasive weight, I am not bound to follow them.⁴⁶

[86] As far as the remainder of the cases relied upon by the plaintiff are concerned, I am of the view that like in *Rabinowitz*, the courts attempted to find a way to hold a director liable to a creditor by reading into the Companies Act something which simply is not there. In *Meatworld* the court held that 'the imposition of personal liability on those controlling a company which trades recklessly would be a legitimate manner in which to promote the aim of good corporate governance'.⁴⁷ 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

⁴² *Chemfit Fine Chemicals (Pty) Ltd v Maake* 2017 JDR 1473 (LP) para 28.4.

⁴³ *Ibid* para 30.

⁴⁴ *Rabinowitz v Van Graan and others* 2013 (5) SA 315 (GSJ) para 21.

⁴⁵ *Chemfit Fine Chemicals (Pty) Ltd v Maake* 2017 JDR 1473 (LP) para 36.

⁴⁶ F du Bois et al *Wille's Principles of South African Law* 9 ed (2007) at 90.

⁴⁷ *Meatworld Factory CC v ET Trading House (Pty) Ltd* 2019 JDR 1351 (GJ) para 34.

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.

[87] I find myself agreeing with the remarks made in *Steinhoff* namely that section 218(2) simply ‘recognises that liability for loss or damage may arise from contraventions of the Companies Act’, but what that right is and who enjoys it, is to be found in the provisions of the Companies Act itself.⁴⁸ This is even more important when considering what was held by the Supreme Court of Appeal in *Hlumisa*, with reference to sections 77(2)(b) and 77(3)(b), namely that the ‘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’.⁴⁹

[88] In my view, 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.

[89] I am therefore of the view that the plaintiff’s claim does not disclose a cause of action. As a result of this finding, it is not necessary to deal with the second exception.

Order

[90] I make the following order:

1. The second defendant’s first exception dated 4 November 2021 is upheld, with costs.
2. The plaintiff’s particulars of claim are set aside.

⁴⁸ *De Bruyn v Steinhoff International Holdings NV and others* 2022 (1) SA 442 (GJ) para 191.

⁴⁹ *Hlumisa Investment Holdings RF Ltd and another v Kirkinis and others* [2020] ZASCA 83; 2020 (5) SA 419 (SCA) para 50.

3. The plaintiff is granted leave, if so advised, to file amended particulars of claim within ten days from the date of the granting of this order.

BEZUIDENHOUT AJ

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Date of judgment : 16 September 2022

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