Probing the Liability of Company Directors Against Claims by Shareholders Under Section 218(2) of the Companies Act 71 Of 2008

A Full Dissertation Submitted in Fulfilment of the Requirements for the Degree of Master of Laws in Company Law at the School of Law, Faculty of Management, Commerce and Law, University of Venda

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DECLARATION

I, MUNYAI ZWIVHUYA, hereby declare that this full-dissertation for Master of Laws in Company Law titled: **Probing the Liability of Company Directors Against Claims by Shareholders Under Section 218(2) of the Companies Act 71 Of 2008**, hereby submitted by me at the University of Venda, has not been submitted previously for a degree at this or any other institution and that it is my own work in design and execution, and that all reference material contained therein has been duly acknowledged.

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Signed in my presence on this the 13th day of January 2025

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DEDICATION

This dissertation is dedicated to my Heavenly Father, whose guidance and strength have been invaluable throughout my research, as well as to my beloved family for their unwavering support.

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ABSTRACT

The principle of separate legal personality is fundamental in company law, facilitating the formation of companies, the appointment of directors, and capital raising. Directors, as outlined in section 66 of the Companies Act 71 of 2008, are central to a company and responsible for financial decisions. Consequently, they owe fiduciary duties and a duty of care to the company rather than directly to shareholders. However, section 218(2) introduces a remedy allowing any interested party, including shareholders, to hold directors liable for losses due to breaches of the Act. This provision's implications are heightened by section 22(1), which prohibits reckless trading by directors. While it does not explicitly target directors, it allows for their personal liability when the company operates carelessly or recklessly. The statutory restriction against reckless trading, coupled with a solvency and liquidity test in section 4, emphasises directors' responsibilities towards shareholders. This test mandates that directors ensure the company can meet its debts as they arise and remain solvent. The question then arises whether section 218(2) offers an effective remedy for shareholders to hold directors accountable for fiduciary breaches. This study employed a doctrinal approach to analyse the scope of section 218(2), examining directors' liability and shareholder protection. It concludes that while section 218(2) presents a new remedy, its enforceability is hampered by interpretive challenges and policy considerations. Thus, existing remedies like derivative actions may be more effective for holding directors personally liable for breaches of fiduciary duties.

Keywords: Fiduciary Duties, Separate Legal Personality, Directors, Companies Act 71 of 2008, Reckless Trading

CHAPTER 1: BACKGROUND AND INTRODUCTION

1.1. BACKGROUND

It is well-established that directors have a legal duty to act in the company's best interest and exercise independent judgment.[1] This means that whilst directors can consider stakeholder interests, they must protect and promote the company's interests ensuring that it operates ethically and sustainably, in accordance to its mandate.[2] The Companies Act 71 of 2008 (hereinafter the 2008 Act) has now codified the duties of directors.[3] The 2008 Act further guides the remedies available to shareholders and has enhanced the powers of company shareholders and instances of director liability.[4]

However, even with the codification of the directors' duties in the 2008 Act, there has been a concerning trend of fiduciary duty violations by South African company directors.[5] As a result, shareholders have recently sought remedies for what they perceive as wrongdoing by company directors who fail to fulfil their duties, such as in the approval of false financial statements.[6] For instance, poor decision-making by directors, financial misstatement or misreporting have led to financial losses for companies. Characterising Steinhoff scandal, which came to light in 2017, has severely tarnished South Africa's corporate governance image. Like many companies embroiled in scandals, Steinhoff appeared to adhere to all legal and listing requirements across its various jurisdictions, including South Africa, while it was actually inflating its financial results. Steinhoff was found to have employed various irregular accounting practices that made it challenging to determine the true source of its profits. The company concealed billions of dollars in liabilities through special-purpose entities, allowing it to maintain the illusion of profitability while rapidly losing

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[1] *Fisheries Development of SA Ltd v AWJ Investments (Pty) Ltd & Others* 1980 (4) SA 156 (W) at 156.
[2] Falato, Antonio and Kadyrzhanova, Dalida and Lel, Ugur, Distracted Directors: Does Board Busyness Hurt Shareholder Value? (December 10, 2013). Available at SSRN: https://ssrn.com/abstract=2272478 or http://dx.doi.org/10.2139/ssrn.2272478.
[3] Companies Act 71 of 2008.
[4] Chanté Ashley Cockrill, 'A Shareholder's Personal Claim Against Directors For Causing Pure Economic Losses Through Diminution In Share Value: A South African Critical Analysis' (Published LLM Thesis, University Of Western Cape, 2020) 2.
[5] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83; *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43; *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* [2017] ZALMPPHC 27; *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).

[6] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83.

cash. When the scandal unfolded, Steinhoff's share price plummeted, resulting in massive losses for its shareholders.[7] This high-profile scandal led to action proceedings being instituted against Steinhoff's directors since the allegations surfaced in 2017.[8]

Many of these cases involve shareholders seeking to recover damages due to the significant decline in their share price caused by "material misstatements".[9] In 2018, another corporate scandal surfaced and found itself at the door of the South African courts. The directors were alleged to have between 2012 and 2014, failed to exercise their powers in good faith and in African Bank's best interests, violating section 76(3) of the 2008 Act, which led to reckless or negligent business practices at African Bank.[10] The alleged misconduct by the directors, included publishing false statements for African Bank, authorising misleading rights issues and prospectuses, violating section 74 regarding meetings, breaching section 45 concerning financial assistance, and engaging in reckless accounting practices. This resulted in the company's share price decreasing drastically and shareholders suffering significant pure economic losses.[11]

Again, in the South African Airways (the Myeni saga) scandal, which became public in 2017, the plaintiffs applied to declare Duduzile Cynthia Myeni delinquent in terms of the 2008 Act. Myeni was accused of grossly abusing her position as director, making decisions that were detrimental to the South African Airways. Her actions were deemed reckless and negligent, particularly in relation to the Emirates deal and the Airbus deal, which she failed to conclude. She was also of accused of taking personal advantage of information or opportunities for her own benefit, contrary to her duties as a director. Myeni was found to have facilitated corruption, including influencing former President Jacob Zuma to favour the facilities management company Bosasa, which was involved in industrial-scale corruption. Her actions were not just negligent but wilful, causing significant financial losses to South African Airways. Myeni's reckless conduct while she was a director of South African Airways, resulted in irreparable harm

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[7] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
[8] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
[9] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43; *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ); *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
[10] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83.
[11] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83.

to South African Airways, its employees, and the country as a whole. As a result, the court declared Myeni delinquent for her lifetime.[12]

In 2018, VBS Mutual Bank, a South African mutual bank, collapsed after a major fraud and corruption scandal. VBS Mutual Bank was placed under curatorship by the South African Reserve Bank in 2018 after it was revealed that the bank had been looted of billions of rands through fraudulent activities. An investigation found that VBS directors, politicians, and other connected individuals had systematically siphoned funds from the bank through various means, including fake loans and deposits.[13] The scandal was one of South Africa's most prominent corporate corruption cases. It led to the collapse of the bank and significant losses for depositors, many of whom were elderly citizens who had entrusted their savings to VBS. Several individuals, including the bank's former directors and politicians, have been criminally charged for their roles in the fraud and corruption at VBS. The VBS scandal highlighted broader issues of poor governance, lack of oversight, and corruption within South Africa's financial sector and political system.[14] It was a significant setback for financial inclusion efforts targeting vulnerable communities. The collapse of VBS Mutual Bank and the subsequent investigations and prosecutions are ongoing as authorities work to hold those responsible accountable and recover the stolen funds where possible. But as of recently, one of the persons (former director) involved in the VBS Mutual Bank heist, which resulted in the theft of more than R1.9 billion, pleaded guilty to theft, fraud, money laundering, and racketeering, and he was sentenced to an effective 15-year imprisonment by the Gauteng High Court in 2024.[15]

Furthermore, in 2022, a significant crisis emerged surrounding Tongaat Hulett, a prominent agri-business in Southern Africa known for its operations in sugar production, ethanol, animal feeds, and land management. This situation escalated when 19 fraud charges were filed against several former directors of the company,

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[12] *Myeni v Organisation Undoing Tax Abuse and Another* [2021] ZAGPPHC 56.
[13] Alex Mitchly, 'VBS looting kingpin pleads guilty to 33 charges as part of agreement' (10 July 2024) https://www.news24.com/news24/southafrica/news/vbs-looting-kingpin-pleads-guilty-to-33-charges-as-part-of-agreement-20240710 accessed 14 July 2024.
[14] Alex Mitchly, 'VBS looting kingpin pleads guilty to 33 charges as part of agreement' (10 July 2024) https://www.news24.com/news24/southafrica/news/vbs-looting-kingpin-pleads-guilty-to-33-charges-as-part-of-agreement-20240710 accessed 14 July 2024.
[15] Alex Mitchly, 'VBS looting kingpin pleads guilty to 33 charges as part of agreement' (10 July 2024) https://www.news24.com/news24/southafrica/news/vbs-looting-kingpin-pleads-guilty-to-33-charges-as-part-of-agreement-20240710 accessed 14 July 2024.

including its former CEO Peter Staude and CFO Murray Munro. The charges stemmed from alleged fraudulent activities between March 2015 and September 2018, which involved backdating land sale agreements that materially affected the company's financial results. A forensic investigation conducted by PwC revealed that these directors engaged in undesirable accounting practices that inflated profits and misrepresented the company's financial health. As a result, Tongaat Hulett was compelled to restate its financial statements, leading to a significant decrease in reported assets by approximately R12 billion. The various provisions of the 2008 Act delineate essential standards and responsibilities for directors, which were contravened by the accused in this case.

Section 76 of the 2008 Act specifies the standards of conduct expected of directors, and it was concluded that the accused prioritised their personal interests over those of the company and its shareholders, thereby breaching their fiduciary duties.[16] Section 75 of the 2008 Act addresses the issue of conflicts of interest, revealing that the accused failed to adequately disclose and manage such conflicts.[17] Additionally, section 76(3) of the 2008 Act imposes a duty on directors to act with care, skill, and diligence; however, the actions of the accused were characterised by negligence and recklessness, leading to significant financial misstatements.[18] Section 75 mandates that directors disclose any personal financial interests in proposed transactions or arrangements, a requirement that the accused neglected to meet.[19] Finally, section 77 of the 2008 Act establishes the liability of directors for any losses incurred by the company due to their conduct; in this instance, the accused were held accountable for the financial losses experienced by Tongaat Hulett as a direct consequence of their actions.[20] Collectively, these violations resulted in considerable financial restatements and the company's financial performance was significantly impacted by the alleged fraudulent activity, which allegedly took place between March 2015 and September 2018 and caused a loss of share value for shareholders.[21]

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[16] Section 76 of the Companies Act 71 of 2008.
[17] Section 75 of the Companies Act 71 of 2008.
[18] Section 76(3) of the Companies Act 71 of 2008.
[19] Section 75 of the Companies Act 71 of 2008.
[20] Sections 77 & 22 of the Companies Act 71 of 2008.
[21] Comins Lyse, 'The case against the Tongaat executives' (11 February 2022) https://www.businesslive.co.za/fm/features/2022-02-11-former-tongaat-executives-appear-in-court-facing-19-fraud-charges/ accessed 4 July 2024.

This is not the only case that represents an attempt by shareholders to hold directors accountable for breaches of their duties under the 2008 Act.[22] In other English jurisdictions, the Enron scandal, which occurred in the United States, is one of history's most notorious corporate scandals. In early 2001, analysts began questioning the legitimacy of the financial statements presented in Enron's previous annual report. Enron had employed various irregular accounting practices that made it challenging to determine the true source of its profits despite its apparent involvement in energy, commodities, and telecommunications, among other industries.[23] The U.S. Securities and Exchange Commission (SEC) initiated an investigation and uncovered that Enron had been concealing billions of dollars in liabilities by using special-purpose entities (SPEs), essentially companies under Enron's control.[24] This allowed Enron to maintain the illusion of profitability while it was, in reality, rapidly losing cash. As the scandal unfolded, Enron's stock price plummeted from $90.56 to less than a dollar. The company was forced to file for the largest Chapter 11 bankruptcy in U.S. history.[25]

These scandals demonstrate that corporate scandals involving material misstatements can erode shareholders' confidence, negatively impacting share prices. These cases raise questions about the liability of company directors to shareholders when poor decision-making, such as presenting misleading financial statements, occurs. These cases also highlight the need to clarify to whom company directors owe their fiduciary duties and who bears the loss when a company's share value declines on the stock market. This leads to the question of who can claim against directors for causing pure economic losses through diminution in share value. While many of these fundamental questions have been explored in *Itzikowitz v Absa Bank Limited*,[26] cases such as those involving African Bank and Steinhoff still occur, with shareholders attempting to hold directors personally accountable. This suggests a need for further clarity and adherence to established legal principles in corporate governance.

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[22] *Organisation Undoing Tax Abuse v Myeni* [2020] 3 All SA 578 (GP).

[23] Bondarenko Peter, 'Enron scandal' (7 May 2024) https://www.britannica.com/event/Enron-scandal accessed 4 July 2024.

[24] Bondarenko Peter, 'Enron scandal' (7 May 2024) https://www.britannica.com/event/Enron-scandal accessed 4 July 2024.

[25] Bondarenko Peter, 'Enron scandal' (7 May 2024) https://www.britannica.com/event/Enron-scandal accessed 4 July 2024.

[26] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43.

1.2. INTRODUCTION

When a shareholder experiences a direct financial loss due to a decrease in the value of their shares, they often pursue a remedy that involves holding a director personally accountable. However, it has been established that fiduciary duties are typically owed to the company itself rather than to its shareholders, unless a special relationship exists. A key implication of the principle that directors owe their fiduciary duties to the company is that only the company has the right to enforce these duties against negligent or fraudulent directors. Generally, directors do not owe fiduciary duties to shareholders, whether collectively or individually. This reflects the enduring principle established in the landmark English case *Salomon v A Salomon & Co Ltd*, and reaffirmed in *Shipping Corporation of India Ltd v Evdomon Corporation*, [27] which states that a company is separate from its members. [28]

This is further exemplified in cases such as *Itzikowitz v Absa Bank Ltd,*[29] *De Bruyn v Steinhoff International Holdings N.V. and Others,*[30] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others,*[31] and *Venator Africa (Pty) Ltd v Watts and Another*.[32] This study explores whether shareholders can bring personal liability claims against directors for causing a decrease in their value of shares, which impacts the company's financial standing, as the loss suffered by shareholders mirrors the loss experienced by the company. The default position for shareholders who suffer consequential losses due to company losses is to sue the directors to recover their pure economic losses personally. Four recent examples that illustrate this are *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others,*[33] *De Bruyn v Steinhoff International Holdings N.V. and Others*,[34] and *Itzikowitz v Absa Bank Ltd,*[35] *Venator Africa (Pty) Ltd v Watts and Another*[36] cases. In these cases, shareholders

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[27] *Shipping Corporation of India Ltd v Evdomon Corporation* & another 1994 (1) SA 550 (A) para 566C-F*.*
[28] *Salomon v A Salomon and Co Ltd* [1897] AC 22.
[29] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43.
[30] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
[31] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
[32] *Venator Africa (Pty) Ltd v Watts and Another* (053/2023) [2024] ZASCA 60.
[33] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
[34] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
[35] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43.
[36] *Venator Africa (Pty) Ltd v Watts and Another* (053/2023) [2024] ZASCA 60.

sued former and current directors, alleging that the directors' poor decision-making had caused the companies to suffer losses, leading to a decrease in the companies' share values and reflective losses for the shareholders.[37] The shareholders' claims of personal liability against the directors for the reduction in share value were based on section 218(2) of the 2008 Act.[38]

Section 218 (2) of the 2008 Act further provides that:

> "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".[39]

However, whether section 218(2) provides an appropriate legal basis for shareholders to recover personal damages against directors solely because the company they hold shares in has suffered a loss has become controversial, given the ambiguities in the interpretation and application of this provision, as displayed by courts and leading scholars in company law.[40] Therefore, this study will undertake a critical analysis of the relevant common law principles and further examine the scope and content of section 218(2) of the 2008 Act.

1.3. PROBLEM STATEMENT

This study confronts the legal framework governing directors' duties in South Africa and determines whether the law allows shareholders to hold directors personally accountable for losses incurred by either the shareholders themselves or the company

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[37] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.para 4-5; *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43 para 6-7; *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ) para 180-194.; and *Venator Africa (Pty) Ltd v Watts and Another* (053/2023) [2024] ZASCA 60 para 25-27.
[38] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.para 4-5; *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43 para 6-7; *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ) para 180-194.; and *Venator Africa (Pty) Ltd v Watts and Another* (053/2023) [2024] ZASCA 60 para 25-27.
[39] Companies Act 71 of 2008 s 218(2).
[40] Brighton Mupangavanhu, 'Diminution' In Share Value And Third-Party Claims For Pure Economic Loss: The Question Of Director Liability To Shareholders' (2019) 31 Sa Mercantile Law Journal 110; *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd and Others* (22288/2014) [2016] ZAWCHC 35.

due to the directors' misdemeanours or omissions under section 218(2) of the 2008 Act. The scope of section 218(2) of the 2008 Act has been a subject of ongoing debate since the law was enacted. This section appears to be a key driver behind the continued shareholder litigation in cases where the conduct of directors has diminished the share price. More especially in the event when the directors fail to uphold the principles and standards set out in the 2008 Act, this disrupts the expectations and reliance shareholders have placed on them. As evidenced by cases such *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others,*[41] *De Bruyn v Steinhoff International Holdings N.V. and Others*,[42] and *Itzikowitz v Absa Bank Ltd,*[43] *Venator Africa (Pty) Ltd v Watts and Another*[44], shareholders often suffer the consequences in the form of a reduction in their share price as a result.

As displayed by these cases, aggrieved shareholders have, on multiple occasions, sought to recover damages and losses suffered under section 218(2) of the 2008 Act.[45] Section 218(2) of the 2008 Act is broadly worded in terms of the individuals it encompasses, which has led to increased shareholder claims against directors.[46] As a result, section 218(2) potentially exposes directors to personal liability to the company and third parties, including shareholders. While section 218(2) appears to provide shareholders with a means to seek recourse against company directors for the recovery of damages, it is essential to note that actions by directors that cause harm to shareholders are likely to also result in losses to the company. Therefore, the "no reflective loss" principle which states that, "where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss",[47] may come into play, preventing shareholders from personally recovering from directors if their loss reflects the loss suffered by the company. Although this position appears to be settled in *Itzikowitz v Absa Bank Ltd* [48] and *Hlumisa Investments*

[41] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
[42] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
[43] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43.
[44] *Venator Africa (Pty) Ltd v Watts and Another* (053/2023) [2024] ZASCA 60.
[45] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43; *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ); *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
[46] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43; *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ); *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
[47] *Johnson v Gore Wood & Co* [2002] 2 AC 1 para 19.
[48] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43.

Holdings (RF) Ltd and Another v Kirkins[49] and many other decided cases in South African law, there are still cases where shareholders attempt to hold directors personally liable for the decrease in share price.[50] Due to these ongoing shareholder personal claims against directors for causing pure economic losses, this has now become a question worth investigating. Therefore, this study investigates the scope and content of section 218(2) of the 2008 Act, particularly regarding directors' personal liability and shareholder protection.

1.4. RESEARCH QUESTION(S)

MAIN RESEARCH QUESTION(S)

The main research question is whether shareholders can hold directors personally liable for losses incurred by either the shareholders themselves or the company due to the directors' misdemeanours or omissions under section 218(2) of the 2008 Act.

SUB-QUESTION(S)

The following sub-research questions will be explored in determining whether shareholders can hold directors personally liable for losses incurred by either the shareholders themselves or the company due to the directors' misdemeanours or omissions under section 218(2) of the 2008 Act:

1. To what extent is the company a distinct legal entity, and do shareholders own the company's assets?

2. What are the director's duties to the company, and are these duties also owed to shareholders?

3. The scope and content of section 218(2), as a general enabling provision, a suitable legal avenue for shareholders to seek redress against directors for pure economic losses suffered?

[49] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
[50] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43; *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ); *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.

4. To what extent can shareholders hold directors accountable for losses to the company and losses to shareholders?
5. What are recommendations necessary for shareholders to hold directors accountable for corporate misdemeanours effectively?

1.5. RESEARCH METHODOLOGY

This study is highly topical given the increasing number of cases where South African courts are asked to consider and adjudicate claims against directors involving the civil liability remedy under section 218(2) of the 2008 Act. The study predominantly consists of a review of the relevant textbooks, law journals, legislation, case law, and internet sources concerning the personal liability of directors towards company shareholders within the specific ambit of section 218(2) of the 2008 Act. This is a crucial aspect, as section 218(2) has been a critical avenue for shareholders to seek recourse against directors for losses related to a decrease in share price. As a result, a doctrinal research method is employed to consider on what basis, if any, the 2008 Act has changed the landscape available to shareholders for pursuing company directors personally for misconduct resulting in pure economic losses (monetary) stemming from a decrease in the shareholder's share price.

Doctrinal research methodology analyses and interprets legal documents, such as statutes, case law, regulations, and treaties, to understand legal concepts, principles, and doctrines. It involves a rigorous analysis and creative synthesis of multiple doctrinal strands. Doctrinal research is primarily "research in law" rather than "research about the law," as it mainly focuses on advancing the understanding and development of the law itself.

The selection of sources in this dissertation is carefully justified by their authoritative nature and direct relevance to the legal issues examined. Primary sources form the essential legal framework, while secondary sources contribute valuable scholarly interpretations and critical analyses that deepen the overall understanding. The research predominantly relies on peer-reviewed journals, official legal texts, and well-established commentaries, thereby ensuring both credibility and academic rigor. Where internet sources, such as commentaries from commercial law practitioners' websites, are incorporated, they are used selectively to provide practical insights or highlight recent developments not yet reflected in academic literature, with their limitations clearly acknowledged. Nonetheless, it is important to recognse that the doctrinal methodology employed has inherent limitations, notably its reliance on the researcher’s interpretation, which may introduce subjectivity and lead to varying conclusions on the same legal issues among different scholars.

By conducting a comprehensive analysis of the available legal sources, the study aims to thoroughly analyse the current state of the law regarding directors' personal liability towards shareholders under section 218(2). This includes examining the relevant case laws, the interpretation and application of section 218(2), and its interplay with common law principles governing directors' duties and liability. This analysis will help clarify the circumstances under which shareholders can hold directors personally accountable for causing a reduction in their shareholding value (pure economic/ monetary losses). Through this in-depth review and analysis, the study seeks to contribute to the ongoing discourse and jurisprudence surrounding the scope and content of the civil liability remedy (section 218(2)) in the context of directors' personal liability towards shareholders.

1.6. AIM AND OBJECTIVES

This study aims to determine whether shareholders can hold directors personally liable for losses incurred by either the shareholders themselves or the company due to the directors’ misdemeanours or omissions under section 218(2) of the 2008 Act.

The objectives that this study aims to accomplish by the conclusion of the research are as follows:

(i) To analyse to what extent is the company a distinct legal entity and determine whether shareholders own the company’s assets.

(ii) To analyse the director's duties to the company and determine whether these duties are also owed to shareholders.

(iii) To critically evaluate the scope and content of section 218(2) and determine whether it is a suitable legal avenue for shareholders to seek redress against directors for pure economic losses suffered.

(iv) To analyse to what extent can shareholders hold directors accountable for losses to the company and losses to shareholders.

(v) To identify the necessary recommendations for shareholders to hold directors accountable for corporate misdemeanours effectively.

1.7. LIMITATIONS OF THE STUDY

The study specifically examines the provisions of the 2008 Act concerning directors' personal liability and shareholder remedies. The study concentrates on the extent to which shareholders can hold directors personally liable under section 218(2). More particularly, it explores the extent to which shareholders can hold directors liable amidst fundamental company law principles such as the separate legal personality and “no reflective loss” rule.

1.8. LITERATURE REVIEW

The civil liability remedy under section 218(2) of the 2008 Act has been scrutinised recently. This is evidenced by the surge in cases addressing directors' personal liability, particularly in the wake of high-profile corporate scandals and failures.[51] Shareholders, creditors, and other affected parties are increasingly seeking to utilise the legal mechanisms available to them, such as the civil liability remedy in terms of section 218(2), to recover losses and hold directors accountable for their actions or inactions resulting in any reduction in the value of shareholders share price. This is not surprising in that any decrease in the value of shareholders' share price is understandably a matter of significant concern for the shareholders. This is particularly the case when shareholders believe that the actions or decisions made by the company's directors are the root cause of the said decrease in share value.

However, shareholders are generally limited in seeking remedies in such situations because of the “no reflective loss” principle.[52] This principle restricts shareholders from making claims where their loss mirrors the loss suffered by the company. The principle comes into play when both the company and the shareholder have claims against the

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[51] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43; *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ); *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.

[52] Antony Corsi and Nicola Birney, ‘Shareholder claims and the no reflective loss rule’<https://www.nortonrosefulbright.com/en/knowledge/publications/0688bcea/shareholder-claims-and-the-no reflective-loss-rule>(1 December 2018) accessed on 29 June 2024.

directors or other parties based on the same facts, and the shareholder's loss, whether in the form of reduced share value or lost dividends, directly reflects the company's loss. Consequently, shareholders are constrained by the "no reflective loss" principle from recovering losses that merely reflect the company's losses.[53]

As mentioned already, when directors make poor decisions, one consequence is that the value of the shares held by shareholders may decrease due to actions or oversights that are largely beyond the shareholder's control but stem from ineffective leadership by the directors. In such instances, shareholders may find themselves without a direct recourse to address this loss, as they are prevented from seeking recovery under the "no reflective loss" principle.[54] Despite this limitation, there are instances where shareholders attempt to hold directors personally accountable for the decline in share value, relying on section 218(2).

The SCA in the *Itzikowitz v Absa Bank Ltd* case was tasked in 2016 with clarifying the distinction between delicts (wrongful acts) committed against a company and those committed against a shareholder and determining whether such shareholders could sustain a claim in terms of section 218(2) of the 2008 Act against the party who caused such losses or damages.[55] In this case, the appellant, Mr. Gary Itzikowitz, was the sole shareholder of Compass Projects (Pty) Ltd, which held a 17.29% stake in Quantum Properties Group Limited (QPG). QPG, in turn, owned 100% of A Million UP (Pty) Ltd (AMU). Absa Bank was the banker to both AMU and QPG. The dispute arose when Absa increased AMU's loan facilities and later sought to place AMU under provisional winding-up despite AMU's board resolving to commence voluntary business rescue. Mr. Itzikowitz claimed Absa owed him a duty to act reasonably and not adversely affect the value of his shares in AMU.[56]

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[53] Chanté Ashley Cockrill, 'A Shareholder's Personal Claim Against Directors For Causing Pure Economic Losses Through Diminution In Share Value: A South African Critical Analysis' (Published LLM, University Of Western Cape, 2020) 9.
[54] Brighton Mupangavanhu, 'Diminution' In Share Value And Third-Party Claims For Pure Economic Loss: The Question Of Director Liability To Shareholders' (2019) 31 Sa Mercantile Law Journal 110; Chanté Ashley Cockrill, 'A Shareholder's Personal Claim Against Directors For Causing Pure Economic Losses Through Diminution In Share Value: A South African Critical Analysis' (Published LLM, University Of Western Cape, 2020) 9.
[55] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43.
[56] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43 para 4-9.

In answering this question, the SCA relied on English Law principles and held that the South African legal position is similar to that found in English common law, which was based on principles of English law. The SCA then ruled that a shareholder cannot recover a sum equal to the reduction in the value of his shares or the likely deterioration in dividends because such a loss reflects the company's loss. This is because the shareholder does not suffer any personal loss; instead, he suffers loss through the company's net assets reduction.[57] As a result, just though a company in which the shareholder holds shares suffered losses does not give them cause of action to claim personal damages.[58]

Only the company may bring an action for the losses it has suffered. This is particularly so when the company's loss is caused by a breach of a fiduciary duty owed to it.[59] However, notwithstanding the SCA's decision, which clarified this position, legal proceedings by shareholders seeking compensation for the decrease of their share values through direct claims against company directors have persisted to date. For instance, in 2018, the High Court in the *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* case dismissed claims by shareholders against directors of the African Bank companies in terms of section 218(2) of the 2008 Act for damages they had suffered in the form of a decrease in their share values.[60] The shareholders alleged that the directors acted in bad faith, without the requisite degree of care, skill, and diligence, and for ulterior purposes when conducting the bank's business. Thus, they breached sections 22(1) and 76(3) of the 2008 Act.[61] The matter then went to the SCA on appeal against the decision of the High Court in 2020, and the SCA confirmed the decision of the High court.[62]

However, this is not the only case whereby shareholders have personally endeavoured to sue company directors for their conduct, which resulted in the shareholders' decrease of their share value. Again, in 2020, in the *De Bruyn v Steinhoff International Holdings N.V. and Others* case,[63] the Johannesburg High Court dealt

[57] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43 para 12.
[58] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43 para 10-11.
[59] *Johnson v Gore Wood* [2001] 1 All ER 481 para 502.
[60] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83.
[61] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83 para 1.
[62] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83.
[63] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).

with an application in terms of section 218(2) of the 2008 Act brought by a shareholder in Steinhoff companies (International Holdings (Pty) Ltd and Steinhoff International Holdings) against Steinhoff company directors.[64] The shareholder claimed Steinhoff company directors breached their fiduciary duties under section 20(6) of the 2008 Act. The High Court dismissed the application in the *De Bruyn v Steinhoff International Holdings N.V. and Others* case, similar to how it did in the *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* case, and held that section 218(2) could not be interpreted to hold directors accountable.[65]

On the other hand, other courts, such as the High Court in *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others*,[66] have applied the provision of section 218(2) in a manner that permits company directors to be held personally accountable to third parties such as shareholders for breaching the 2008 Act.[67] In this case, the applicants brought a personal claim in terms of sections 218(2) and 22(1) of the 2008 Act against the company directors for engaging in insolvent trading while they were in financial difficulty and under voluntary business rescue, and even went so far as to attempt to increase the already constrained liquidity by borrowing against their credit facility.[68] The High Court, therefore, found the directors personally accountable for the company's debts.[69] In the case of *Rabinowitz v Van Graan and Others*,[70] the High Court further solidified the enforceability of section 218(2).[71] The court held that a director of a company can be held personally liable under section 218(2) as read with section 22(1) of the 2008 Act, when a breach of the 2008 Act is proven, along with a clear connection between the breach and the losses incurred.[72]

However, in the 2024 recent case of *Venator Africa v Watts*, the SCA disagreed with *Rabinowitz* and found that section 218(2) does not give rise to a specific cause of

[64] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
[65] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ) para 138-142.
[66] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* [2017] ZALMPPHC 27.
[67] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* [2017] ZALMPPHC 27.
[68] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* [2017] ZALMPPHC 27 para 2-8.
[69] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* [2017] ZALMPPHC 27 para 38.
[70] *Rabinowitz v Van Graan and Others* [2013] ZAGPJHC 151.
[71] *Rabinowitz v Van Graan and Others* [2013] ZAGPJHC 151.
[72] *Rabinowitz v Van Graan and Others* [2013] ZAGPJHC 151.

action against directors for a company's breach of section 22(1). The SCA held that section 22(1) imposes duties on the company itself, not its directors.[73]

Thus, it is indisputable that some courts' rulings favour permitting claims to hold directors personally accountable under section 218(2) of the 2008 Act. Therefore, this study contends that this provision is ambiguous and challenging even for the courts to interpret correctly.[74] On the other hand, this raises questions such as whether the legislatures, when drafting this provision, purposefully intended to alter the common law, primarily the principle of the reflective loss, which states that a shareholder of a company is not allowed to claim damages or losses (such as a decrease in the value of their shares) as a result of situations where the company has itself incurred such damages or losses.[75]

It is worth mentioning that these case laws were selected based on their direct relevance to the legal principles and issues under investigation. For instance, landmark judgments from the Supreme Court of Appeal (SCA) were prioritised to establish the prevailing interpretation of key legislative provisions, such as section 218(2) of the Companies Act 71 of 2008 concerning directors' liability. Case laws illustrating divergent judicial interpretations, such as the High Court decisions as opposed to the SCA, were included to demonstrate the complexity and contested nature of the legal doctrine. The selection also favoured case law that presented factual scenarios closely aligned with the research questions, allowing for a nuanced analysis of how legal principles are applied in practice.

By merely looking at the wording of the provision of section 218(2), it appears that this provision aims to provide or offer company shareholders a legal avenue remedy through which they can directly pursue directors who breached the 2008 Act and, in so doing, caused the shareholders to incur losses or damages. Furthermore, based on a reading of section 218(2), it can also be stated that shareholders have a right to personally claim from company directors for contravening the 2008 Act. However, as discussed above, the courts in *Itzikowitz v Absa Bank Ltd*,[76] *Hlumisa Investments*

[73] *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
[74] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* [2017] ZALMPPHC 27 para 39.
[75] *Broadcasting Investment Group Ltd v Adam Smith* [2020] EWHC 2501 (Ch).
[76] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43.

Holdings (RF) Ltd and Another v Kirkins and Others,[77] *De Bruyn v Steinhoff International Holdings N.V. and Others,*[78] *and Venator Africa (Pty) Ltd v Watts and Another*[79] show how unequivocally and narrowly this provision is applied.

Therefore, this study asserts that section 218(2) is an error or fallacy that needs to be corrected. This contention finds its basis in the broad language of section 218(2). It can further be contended that this provision is remarkable for the simplicity of its drafting, with its wording so open-ended that it is reasonable to assume that anyone, including shareholders and directors, could use it to recover any losses other person caused to them as a result of contravening the 2008 Act. However, the four case laws mentioned above have shown otherwise. Due to this, it is very challenging for shareholders to prevail in their legal actions against company directors.

This view is also supported by Cockrill, who opines that section 218(2) is broadly written about the individuals it covers, leading to a rise in shareholder claims against directors. She adds that this provision’s broad language allows directors to potentially be held personally liable to the company and external parties, such as shareholders.[80]

The *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* case, Navsa JA and Schippers JA, with Makgoka JA and Mojapelo and Koen JA concurring, confirmed that while section 218(2) is broadly written regarding the individuals it encompasses, its application is limited. It specifically pertains to “damage suffered by that person as a result of that contravention”.[81] This limitation necessitates that a specific individual must has incurred harm due to a particular contravention. Essentially, this requirement dictates that the individual who has suffered harm must be capable of initiating a claim for damages stemming from a specific violation of the 2008 Act.[82]

Duvenhage also notes that the potential impact of the civil liability remedy, when viewed alongside the partial codification of directors' duties under the 2008 Act, could

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[77] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83.
[78] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
[79] *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
[80] Chanté Ashley Cockrill, ‘A Shareholder’s Personal Claim Against Directors For Causing Pure Economic Losses Through Diminution In Share Value: A South African Critical Analysis’ (Published LLM, University Of Western Cape, 2020) 7.
[81] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83 para 12.
[82] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83 para 12.

lead to an extension of liability for breaching fiduciary duties and the duty of care and skill to third parties, such as creditors and shareholders.[83] This provision is drafted broadly, which might discourage experienced individuals from taking up director roles, even though it could be challenging for third parties to succeed with a claim based on section 218(2).[84] Mapangavanhu identifies the ambiguity in section 218(2) as part of such a challenge. He then suggests that a judicial approach should be adopted to the interpretation of section 218(2) to distinguish between instances where the general remedy under section 218(2) is applicable and cases in which it is not. He adds that this approach will provide clarity and guidance on the appropriate application of this provision, given the ambiguity that has been identified.[85]

In *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others*, Phatudi J described the remedy under section 218(2) as establishing a unique form of liability against any individual whose violation of the 2008 Act results in loss or damage to another party. He described this provision as a general enabling remedy.[86] This second description by Phatudi J seems to have been influenced by a similar perspective found in "Henochsberg on The Companies Act 71 of 2008",[87] as referenced in the *Rabinowitz v Van Graan and Others* case.[88] Davis and Geach also refer to section 218(2) as a general remedy.[89] Cassim also views this provision as offering a broad scope and reach, serving as a valuable complement to the specific liability provisions outlined in section 77 of the 2008 Act.[90] Stein, in agreement with Cassim, notes that section 218(2) is broad enough to encompass a pure economic claim by any party against a director personally if that director breaches any provision of the 2008 Act.[91]

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[83] Arno Duvenhage, 'Personal Liability Of Company Directors Towards Company Creditors Under The Companies Act 71 Of 2008: Much Ado About Nothing?' (Published LLM, University Of Pretoria 2020) 3.
[84] Arno Duvenhage, 'Personal Liability Of Company Directors Towards Company Creditors Under The Companies Act 71 Of 2008: Much Ado About Nothing?' (Published LLM, University Of Pretoria 2020) 3.
[85] Brighton Mupangavanhu, 'Diminution' In Share Value And Third-Party Claims For Pure Economic Loss: The Question Of Director Liability To Shareholders' (2019) 31 Sa Mercantile Law Journal 120.
[86] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* [2017] ZALMPPHC 27 para 30.
[87] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* [2017] ZALMPPHC 27 para 38.
[88] *Rabinowitz v Van Graan and Others* [2013] ZAGPJHC 151 Para 18.1.
[89] Dennis Davis & Walter Geach, '*Companies and other Business Structures'* (Oxford University Press 2019) 153.
[90] Farouk Cassim, '*Contemporary Company Law*' ((Juta and Company Ltd 2022) 587.
[91] Carl Stein, '*The New Companies Act Unlocked'* (Siber Ink 2011) 407.

Jordan believes that section 218(2) of the 2008 Act deals with liability to third parties, not just the company itself. This provision is seen as having a vast scope. Additionally, Jordan opines that section 218(2), read together with section 22 of the 2008 Act, does not make the director personally liable for the actual debts of the company. Instead, the director may be held liable for any loss or damages suffered by a third party, such as shareholders, as a result of the relevant contravention of the 2008 Act.[92]

In cases similar to *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others*,[93] *De Bruyn v Steinhoff International Holdings N.V. and Others,*[94] *and Venator Africa (Pty) Ltd v Watts and Another*, it is common for shareholders to expect directors to enhance the company's share value for the shareholders' benefit.[95] However, directors may have limited or no personal investment in the company, so their motivation to maximize shareholder value could be lacking.[96]

In some instances, directors might be inclined to use their positions for personal gain, potentially to the detriment of shareholders. If directors' actions, such as mishandling financial statements or making poor decisions, harm the company, shareholders may experience pure economic repercussions in the form of a decrease in the value of their shares.[97] But when shareholders intend to sue directors for damages, case law has shown that confusion can arise in determining the appropriate damages for the shareholder. This is so in that the directors' wrongful conduct may have also given the company grounds for a cause of action.[98] A problem then arises when the company claims for its own loss while the shareholder claims for the reduction in the value of

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92 Tobie Jordan, 'Business-Rescue-Restructuring-Insolvency' < https://www.cliffedekkerhofmeyr.com/export/sites/cdh/news/publications/2020/dispute/Downloads/Business-Rescue-Restructuring-Insolvency > (17 July 2020) accessed 1 May 2024.
93 *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83.
94 *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
95 Carias Tererai 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) 9.
96 Carias Tererai 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) 9.
97 Bas De Jong, 'Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis' (2013) 14 European Business Organization Law Review 1.
98 *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 (HL) 502; *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) [1982] 1 All ER 354 (CA) 222h-223b.

their shares as their loss. Therefore, awarding damages in both cases could result in the shareholder receiving a double recovery for the same underlying loss.[99]

In English Company Law, one of the fundamental principles is that shareholders are generally not permitted to bring individual claims against directors for pure economic losses stemming from a decrease in the value of their shares. This restriction is based on the concept that a company is a legal entity capable of initiating legal actions and being sued in its own name. Therefore, when directors' actions result from poor decision-making, the wrongdoing is viewed as harmful to the company, making it the appropriate party to pursue legal action rather than individual shareholders.[100] Similarly, the principle appears to apply in South African Company Law because the harm shareholders suffer is seen as merely mirroring the loss experienced by the company. Therefore, the company is deemed the rightful entity to seek compensation for pure economic losses rather than individual shareholders.

This concept is known as the "no reflective loss rule," with its roots traced back to the *Prudential Assurance v Newman Industries* ruling.[101] The court's view was that the justification behind the "no reflective loss" principle is to avoid the possibility of duplicate compensation if the company was to pursue legal action. This principle aims to prevent shareholders from seeking recovery for losses arising from directors breaching their fiduciary duties, which could lead to the company and individual shareholders claiming the same loss. Moreover, it also stops individual shareholders from seeking compensation at the cost of the company, its creditors, and other shareholders. When examining the track record of claims involving reflective loss, it becomes evident that our courts have consistently rejected shareholders' attempts to pursue reflective loss due to harm caused by directors breaching their fiduciary duties towards the company.[102]

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[99] *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 (HL) 502; *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) [1982] 1 All ER 354 (CA) 222h-223b.
[100] Bas De Jong, 'Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis' (2013) 14 European Business Organization Law Review 1.
[101] *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 (CA).
[102] Maleka Femida Cassim, 'Judicial Discretion In Derivative Actions Under The Companies Act Of 2008'(2013) 130 SALJ 778.

The 2024 SCA judgment in *Venator Africa (Pty) Ltd v Watts and Another*[103] also has significant implications for the interpretation and application of section 218(2). Venator Africa (Pty) Ltd, a company that makes chemical products, made a deal with Siyazi Logistics and Trading (Pty) Ltd to manage customs and shipping tasks. Siyazi was supposed to send Venator invoices showing how much they owed to the South African Revenue Service (SARS). Venator would pay Siyazi, who was then supposed to pay SARS. In 2018 and early 2019, Siyazi claimed that Venator owed more than R66 million to SARS. Venator paid this amount to Siyazi, but Siyazi only sent R31 million to SARS. Because of this shortfall, SARS charged Venator additional fees, leading to total damages of over R41 million for Venator. Venator then sued the directors of Siyazi, claiming they violated sections 22(1) and 218(2) of the 2008 Act.[104] They argued that the directors were either behind the fraud or were careless in managing Siyazi. Section 22(1) states that a company must not operate recklessly or with the intent to deceive anyone. Section 218(2) provides that anyone who breaks the law is responsible for any losses caused by that violation. The directors contested the lawsuit. One director argued that section 22(1) applies to the company, not to the directors personally, and that section 218(2) only applies if someone actually breaks the law, which Venator did not prove. The High Court agreed with the directors and dismissed Venator's claims, allowing them to revise their lawsuit. Venator argued to the SCA that the High Court did not properly analyse section 218(2) and focused too much on section 22. They claimed the law was meant to hold directors accountable for fraud or reckless behaviour toward creditors. They insisted that the court should interpret the law in a way that allows for justice.[105]

The SCA noted that the legal identity of a company is very important and cannot be ignored. They confirmed that section 218(2) does not automatically hold directors liable unless there is a clear violation of the law. They stated that section 22(1) imposes obligations on the company, not the directors. The court ruled that if someone wants to sue for a violation of section 22(1) or section 218(2), they must sue the company, not the directors. The SCA found that Venator could not show that the directors broke

103 *Venator Africa (Pty) Ltd v Watts and Another* 2024 (4) SA 539 (SCA).
104 *Venator Africa (Pty) Ltd v Watts and Another* 2024 (4) SA 539 (SCA) para 3-4.
105 *Venator Africa (Pty) Ltd v Watts and Another* 2024 (4) SA 539 (SCA) para 5-6.

any law, so they dismissed the appeal but allowed Venator to amend their claim to continue the case in the High Court.[106]

The SCA clarified that section 218(2) does not automatically make directors liable. It only creates liability if there is a clear violation of another section of the 2008 Act. To determine liability, you must look at the specific section of the 2008 Act that was allegedly broken.[107] Section 22(1) puts obligations on the company itself, not its directors. The 2008 Act has specific provisions (sections 76 and 77) that deal with when directors can be held liable for breaking the 2008 Act. The separate legal personality of a company is a fundamental principle of company law. You cannot just disregard the separate legal personality – the law has to allow you to do so.[108]

When shareholders have incurred losses, they may have other available remedies, though none benefit the shareholders personally. One option is for shareholders to initiate a derivative action against a director on behalf of the company.[109] However, shareholders can only commence such proceedings when the company has declined to pursue the action directly.[110] If a shareholder derivative action is successful, any damages awarded will go to the corporation, not to the individual shareholders who initiated the legal proceedings.[111] Over time, shareholder derivative claims have become a common feature of the corporate landscape, with more or less defined parameters. While shareholders can institute such claims on behalf of the company under section 165 of the 2008 Act, questions arise as to whether the derivative claim is an effective alternative to protect the interests of shareholders.[112]

The debate surrounding directors' fiduciary duties is one of the reasons why the issue of directors' liability in situations where shareholders suffer pure economic losses is a contentious area in South African law. Despite the contention in this area of the law,

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[106] *Venator Africa (Pty) Ltd v Watts and Another* 2024 (4) SA 539 (SCA) para 30-35.
[107] *Venator Africa (Pty) Ltd v Watts and Another* 2024 (4) SA 539 (SCA).
[108] *Venator Africa (Pty) Ltd v Watts and Another* 2024 (4) SA 539 (SCA).
[109] S 165 Companies Act 71 of 2008.
[110] Maleka Femida Cassim, 'The new derivative action under the Companies Act' (Juta and Company Ltd 2016).
[111] Maleka Femida Cassim, 'The new derivative action under the Companies Act' (Juta and Company Ltd 2016).
[112] Maleka Femida Cassim, 'The Statutory Derivative Action Under the Companies Act of 2008: guidelines for the Exercise of the Judicial Discretion' (published PhD thesis, University of Cape Town, 2014).

there has been limited academic writing and discussion on the subject. In particular, the question of whether directors could be held personally liable to shareholders for the decrease in share price resulting from a material misstatement has received little attention. The lack of clarity in this area of the law has led to shareholders continuing to pursue personal claims against directors when they believe share prices have dropped due to the director’s negligence or fraudulent conduct. This is particularly the case when shareholders have purchased shares based on public statements made by directors about the company's financial strength or other factors influencing the decision to invest. If left unresolved, this gap in the law would likely result in further unnecessary claims by shareholders seeking to hold directors personally liable for the decrease in their share value arising from poor decision-making. Thus, there is a clear need to address this issue and provide more definitive guidance in South African company law.

1.9. CHAPTER OUTLINE

CHAPTER 1: BACKGROUND AND INTRODUCTION

This chapter serves as the study's introduction. It develops and defines the problem statements and problem questions of the study, which examine the liability of company directors with regard to shareholder claims, seeks to address. A review of the academic literature on the subject of the study was also included, along with details on the research methodology employed to gather the information.

CHAPTER 2: THE FUNDAMENTAL PRINCIPLES OF COMPANY LAW

The second chapter examines the extent to which a company is a distinct legal entity. It further investigates whether or not the shareholders own the company’s assets. The chapter delves deeper into the legal implications and consequences of a company's recognition as a distinct legal person. Additionally, the chapter explores the exceptions to the principle of separate legal personality. That is, it examines instances where the courts may pierce the corporate veil under common law and statutory provisions to impose personal liability on the company's directors.

CHAPTER 3: COMMON LAW AND STATUTORY FIDUCIARY DUTIES OF COMPANY DIRECTORS

This chapter discusses directors' duties to the company under common law and the Companies Act 71 of 2008. Furthermore, it examines whether or not these duties are also owed to shareholders.

CHAPTER 4: UNDERSTANDING THE PROVISIONS OF SECTION 218(2) OF THE COMPANIES ACT AS INTERPRETED BY THE SOUTH AFRICAN COURTS

This chapter provides an understanding of the provisions of section 218(2) of the 2008 Act as interpreted by the South African courts. It further analyses the scope and content of section 218(2) of the 2008 Act, evaluating whether this section provides a suitable legal avenue for shareholders to seek redress against directors for pure economic losses they have suffered. It also differentiates between cases concerning the reduction in share price and those associated with reckless trading. The analysis will further include a discussion of relevant case law that has utilised this provision, examining the arguments put forward by the courts. Additionally, the chapter will draw upon commentaries on the provision and academic articles to comprehensively assess section 218(2) and its suitability for shareholders to seek recourse against directors.

CHAPTER 5: PROBING THE LIABILITY OF COMPANY DIRECTORS AGAINST CLAIMS BY SHAREHOLDERS

This chapter explores the extent to which shareholders can hold directors accountable, considering common law principles and relevant statutory provisions. Furthermore, the chapter will evaluate both statutory and non-statutory provisions that may establish duties owed by directors to shareholders, in order to ascertain to what extent can shareholders hold directors accountable for losses to the shareholders.

CHAPTER 6: RECOMMENDATIONS NECESSARY TO EFFECTIVELY HOLD DIRECTORS ACCOUNTABLE FOR CORPORATE MISDEMEANOURS

This chapter serves as the overall conclusion of the study. It provides recommendations for the remedies that shareholders could utilise to claim damages directly from the company's directors, as opposed to the company itself. These recommendations cover common law and statutory remedies available to shareholders who have suffered losses due to the directors' actions.

10. CONCLUSION

It is therefore concluded that one fundamental principle in company law is recognising a company as a separate legal entity distinct from its members. Consequently, shareholders possess a right to participate in the company. This means the company's assets are owned by itself and not by the shareholders. In cases where harm is inflicted upon the company, the company is the appropriate party to bring a claim against the wrongdoer. Furthermore, this means that directors do not owe any fiduciary duties towards shareholders except only when a specific, factual relationship exists. Section 218(2) of the 2008 Act establishes a unique form of liability. It provides a remedy for any person to be held liable for any loss or damages suffered by any person who contravenes a provision of the 2008 Act. However, claims for the decrease in share value have not been successful based on section 218(2) due to the application of the “no reflective loss” principle. This principle holds that shareholders cannot recover losses that reflect the company's losses, as the proper plaintiff would be the company itself.

Even though the law is clear on the difference between wrongdoings committed against a company and those committed against its shareholders, the shareholder-litigant still feels they can pursue personal claims against directors. This study highlights the basis of shareholder plaintiffs' erroneous belief that they have a cause of action against directors simply because a company in which they own shares has suffered damages. The ambiguity in section 218(2) as a general enabling remedy encourages the shareholder litigants. Therefore, this study aims to contribute to a better understanding of the legal framework governing directors' liability and shareholders' rights. This will help address the ongoing misapprehension that section 218(2) allows for personal claims by shareholders against directors for pure economic losses.

As a result, it is suggested that section 218(3) be amended to address the ambiguity in section 218(2). The proposed amendment is to clarify that section 218(2) should be read in conjunction with, and not in place of, any relevant common-law principles governing remedies for losses suffered by persons in the context of company law. The proposed amendment will, therefore, aid in clearing up any confusion regarding the scope and content of section 218(2) by ensuring that it is read in harmony with established common-law principles, thereby providing greater legal certainty and clarity for shareholders, directors, and other stakeholders involved in company law disputes.

CHAPTER 2: THE FUNDAMENTAL PRINCIPLES OF COMPANY LAW

2.1. INTRODUCTION

The previous chapter discussed various corporate scandals (e.g., *Steinhoff, African Bank, South African Airways, VBS Mutual Bank* and *Venator Africa*) where directors' misconduct led to significant financial losses, highlighting the potential for shareholder claims under section 218(2). It was established that there are interpretive challenges regarding the scope and content of section 218(2), and whether it effectively provides a new remedy for shareholders to hold directors personally accountable for breaches of fiduciary duties. It was further noted that shareholders may face difficulty in imposing personal liability on directors for losses they may have suffered as directors' duties are owed to the company and thus the company is the correct plaintiff to institute proceedings in such instances.[113]

The legal personality is a concept that has evolved over centuries, defining who qualifies as legal subjects capable of holding rights, duties, and obligations. It is well-established that a natural person is a legal subject with specific rights concerning legal objects. The rights of these legal subjects can be categorised into several types, including, amongst others, real rights, personal rights, and intellectual property rights. In any established legal system, there is a recognised necessity to create artificial legal entities that can bear rights, duties, and obligations similar to those of natural persons. This is known as separate legal personality, indicating that legal personality is not a natural occurrence but rather a construct of the law.[114]

In light of the above, this chapter primarily focuses on exploring the extent to which a company functions as a separate legal entity. It further delves into the question of whether shareholders have ownership over the company's assets. The chapter provides an in-depth examination of the legal implications and consequences associated with a company's status as a separate legal person on the company's

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[113] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83; *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43; *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* [2017] ZALMPPHC 27; *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
[114] Cilliers A Critical enquiry into the origin, development and meaning of the concept "Limited Liability" in Company Law. Regshistoriese en regsvergelykende studie LLD Thesis 1963.

assets apropos shareholders' assets. Additionally, it investigates the exceptions to the principle of separate legal personality, including situations where courts may pierce the corporate veil under both common law and statutory provisions to hold the company's directors personally liable.

2.2. THE LEGAL NATURE OF A COMPANY AS A SEPARATE LEGAL PERSON

2.2.1. ACQUIRING LEGAL PERSONALITY

The premise that a company is a distinct and separate legal person lies at the core of company law.[115] It is a common law principle that has long been established that an imaginary veil or curtain is formed from the moment the company is incorporated.[116] South Africa has adopted this principle from English law, which has formed part of South African common law. For example, in *the Salomon v Salomon and Co Ltd* case (hereinafter *Salomon* case), Lord Templeman described this veil or curtain as a solid foundation for companies and company law.[117] Put in a literal sense, a veil or curtain is placed between members of the company on one side and the company on the other side. This means the company becomes a juristic or legal person distinct and separate from its members.[118] It is ultimately a making with a twofold nature – it is both an association of its members and a separate person who exists independently of its members. As a consequence of this, a company may only act through authorised agents.[119] This further entails that a company is a legal person who can acquire rights and incur obligations separate from those of its directors and shareholders.[120] In other words, the company's assets and liabilities are solely its own.[121]

A company is merely a legal concept created by law. Thus, it has no physical existence.[122] Accordingly, it cannot carry out fundamentally human actions, such as

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[115] Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* (Juta and Company (Pty) Ltd 2021).
[116] Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* (Juta and Company (Pty) Ltd 2021).
[117] *Salomon v A Salomon and Co Ltd* [1897] AC 22 para 30.
[118] Companies Act 71 of 2008 sec 19 (1); *Salomon v A Salomon and Co Ltd* [1897] AC 22.
[119] *Quigley Meats Ltd v Hurley* [2011] IEHC 192*; Daimler Co Ltd v Continental Tyre and Rubber Co* [1916] UKHL 845.
[120] *Rees and Others v Harris and Others* [2011] ZAGPJHC 237 para 13.
[121] *Rees and Others v Harris and Others* [2011] ZAGPJHC 237 para 13.
[122] Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 61-62.

appearing in court in person for proceedings, entering into marriage, or agreements that are inherently human in nature. These actions require human relationships and personal contact.[123] However, a legal person does have its own legal personality and can acquire rights and incur obligations that are different from those of the company's director and shareholders, even though it is only a legal concept with no physical existence.[124]

The Act further affirms the separation of a company's personality from its shareholders.[125] In terms of section 19(1) of the 2008 Act, a company is a juristic person with all the legal rights and capacities of an individual as of the date and time of its incorporation, unless such company is not capable of exercising those rights or capacities or the Memorandum of Incorporation of the company requires the opposite.[126] Thus, due to incorporation, the company can sue and be sued in its own name. It can either sue to enforce its rights or be sued for any liabilities it has incurred.[127] As a result, the company is held accountable for its performance or debts when an aggrieved party or its creditors sue it for obligations it owes.

Generally, the shareholders are not liable for the company's liabilities.[128] This is because the corporate veil shields the company directors and shareholders from claims against the company by excluding them from being liable for the company's liabilities. The shareholders further enjoy limited liability when the company is liquidated. This is so in that in such an event, the shareholders only lose their right to claim the return of their share capital which they invested in the company.[129] The fact that the company has accrued a lot of liabilities is irrelevant. It is important that the shareholders are not liable for such liabilities.[130]

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123 Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 61-62.
124 Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 62.
125 Sec 19(1) Companies Act 71 of 2008.
126 Sec 19(1) Companies Act 71 of 2008.
127 *Salomon v A Salomon and Co Ltd* [1897] AC 22.
128 *Airport Cold Storage (Pty) Limited v Ebrahim and Others* [2007] ZAWCHC 25 para 6.
129 *Salomon v A Salomon and Co Ltd* [1897] AC 22 para 52.
130 Companies Act 71 of 2008 secs 19 (1) & (2).

2.2.2. SIGNIFICANCE OF THE SALOMON V A SALOMON AND CO LTD CASE

The *Salomon* case, a famous case viewed by various company law scholars as the cornerstone of company law, cemented the principle of incorporation (legal personality) and limited liability in English company law.[131] Mr. Salomon was a leather merchant and a wholesale boot manufacturer who operated as a sole proprietor. However, he later felt the necessity to establish a company to which he sold the business in order to acquire the benefits of perpetual succession and limited liability. The company issued 40,000 shares with a nominal value of £1 as part of its share capital. Salomon, his wife, daughter, and four sons subscribed as shareholders for one share.[132] A partial cash payment of £39 000, the issuance of 20,000 fully paid the shares to Mr. Salomon, and another issuance of debentures for the outstanding £10,000. The plan was for the company to continue operating as a family business.[133] With 20 001 of the 20 007 issued shares, Mr. Salomon was the majority shareholder. He was an employee and served as the director of the company. Sadly, the company failed and was liquidated.[134] In the course of liquidation, it turned out that there would not be enough money to pay off the remaining company creditors if Mr. Salomon was to be paid the value of his debentures. On behalf of the creditors, the liquidator attempted to have the company declared an alias of Mr. Salomon, a facade, and a plot by Mr. Salomon to avoid being held liable for the company's debts. The liquidator further argued that because Mr. Salomon held all but six of the company's shares, he and the company were the same entity, and the debts of the company belonged to him.[135]

The House of Lords ruled in favour of Mr. Salomon and held that a company that has been properly incorporated and registered in accordance with the applicable laws, is in terms of the law, a different person from the person who is the actual owner of all the shares in the company. The motives, schemes, ideas, or purpose for incorporation

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[131] *Salomon v A Salomon and Co Ltd* [1897] AC 22.
[132] Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 62-63.
[133] Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 62-63.
[134] Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 63.
[135] Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 63.

are irrelevant; once the company has been incorporated, it must be treated as any other independent person with its own rights and liabilities.[136]

The House of Lords went further and held that the company was a legal person since it had been legally incorporated and registered. As a result, the company was not a facade, and Mr. Salomon's actual motives were not in conflict with the true spirit and purport of the then Companies Act of 1862. Hence, Mr. Salomon was not liable for the company's debts. Furthermore, it was upheld by Lord Halsbury that if a company is legally incorporated, then such a company is not an agent or trustee to its members because the company is a legal person, and the business belongs to the company and not Mr. Salomon. Thus, the secured debentures were legal against the company's creditors since Mr. Salomon did not commit fraud.[137]

To date, the *Salomon* decision is still revered for laying down the principle that shareholders are generally not liable for the company's debts because a company is a separate legal person who is entirely different from its directors and shareholders.[138] The House of Lords concluded that the true intentions of Mr. Salomon were not contrary to, or did not reflect the true intent and meaning of the Companies Act 1862; the company was indeed a valid legal person because it had been formed and registered lawfully, and accordingly, the company was not a façade.[139] Therefore, despite motives, ideas, schemes, or intentions, the artificial existence of a company should be recognised as separate to its members because once a company is legally incorporated, it must be treated like any other independent person with its rights and liabilities. [140]

Consequently, Mr. Salomon was not liable to the company's creditors.[141] Since the company was a legal entity, the business belonged to the company and not Mr. Salomon, therefore, Lord Halsbury confirmed that if a company is validly created, the company is not an agent or trustee to its members. [142] Ultimately, Mr. Salomon (in

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136 *Salomon v A Salomon and Co Ltd* [1897] AC 22 para 51.
137 *Salomon v A Salomon and Co Ltd* [1897] AC 22 para 51.
138 Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 63.
139 Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 63.
140 *Salomon v A Salomon and Co Ltd* [1897] AC 22.
141 *Salomon v A Salomon and Co Ltd* [1897] AC 22.
142 *Salomon v A Salomon and Co Ltd* [1897] AC 22.

circumstances out of his control) did not intend on doing anything dishonest or unworthy.[143] Lord Macnaghten questioned why Mr. Salomon, an ambitious businessman, could not take advantage of the provisions set out in statute; he was perfectly entitled to do so, and in response, Lord Macnaghten famously stated in his key dictum that:

> "The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act".[144]

In conclusion, the House of Lords cemented the greatest and most central aspects of company law more than a century after the decision was handed down.[145] As a result, the principle of separate legal personality of a registered company is of the greatest importance in company law.[146] It illustrated that incorporation, separate legal personality and limited are available to all, for any legal purpose.[147] The principles from the *Salomon* case have been confirmed in South African law by the case *Shipping Corporation of India Ltd v Evdomon Corporation*,[148] which emphasised that it is very important to keep the property rights of a company separate from those of its shareholders, even if there is only one shareholder.[149]

The court in *Kolisang v Alegrand General Dealers and Auctioneers and Another*[150] considered the principle of separate personality and piercing the veil under section 20(9) of the 2008 Act. The case involved a false claim (misrepresentation) about a Golf GTI that was bought at an auction. In August 2016, Ms. Lebamang Octavia Kolisang

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[143] Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 63.
[144] Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 63.
[145] Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 63.
[146] Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 63.
[147] Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 63.
[148] *Shipping Corporation of India Ltd v Evdomon Corporation* & another 1994 (1) SA 550 (A) para 566C-F.
[149] *Shipping Corporation of India Ltd v Evdomon Corporation* & another 1994 (1) SA 550 (A) para 566C-F.
[150] *Kolisang v Alegrand General Dealers and Auctioneers and Another* [2022] ZAGPJHC 431.

(the buyer) purchased a car described as a 2012 Golf GTI from Alegrand General Dealers and Auctioneers (the company). Mr. Jassat, who was the director and owner of the company, represented it during the sale. After paying for the car, Ms. Kolisang found out that it was actually a 2010 Golf GTI, not a 2012 model. She cancelled the sale, returned the car, and asked for her money back. The company accepted the return but refused to refund her. As a result, she took legal action against the company. The court eventually ruled in her favour because the company did not defend itself.[151]

While trying to enforce the court's decision, Ms. Kolisang discovered that Mr. Jassat had resigned as director, the company had changed its address and was deregistered. This made it difficult for her to collect the money owed. Although Mr. Jassat tried to argue about the case's merits, he never filed a request to overturn the judgment or explained why the company did not defend itself. Given these circumstances, Ms. Kolisang sought to hold Mr. Jassat personally responsible for the debt by piercing the corporate veil under section 20(9)(b) of the 2008 Act. The court examined two main issues: whether Mr. Jassat had misrepresented the car's details and if this misrepresentation justified piercing the corporate veil. The court concluded that Mr. Jassat had misrepresented the facts, and the key question was whether this amounted to “unconscionable conduct” as required by the law.[152]

The court began by explaining the purpose of section 20(9) of the 2008 Act. One advantage of having a company is that it has its own legal identity, separate from its shareholders. This means that, the company's debts are not considered the debts of its shareholders or directors. However, directors must fulfil their legal and ethical responsibilities. If they fail, they can be held personally responsible for their actions, regardless of the company's separate legal identity. It is more challenging to hold shareholders accountable, which is why being able to pierce the corporate veil is important when trying to hold them responsible for the company's actions.[153]

Section 20(9) allows a court to pierce the corporate veil and ignore the separation between a company’s legal identity and director's identities. This means the court can hold a director or shareholder personally liable for the company's actions if there is an “unconscionable abuse” of the juristic personality. The court confirmed that this

[151] *Kolisang v Alegrand General Dealers and Auctioneers and Another* [2022] ZAGPJHC 431.
[152] *Kolisang v Alegrand General Dealers and Auctioneers and Another* [2022] ZAGPJHC 431.
[153] *Kolisang v Alegrand General Dealers and Auctioneers and Another* [2022] ZAGPJHC 431.

standard has made pierce the corporate veil easier than before. Courts recognise that fraud and improper company use are valid reasons to pierce the corporate veil, especially when it harms the company itself.[154]

In this case, the buyer argued that she purchased the car because of the second respondent's intentional false statements, amounted to fraud, and were unfair. The second respondent admitted that his misrepresentation led to the judgment against the company but denied that the corporate veil could be pierced. Ultimately, the court agreed that the buyer had proven that the second respondent's misrepresentation was significant, intentional, fraudulent, against the company's best interests, and an unfair abuse of the company's legal identity. The court concluded that the corporate veil could be pierced under section 20(9)(b), making the second respondent personally liable.[155]

Furthermore, in the cases of *Lategan and Another NNO v Boyes*[156] and *Botha v Van Niekerk*,[157] the courts confirmed that they are willing to pierce the corporate veil and disregard the separate legal personality when there is clear evidence of improper, dishonest, or fraudulent behaviour. In contrast, in *Cape Pacific v Lubner Controlling Investments*,[158] the court took a more flexible approach to justify piercing the corporate veil, indicating that each case is considered based on its specific circumstances. Also, in the case of *Orkin Bros Ltd v Bell*,[159] the court disregarded the separate legal personality, and the defendants were held personally responsible because they bought goods on credit while knowing the company could not pay. Similarly, in *Knoop NO and Others v Birkenstock Properties*,[160] the court ruled that:

> "The corporate veil may be pierced where there is proof of dishonesty, improper conduct or fraud in the establishment or the use of the company or the conduct of its affairs and in this regard, it may be convenient to consider whether the transactions complained of were part of a cloak, device or a sham".[161]

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[154] *Kolisang v Alegrand General Dealers and Auctioneers and Another* [2022] ZAGPJHC 431.
[155] *Kolisang v Alegrand General Dealers and Auctioneers and Another* [2022] ZAGPJHC 431.
[156] *Lategan and Another NNO v Boyes* 1980 (4) SA 191 (T).
[157] *Botha v Van Niekerk En 'n Ander* 1983 (3) SA 513 (W).
[158] *Cape Pacific v Lubner Controlling Investments* 1995 (4) SA 790 (A).
[159] *Orkin Bros Ltd v Bell and Others* 1921 TPD 92.
[160] *Knoop NO and Others v Birkenstock Properties (Pty) Ltd and Others* [2009] ZAFSHC.
[161] *Knoop NO and Others v Birkenstock Properties (Pty) Ltd and Others* [2009] ZAFSHC.

The principles established in the *Salomon* case above form the foundation of separate legal personality. Significant legal implications arise from a company's separate legal personality, which will be explored below.

2.3. CONSEQUENCES OF SEPARATE LEGAL PERSONALITY

2.3.1. IMPLICATIONS ON THE PROPERTY AND ASSETS OF THE COMPANY

A key implication of a company's separate legal personality is that its property, assets, profits, debts, and liabilities belong to the company itself. Therefore, this cannot be considered the property of the company's shareholders. Even a shareholder who owns all the shares in a private company does not have a proprietary interest in the company's assets. Shareholders only have a right to share in the distribution of the company's assets upon its liquidation.[162]

The principle that any property acquired by the company belongs to the company itself, not to its shareholders, is clearly demonstrated in the South African case of *Dadoo Ltd v Krugersdorp Municipal Council*.[163] In this case, in the Transvaal province, certain legislation prohibited Indians from owning immovable property. In 1915, Dadoo Ltd was established with two Indian shareholders: Dadoo, who owned all but one of the shares, and Dindar, who held the remaining share. The company acquired property in Krugersdorp and leased it to Dadoo for his general dealer business. The Krugersdorp Municipal Council argued that the company violated the statute against Indian ownership of immovable property in the Transvaal.[164] However, the Appellate Division dismissed this claim, stating that the statute did not apply to companies, even if descent. The court ruled that ownership by Dadoo Ltd did not equate to ownership by its Indian shareholders, asserting that property held by the company could not be considered owned by its shareholders. Consequently, the court concluded that the company had not breached the statute.[165] The same principle applies to a company's profits: they belong to the company itself, not the shareholders. Shareholders are

[162] *Salomon v A Salomon and Co Ltd* [1897] AC 22.
[163] *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530.
[164] *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530, Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 110.
[165] *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530, Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 110.

entitled to receive profits only after the company declares a dividend. Even a sole shareholder cannot simply take the company's profits for personal use; doing so would constitute the criminal offence of theft.[166]

This was further reaffirmed in *Lipschitz and Another NNO v Wolpert and Abrahams* (hereinafter the *Lipschitz* case)[167], wherein it was held that a company's assets are separate from those of its shareholders, emphasising that shareholders do not have a claim to the company's property. Again, in *Robinson v Randfontein Estates Gold Mining Co Ltd*[168] the court reiterated that the debts and assets of a company are separate from those of its shareholders, further solidifying the principle of limited liability.[169]

The court in *Sasol Oil v Nationwide Poles* (hereinafter *Sasol* case) highlighted that the company's property is owned by the company itself and not by its shareholders or directors, reinforcing the principle of separate legal identity.[170] In *Cape Pacific v Lubner Controlling Investments*,[171] the court adopted a flexible approach to piercing the corporate veil but maintained the fundamental principle that a company's property belongs to the company, not to its shareholders.[172] Furthermore, this was affirmed in *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others,* where the court emphasised that a company's assets belong to the company itself, not to its shareholders.[173] This case reinforced the idea that shareholders do not have a direct claim to the company's assets. Another relevant case is *Capital Appreciation Ltd v First National Nominees (Pty) Ltd and Others*,[174] which dealt with the repurchase of shares and highlighted the separation between the company's assets and the shareholders' interests.[175]

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166 *S v De Jager* 1965 (2) SA 616.
167 *Lipschitz and Another NNO v Wolpert and Abrahams* [1977] ZASCA 20.
168 *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.
169 *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.
170 *Sasol Oil (Pty) Ltd v Nationwide Poles* CC 2006 (3) SA 400 (CAC).
171 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* [1995] ZASCA 53.
172 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* [1995] ZASCA 53.
173 *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others* [2019] ZASCA 152.
174 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd and Others* [2022] ZASCA 85.
175 *Capital Appreciation Ltd v First National Nominees (Pty) Ltd and Others* [2022] ZASCA 85.

A shareholder's entitlement to a company's assets is limited to declared dividends and the understanding that they are residual claimants of the company's assets.[176] If shareholders are recognised as residual claimants, this legal aspect of a company's separate legal personality underscores the necessity of distinguishing between ownership and management or control within the corporate structure. This distinction also significantly impacts directors' legal status and responsibilities in a modern company. While share capital belongs to the company, individual shares are considered the shareholder’s property.[177]

Therefore, a company with a legal personality separate from its shareholders can own property and assets independently. A company's assets should not be confused with those of its shareholders.[178] As a result, the company owns its assets, including its share capital. While a share represents the property of the shareholder, share capital is the property of the company. Holding a share in a company does not grant a shareholder ownership or partial ownership of the company's assets. Instead, the right to receive a proportional share of the assets upon liquidation reflects a financial interest in the company's success rather than a right or title to any specific company assets.[179]

2.3.2. IMPLICATIONS ON THE COMPANY AND ITS MEMBERS IN GENERAL

Under common law, a juristic person is treated similarly to a natural person, with the exception of certain actions that a juristic person cannot perform, such as entering into

[176] Chanté Ashley Cockrill, ‘A Shareholder’s Personal Claim Against Directors For Causing Pure Economic Losses Through Diminution In Share Value: A South African Critical Analysis’ (Published LLM Thesis, University Of Western Cape, 2020) 30.

[177] Chanté Ashley Cockrill, ‘A Shareholder’s Personal Claim Against Directors For Causing Pure Economic Losses Through Diminution In Share Value: A South African Critical Analysis’ (Published LLM Thesis, University Of Western Cape, 2020) 30, Brighton Mupangavanhu, ‘Diminution’ In Share Value And Third-Party Claims For Pure Economic Loss: The Question Of Director Liability To Shareholders’ (2019) 31 Sa Mercantile Law Journal 115.

[178] Chanté Ashley Cockrill, ‘A Shareholder’s Personal Claim Against Directors For Causing Pure Economic Losses Through Diminution In Share Value: A South African Critical Analysis’ (Published LLM Thesis, University Of Western Cape, 2020) 30, Brighton Mupangavanhu, ‘Diminution’ In Share Value And Third-Party Claims For Pure Economic Loss: The Question Of Director Liability To Shareholders’ (2019) 31 Sa Mercantile Law Journal 115.

[179] Chanté Ashley Cockrill, ‘A Shareholder’s Personal Claim Against Directors For Causing Pure Economic Losses Through Diminution In Share Value: A South African Critical Analysis’ (Published LLM Thesis, University Of Western Cape, 2020) 30, Brighton Mupangavanhu, ‘Diminution’ In Share Value And Third-Party Claims For Pure Economic Loss: The Question Of Director Liability To Shareholders’ (2019) 31 Sa Mercantile Law Journal 115.

a marriage or serving as a guardian for a minor.[180] In terms of section 19(1) of the 2008 Act, a company is recognised as a juristic person from the moment its incorporation is registered.[181] A company possesses personality rights, which include the right to privacy and the right to identity. This was affirmed in the case of *Financial Mail (Pty) Ltd v Sage Holdings Ltd*,[182] where the court ruled that a legal entity has the right to privacy concerning confidential information that is not publicly known, including potentially defamatory material.[183] Additionally, a company can sue for damages resulting from defamatory statements that could harm its reputation.[184]

In the case of *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd*, the notion of personality rights for juristic persons was further expanded.[185] The court held that a juristic person has rights regarding their goodwill, which deserves legal protection. A trading juristic person can claim special damages based on defamation if the requirements of the *aquilian* action are met, such as proving a direct loss of profit resulting from the defamation or demonstrating that the publisher knew the information was false, with fault in the form of either intent (*dolus*) or negligence (*culpa*).[186] Additionally, a company can pursue an action *iniuriarum* claim for general damages due to defamation.[187] In the case of *Manong & Associates (Pty) Ltd v City Manager, City of Cape Town and Another*, it was held that a company can enjoy the right to equality and can, therefore, be subjected to discrimination on racial grounds.[188]

As a legal entity, a company is distinct from its members. Therefore, it is important to note that the incorporators, shareholders, or directors are not personally liable for the company's liabilities or obligations. Similarly, directors do not act in their individual capacity when fulfilling their directorial responsibilities. This is a key benefit of the

[180] *Ex parte Donaldson* 1947(3) SA 170 (T) 173, Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 110.
[181] Section 19(2) of the Companies Act 71 of 2008.
[182] *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) para 461-463.
[183] *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) para 461-463.
[184] *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (AD) para 560, Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 110.
[185] *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA).
[186] *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA).
[187] *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA).
[188] *Manong & Associates (Pty) Ltd v City Manager, City of Cape Town and Another* 2009 (1) SA 644 (EqC).

incorporated form with limited liability.[189] As confirmed by Justice Calhoun in the case of *William Sanders v Roselawn Memorial Gardens Incorporated,*[190] the doctrine that a corporation is a legal entity distinct from the individuals who make it up is a legal concept created for convenience and to promote justice.[191] A corporation is essentially a group of individuals, and the notion of a corporation as a separate legal entity or person from its members is simply a legal fiction designed to facilitate business operations in this advantageous manner.[192]

However, in principle, a person should be held accountable for their own wrongful acts.[193] Therefore, there are instances where courts will disregard the legal personality of a company by piercing or lifting the corporate veil. In doing so, the court removes "the protective covering of limited liability presented by the company structure" in order to identify the individuals behind the company to whom liability may be attached.[194]

2.4. PIERCING THE CORPORATE VEIL: EXCEPTIONS TO THE PRINCIPLE OF SEPARATE LEGAL PERSONALITY

2.4.1. PIERCING THE CORPORATE VEIL UNDER COMMON LAW

Metaphorically, when a company is established, a veil or curtain is drawn between the company and its shareholders and directors, creating a separation that protects them from liability for the company's debts and wrongful actions. However, when the corporate veil is pierced, this protection is lifted, allowing for an examination of the company's substance rather than its formal structure.[195] Piercing the corporate veil is "an exception to the principle of separate legal personality". The focus then shifts from the company to the individuals behind it or those controlling its operations, as if there were no distinction between them and the company. This process allows for personal liability to be assigned to individuals who misuse or exploit the concept of corporate personality.[196]

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189 *Manong & Associates (Pty) Ltd v City Manager, City of Cape Town and Another* 2009 (1) SA 644 (EqC), Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 110.
190 *William H Sanders v Roselawn Memorial Gardens Incorporated 159* S.E.2d 784 (W. Va.1968).
191 *William H Sanders v Roselawn Memorial Gardens Incorporated 159* S.E.2d 784 (W. Va.1968).
192 *William H Sanders v Roselawn Memorial Gardens Incorporated 159* S.E.2d 784 (W. Va.1968).
193 *Mentmore Manufacturing Co v National Merchandise Manufacturing Co* (1978) 89 DLR (3d) 195 para 23.
194 Nicole Schoeman, 'Piercing the corporate veil under the New Companies Act' (2012) June DR 10.
195 Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *The Law of Business Structures* 110.
196 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) 802.

The separate corporate identity of a company can be disregarded when the legislature does so in cases of non-compliance with statutory requirements, as demonstrated in *Dadoo Ltd and Others v Krugersdorp Municipal Council*.[197] This may occur, for instance, when a bill of exchange is signed without mentioning the company's registered name, or when business is conducted recklessly or with intent to defraud under section 424 of the 1973 Companies Act (which has no equivalent in the 2008 Companies Act).[198]

When the corporate veil is pierced or lifted, the court removes the protective shield of limited liability provided by the corporate structure.[199] The case of *Le'Bergo Fashions CC v Lee and Another* provides an example of a court piercing the corporate veil.[200] The first respondent, Lee, had signed a restraint of trade agreement in her personal capacity, agreeing not to compete with the applicant. Lee then used her company, the second respondent, who was the sole shareholder and director, to compete with the applicant. The company had not been a party to the restraint of trade agreement. The court had to determine whether the restraint of trade obligation could be imposed on the company.[201]

The court found that Lee had effectively carried on the business of the company. In their daily activities, Lee and the company had acted as one person. Through her conduct and business activities, Lee did not treat the company as a separate entity; rather, she treated it as an instrument or conduit for advancing her business affairs.[202] The court held that this was sufficient to sustain the argument that Lee had been guilty of improper conduct in using the company as a facade behind which she engaged in business in breach of the restraint of trade undertaking. The court was satisfied that, whether based on veil piercing or interference in contractual relations, the second respondent (the company) must be interdicted from competing.[203]

Consequently, even though the company was not a party to the restraint of trade agreement, the court determined that its competition with the applicant constituted intentional assistance to Lee in violating her obligations under the restraint clause,

[197] *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530.
[198] Nicole Schoeman, 'Piercing the corporate veil under the New Companies Act' (2012) June DR 10.
[199] Nicole Schoeman, 'Piercing the corporate veil under the New Companies Act' (2012) June DR 10.
[200] *Le'Bergo Fashions CC v Lee and Another* 1998 (2) SA 608 (C).
[201] *Le'Bergo Fashions CC v Lee and Another* 1998 (2) SA 608 (C) para 613.
[202] *Le'Bergo Fashions CC v Lee and Another* 1998 (2) SA 608 (C) para 613-614.
[203] *Le'Bergo Fashions CC v Lee and Another* 1998 (2) SA 608 (C).

which was legally wrongful and could, therefore, be prohibited. As a result, both Lee and the company were barred from competing with the applicant. This situation is noteworthy because the company had not directly signed the restraint of trade agreement. Thus, one circumstance in which a court may disregard the separate corporate personality of a company is when an individual bound by a restraint of trade uses a company as a facade to engage in activities prohibited by that agreement.[204]

The case of *Jones v Lipman* further exemplifies the court's disregard for the separate legal personality of a company.[205] In this case, Lipman had entered into a contract to sell land to Jones. However, after requesting to be released from the contract, which Jones refused, Lipman established a company, of which he and a clerk from his solicitor were the only shareholders and directors. He then transferred the land to this company to avoid fulfilling his obligation to Jones. The court ultimately ordered specific performance against both Lipman and the company. It characterised the company as a sham, describing it as a creation or mask used by Lipman to evade his contractual responsibilities. Consequently, the court ruled that specific performance could be enforced in this situation, highlighting how the corporate veil can be pierced when a company is used to circumvent legal obligations.[206]

In the *Knoop NO and Others v Birkenstock Properties (Pty) Ltd and Others* (FB) (hereinafter the *Knoop* case), the court held that the corporate veil may be pierced where there is proof of fraud or dishonesty or other improper conduct in the establishment or the use of the company or the conduct of its affairs and in this regard it may be convenient to consider whether the transactions complained of were part of a 'device', 'stratagem', 'cloak' or a 'sham'.[207] There have been cases where the doctrine of lifting or piercing the corporate veil has been applied outside instances of commercial abuse or fraud. In these cases, the application has been extended to eliminate the use of the corporate form to avoid legitimate obligations. However, it has not been applied lightly - the courts should strive to uphold the separate legal personality. The court emphasised this notion in the *Knoop* case when it held that

[204] *Le'Bergo Fashions CC v Lee and Another* 1998 (2) SA 608 (C) para 614.
[205] *Jones v Lipman* [1962] 1 All ER 442.
[206] *Jones v Lipman* [1962] 1 All ER 442.
[207] *Knoop NO and Others v Birkenstock Properties (Pty) Ltd and Others* (FB) (unreported case no 7095/2008, 4-6-2009), *The Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994 (1) SA 550 (A) at para 43-44.

when there is fraud, dishonesty or some other improper conduct, policy dictates that the court engages in a balancing exercise.[208] The court considers the circumstances and facts of each case to determine whether, in the appropriate case, it is proper to disregard the corporate personality and apportion liability where it belongs.[209]

In *Atlas Maritime Co SA v Avalon Maritime Ltd*[210] Straughton LJ made the following distinction between 'piercing' the veil' and 'lifting' the veil:

> "To pierce the corporate veil is an expression that I would reserve for treating the rights or liabilities of activities of a company as the rights or liabilities or activities of its shareholders. To 'lift' the corporate veil or 'look behind it', on the other hand, should mean to have regard to the shareholding in a company [in other words to its controllers] for some legal purpose".[211]

In *Pioneer Concrete Services Ltd v Yelnah Pty Ltd,*[212] Young J described 'lifting the corporate veil' as meaning "that although whenever each individual company is formed a separate legal personality is created, courts will occasionally look behind the legal personality to the real controllers".[213] Binns-Ward J in *Ex Parte Gore and Others NNO*,[214] stated that "nothing really turns on the labels despite the documented debate about nuances in the terminology. Rather it is a facts-based determination made by courts to disregard all or some of the characteristics of separate legal personality".[215]

The courts in England and South Africa have been far more willing to 'lift' the veil than to 'pierce' it.[216] Our common law has further not followed any consistent principles in disregarding the separate legal personality of juristic persons.[217] In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* (hereinafter the *Cape Pacific* case),[218] the appeal court recognised that in some circumstances, it would be justified to ignore the separate legal personality of an entity. However, Smalberger JA stated that "the law is

208 *Knoop NO and Others v Birkenstock Properties (Pty) Ltd and Others* (FB) (unreported case no 7095/2008) para 14.
209 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) para 31-32.
210 *Atlas Maritime Co SA v Avalon Maritime* Ltd (No. 1) [1991] 4 All SA 769 (CA).
211 *Atlas Maritime Co SA v Avalon Maritime* Ltd (No. 1) [1991] 4 All SA 769 (CA).
212 *Pioneer Concrete Services Ltd v Yelnah Ply* Ltd (1986) 5 NSWLR 254 (SCNSW) 264.
213 *Pioneer Concrete Services Ltd v Yelnah Ply* Ltd (1986) 5 NSWLR 254 (SCNSW) 264.
214 *Ex Parte Gore and Others Nno* 2013 (3) SA 382 (WCC) A 2013 (3) SA.
215 *Ex Parte Gore and Others Nno* 2013 (3) SA 382 (WCC) A 2013 (3) SA.
216 *Ex Parte Gore and Others Nno* 2013 (3) SA 382 (WCC) A 2013 (3) SA para 396, *Woolfson v Strathclyde Regional Council* [1978] 2 EGLR 19, *Ebrahim and Another v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA) 594.
217 Farouk Cassim, Contemporary *Company Law* (Juta and Company (Pty) Ltd 2022).
218 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A).

far from settled with regard to the circumstances in which it would be permissible to pierce the corporate veil".[219]

The case of *Daimler Co Ltd v Continental Tyre and Rubber Co*[220] is significant as it represents the first instance in which the House of Lords set aside or "pierced" the corporate veil. This landmark decision reinforced the principle that when a company is utilised to circumvent the law or operates merely as a façade, it is appropriate to disregard the corporate veil.[221]The case arose during World War I, when the Privy Council was tasked with determining whether a company incorporated in England could be classified as an "enemy company". The court pierced the corporate veil by examining the nationalities of the shareholders rather than solely considering the company's legal status. It concluded that since the majority of shareholders were German nationals, the company was deemed an "enemy alien". Consequently, it was ruled that the company could not pursue a debt owed to it, as payment to an "enemy" was prohibited.[222] In hindsight though, politics and public policy largely influenced the court's reasoning for pierce the veil.

In the *Cape Pacific* case,[223] the court acknowledged that fraud, dishonesty, or improper conduct could serve as sufficient grounds for piercing the corporate veil. This decision aligns with the principles established in *The Shipping Corporation of India Ltd v Evdomon Corporation*[224] where the court held:

> "Suffice to say that the circumstances under which a court should pierce the corporate veil would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs".[225]

In *Botha v Van Niekerk,*[226] it was held that the veil could be pierced if an 'unconscionable' injustice existed. The test for 'unconscionable injustice' was set out by Flemming J as follows:

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219 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) para 802.
220 *Daimler Co Ltd v Continental Tyre and Rubber Co* [1916] 2 AC 307.
221 Peter Levenberg,'The Mystery of the Corporate Veil: Comparing Anglo-American Jurisdictions' (2019) 7 Penn St JLIA 115 at 127.
222 *Daimler Co Ltd v Continental Tyre and Rubber Co* [1916] 2 AC 307 para 806.
223 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A).
224 *The Shipping Corporation of India Ltd v Evdomon Corporation* 1994 (1) SA 550 (A).
225 *The Shipping Corporation of India Ltd v Evdomon Corporation* 1994 (1) SA 550 (A).
226 *Botha v Van Niekerk1983* (3) SA 513 (W).

> "I believe that in this case, a conclusion of personal liability could only be reached if there was at least a conviction that the applicant was being subjected to an intolerable injustice as a result of something that is clearly improper conduct on the part of the first respondent".[227]

Smalerger JA, in the *Cape Pacific* case, criticised the rigid approach adopted in *Botha v Van Niekerk*, advocating for a more flexible approach that permits the lifting of the corporate veil when the facts of a case warrant it.[228] However, *in Hülse Reutter and Others v Gödde,*[229] the court established that there must be evidence of "some misuse or abuse" of the distinction between the corporate entity and those who control it, resulting in an unfair advantage for the latter. [230] In this instance, the court rejected the argument that the existence of an alternative remedy would preclude an action to pierce the corporate veil, thereby adopting a stricter approach to its application.[231]

2.4.2. SOUTH AFRICAN APPROACH IN PIERCING THE CORPORATE VEIL UNDER THE ACT

The evolution of the law regarding the circumstances under which courts will permit "veil piercing" has been somewhat constrained by the availability of alternative remedies. [232] The issue of piercing the corporate veil remains unresolved, with each case being determined based on a careful analysis of its specific facts. [233] The courts are generally reluctant to pierce the veil and will typically require evidence that a company has been misused to facilitate fraud, dishonesty, or other forms of improper conduct.[234] In such cases, courts find no principled or logical reason to refrain from piercing the veil.[235] In these circumstances, courts are justified in focusing on the substance rather than merely the form of corporate structures to uncover the true nature of the situation. When dealing with corporate groups, the application of agency

[227] *Botha v Van Niekerk1983* (3) SA 513 (W) 525.
[228] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A).
[229] *Hülse Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA).
[230] *Hülse Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA) para 1346.
[231] Piet Albertus Delport, 'Henochsberg on the Companies Act 71 of 2008' (2011) THRHR 82.
[232] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83; *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43; *Chemfit Fine Chemicals (Pty) Ltd t.a SA, Premix v Maake and Others* [2017] ZALMPPHC 27; *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
[233] *Ex Parte Gore and Others Nno* 2013 (3) SA 382 (WCC) A 2013 (3) SA.
[234] *Ex Parte Gore and Others Nno* 2013 (3) SA 382 (WCC) A 2013 (3) SA.
[235] *Ex Parte Gore and Others Nno* 2013 (3) SA 382 (WCC) A 2013 (3) SA.

principles is often preferred over veil piercing, unless it can be demonstrated that a subsidiary operates as a façade or sham entity. [236] The approach taken towards corporate groups tends to be inconsistent; however, there is a noticeable inclination towards a conservative interpretation. [237]

The "unconscionable injustice test' formulated in *Botha v Van Niekerk* is not required; it is too rigid in nature.[238] Fleming J, in delivering the majority judgment, established the criterion of "unconscionable injustice test" for the purpose of piercing the corporate veil. He articulated that limited liability, which is fundamental to incorporation, necessitates compelling grounds before this distinctive feature can be disregarded. A court may only determine personal liability when it is evident that the other party has endured an unconscionable injustice due to actions that would be deemed clearly improper by a reasonable person. Simply put, the existence of mere equity is insufficient to warrant such a finding of liability.[239]

Nevertheless, the test in *Botha v Van Niekerk* determined that piercing should be decided on allowing the facts of each case to have the dominant purpose.[240] If another remedy exists, it should not necessarily preclude anyone from piercing the veil.[241] As a general rule, if a person has more than one legal remedy at their disposal, they can select any of them and are not obliged to pursue one rather than the other.[242] Nonetheless, since separate legal personality is at the "very core of a company's reason for existence", piercing occurs in exceptional circumstances, and much weight is put on the consideration of policy and judicial judgment.[243] For that reason, in light of finding an equilibrium between the policies in favour of separate legal personality and the policies justifying piercing the veil, piercing will be achieved constructively.[244]

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[236] *Ex Parte Gore and Others Nno* 2013 (3) SA 382 (WCC) A 2013 (3) SA, *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A).
[237] *Ex Parte Gore and Others Nno* 2013 (3) SA 382 (WCC) A 2013 (3) SA.
[238] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) para 37.
[239] *Botha v Van Niekerk* 1983 (3) SA 513 (W) para 523-525.
[240] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) para 37.
[241] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) para 37.
[242] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) para 37.
[243] *ADT Security (Pty) Ltd v Botha and Others* [2010] ZAWCHC 563.
[244] *Glazer v Commission* 431 So. 2d 752 (La.1983)

Although South African courts have not formulated a consistent principle, they have certainly indicated a tendency.[245] Courts have shown appreciation that a company's separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted.[246] For the first time in South African company law, on 1 May 2011, a statutory equivalent of piercing the veil became effective.[247] The Companies Amendment Act 3 of 2011 introduced such a change.[248] Section 20(9) of the 2008 Act explicitly empowers the courts to pierce the veil in instances where if, on application by an interested person or in any proceedings in which a company is involved, a court finds the incorporation, use, or any act by or on behalf of the company, constituted an unconscionable abuse of the juristic personality of the company as a separate entity.[249] The consequence of the provision is that a company may be deemed not to be a juristic person in respect of any rights, obligations or liabilities of the company, of a shareholder of the company, or in the case of a non-profit company, a member of the company, or another person specified in the declaration.[250] The courts specify these consequences by declaration.[251] In addition, the court can make any further order it considers appropriate to give effect to the declaration contemplated in section 20(9)(a).[252]

When section 20(9) became operative, the scope of the provision resulted in considerable misunderstanding, and consequently, appropriate interpretation was required.[253] The questions to be answered were mainly: the meaning of "unconscionable abuse"; whether section 20(9) overrides the common law instances of piercing the corporate veil; whether piercing the veil is still to be regarded as an extraordinary remedy that may be used only as a last resort; and who is an "interested person" in terms of section 20(9).[254]Therefore, notwithstanding such progression,

245 *ADT Security (Pty) Ltd v Botha and Others* [2010] ZAWCHC 563 para 17.
246 *ADT Security (Pty) Ltd v Botha and Others* [2010] ZAWCHC 563 para 16-17.
247 Section 20(9) of the Companies Act 71 of 2008.
248 Section 13(d) of the Companies Amendment Act 3 of 2011.
249 Section 20(9) of the Companies Act 71 of 2008.
250 Section 20(9)(a) of the Companies Act 71 of 2008.
251 Section 20(9) of the Companies Act 71 of 2008.
252 Section 20(9)(b) of the Companies Act 71 of 2008.
253 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) para 26.
254 Rehana Cassim, 'Hiding behind the veil' (2013) De Rebus 32 at 35.

there existed much confusion. However, in *Ex Parte Gore and Others Nno*,[255] the Western Cape High Court provided valuable insight into the questions raised above.[256]

2.4.2.1. *EX PARTE GORE AND OTHERS NNO* – INTERPRETATION OF SECTION 20(9)

The leading case regarding the interpretation of section 20(9) is established in *Ex parte Gore and Others NNO* (hereinafter referred to *Gore* case).[257] The case signified the first time in which a judgement on section 20(9) was handed down, and as such, was much anticipated by the legal and business community.[258] *Gore* case dealt with the piercing of the corporate veil in terms of company groups, consisting of one holding company and its various subsidiaries (forty-one companies in total).[259] The issue was whether the court should pierce the corporate veil in a group of companies conducted in a manner that maintained no distinguishable corporate identity between the various constituent companies in the group.[260]

In *Gore* case,[261] the "King Group" encompassed all forty-one companies and was controlled by the holding company, King Financial Holdings Limited (KFH).[262] The King Brothers were directors of KFH, and the applicants were the liquidators of the King Group.[263] Since the King Brothers were directors of KFH and majority shareholders of the King Group, they were able to exercise complete control.[264] As a business, the King Group provided financial assistance through marketing investments for immovable and residential commercial property.[265] However, the affairs of the King Group were conducted so that there was no distinguishing between the companies, thus negating their corporate personality.[266] The court court's findings were that the entire group operated as one entity, and the King Brothers had treated all their companies as one.[267] In other words, "the disregard by the King Brothers of the

[255] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC).
[256] Rehana Cassim, 'Hiding behind the veil' (2013) De Rebus 32 at 35.
[257] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC).
[258] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC).
[259] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 8.
[260] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 5.
[261] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 6.
[262] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 6.
[263] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 7.
[264] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC).
[265] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 7.
[266] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 8.
[267] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 8-15.

separate legal personalities of the companies in the King Group was so extensive as to impel the conclusion that the King Group was, in fact, a sham".[268]

Under the provisions of section 20(9)(b) of the 2008 Act, a court may declare that a company is deemed not to be a juristic person in respect of any right, obligation or liability of the company; a subsection which affords the widest powers of consequential relief.[269] The court in *Gore* stated that an order made in terms of section 20(9)(b) will always have the effect of fixing the right, obligation or liability in issue of the company somewhere else.[270] The court found that the right involved in this matter was the property held by the subsidiary companies in the King Group, and the obligation or liability was that which any of them might actually have to account for and make payment to the investors.[271]

Consequently, the court ordered that the subsidiary companies, also known as the King Companies (consisting of 40 in total), except for KFH, were deemed not to be juristic persons in respect of any obligation by such companies to the investors.[272] The court further held that the King companies were to be regarded as single entities.[273] Their separate legal existence was ignored, and the holding company, KFH, was treated as if it were the only existing company.[274] In addition, the court made a further order that the applicants (other than the liquidators of KFH) were directed to transfer all monies that might remain in each of the King companies after payment of all liquidation costs, bondholders' claims and claims other than claims by investors to the liquidators of KFH to be administered as a single pool of assets available for distribution to the investors.[275]

Regarding the interpretation of section 20(9), the *dicta* of the court answered the questions raised above.[276] First, an important question arose: does section 20(9) override the common law position on piercing the veil?[277] It was contended that section

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[268] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 8-15.
[269] Section 20(9)(b) of the Companies Act 71 of 2008.
[270] Section 20(9)(b) of the Companies Act 71 of 2008.
[271] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC).
[272] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 37.1.1 & 37.1.3.
[273] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 37.1.1.
[274] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 37.1.2.
[275] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 37.1.2.
[276] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC).
[277] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 31.

20(9) does not override the common law instances of piercing the corporate veil.[278] As well as common law principles can serve as useful guidelines in interpreting section 20(9).[279] It was subsequently affirmed that in terms of the 2008 Act, the provisions (as a whole) suggest that when the requirements of section 20(9) are not relied upon, the common law remedy would most likely apply, and therefore, there is no express indication that the legislature intends to displace the common law.[280] Such sentiments have now been confirmed true.[281] As discussed above, the common law does not provide a closed list of circumstances where a court can pierce the veil.[282] Indeed, regarding the interpretation of section 20(9), the court was “unable to identify any discord between it and the approach to piercing the corporate veil evinced in cases decided before it came into operation”.[283] Therefore, section 20(9) will not override but rather supplement the common law.[284] Hence, the principles developed at common law will serve as useful guidelines, not only in interpreting section 20(9) but in determining what circumstances constitute an unconscionable abuse.[285] Accordingly, the language of section 20(9) is set in very wide terms to include various circumstances and bases and to promote the purpose of the 2008 Act.[286] As a result, courts now have a general discretion to pierce the corporate veil through a statutory remedy.[287]

Next, what is ‘unconscionable abuse’? to provide context, in South African law, piercing the veil by means of the statute is not new. The Companies Act 69 of 1984, provides that piercing the veil of a closed corporation will occur when there is a gross abuse of the legal personality of the closed corporation as a separate entity.[288] Although worded similarly to section 20(9), gross abuse will occur in rare circumstances, whereas unconscionable abuse is intended (by the legislator) to create a more inclusive ground.[289] For that reason, ‘unconscionable abuse’ is a lesser form

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[278] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 31.
[279] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 31.
[280] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 31.
[281] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 34.
[282] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 34.
[283] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 34.
[284] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 34.
[285] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 34.
[286] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC).
[287] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 32-34.
[288] Section 65 of the Companies Act 69 of 1984, *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 27-30.
[289] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 34.

of abuse than 'gross abuse'.[290] Keeping that in mind, legislatively, the concept of unconscionability was introduced into South African law when 'unconscionable' and 'unconscionable conduct' was defined in the Consumer Protection Act 68 of 2008.[291] Subsequently, since the implementation of section 20(9), it has been difficult to clarify the meaning of 'unconscionable abuse'.[292] Since unconscionable abuse is not defined in the 2008 Act, it has further contributed to the vagueness.[293] This is because no guidance was provided as to what constitutes an 'unconscionable abuse' in terms of section 20(9).

However, due to judicial interpretation, it can be said that unconscionable abuse constitutes the use of, or an act by, a company to commit fraud or for a dishonest or improper purpose, or where the company is used as a device or façade to conceal the facts.[294] This was proven in *City Capital SA Property Holding Ltd v Chavonnes Badenhorst St Clair Cooper NO*,[295] where the facts permitted the Supreme Court of Appeal to pierce readily.[296] The court echoed their stance on piercing the veil as five companies in liquidation were declared a single entity (the Dividend Investment Scheme).[297] The Dividend Invest Scheme, which was part of an unsustainable syndication scheme, engaged in reckless trading and defrauded members of the public who made large investments (far more than the value of property) in relation to a shopping centre in Pretoria, South Africa.[298] The court had no qualms in justifying piercing the veil.[299]

Following, is section 20(9) a remedy of last resort? Considering the haphazard approach in common law, where there exist conflicting judgments on the matter, the

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[290] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 34.
[291] Consumer Protection Act 68 of 2008.
[292] *City Capital SA Property Holding Ltd v Chavonnes Badenhorst St Clair Cooper NO* [2017] ZASCA para 26.
[293] *City Capital SA Property Holding Ltd v Chavonnes Badenhorst St Clair Cooper NO* [2017] ZASCA 177 para 26.
[294] *City Capital SA Property Holding Ltd v Chavonnes Badenhorst St Clair Cooper NO* [2017] ZASCA para 29.
[295] *City Capital SA Property Holding Ltd v Chavonnes Badenhorst St Clair Cooper NO* [2017] ZASCA.
[296]*City Capital SA Property Holding Ltd v Chavonnes Badenhorst St Clair Cooper NO* [2017] ZASCA para 29.
[297] *City Capital SA Property Holding Ltd v Chavonnes Badenhorst St Clair Cooper NO* [2017] ZASCA para 29.
[298] *City Capital SA Property Holding Ltd v Chavonnes Badenhorst St Clair Cooper NO* [2017] ZASCA para 29.
[299] *City Capital SA Property Holding Ltd v Chavonnes Badenhorst St Clair Cooper NO* [2017] ZASCA para 29.

court in *Gore* emphatically confirmed that piercing the veil is not a remedy of last resort because the context of section 20(9) “mitigates against an approach that it should be granted only in the absence of any alternative remedy”.[300]

Lastly, in section 20(9), who is an “interested person”?[301] an “interested person” is permitted to bring an application to court, requesting the court to deem a company not to be a juristic person, but no definition is provided in the 2008 Act, and therefore, it was unclear what the scope and extent of whom that person is.[302] Nevertheless, the court in *Gore* had no mystique attached to the term ‘interested person’ and relied on the meaning given in the well-established case of *Jacobs en ‘n Ander v Waks en Andere*.[303] Also, the rights provided in the Bill of Rights, especially section 38, will apply if the facts happen to implicate that right.[304]

As evident, the case dealt with piercing the corporate veil in company groups, however, with additional legislative interpretation to consider. Section 1 of the 2008 Act defines a “group of companies” as a “holding company and all its subsidiaries”; with each company in the group obtaining its own separate legal personality upon creation, either as a holding company or subsidiary.[305] This entails that the liability for the actions of each company within the group is solely the actions of each individual company. It does not necessarily mean that one must treat the group as a single economic unit. The court acknowledged the difficulty involved when courts are faced with piercing the corporate veil, especially in the context of company groups where “the courts have been divided in their approach of whether, and in what circumstances, the corporate veil may be pierced so that the group is in fact treated as a single entity as opposed to a collection of different corporate entities”.[306]

Since South African courts adopted either a liberal approach or a conservative approach to common law, the dictum set out in *Adams v Cape Industries plc* set a strong precedent whereby South African courts accepted a conservative approach to piercing the corporate veil in company groups.[307] In his judgment, Binns-Ward J

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[300] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC).
[301] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 35
[302] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 35.
[303] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 35.
[304] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 35.
[305] Section 1 of the Companies Act 72 of 2008.
[306] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC).
[307] *Adams v Cape Industries plc* [1990] Ch 433.

articulated several principles concerning section 20(9).[308] He emphasised that piercing the veil as a remedy can be applied when the circumstances of a case justify it and should not be viewed as an exceptional measure. Additionally, the term "unconscionable abuse" expands the scope of the remedy, as it implies a less rigorous standard than "gross abuse".[309] The expression "unconscionable abuse of the juristic personality" includes common law notions such as "sham", "device", and "stratagem", which have traditionally been associated with veil-piercing cases, but it may also encompass broader interpretations.[310] The remedy is accessible "whenever the improper use of the concept of juristic personality adversely affects a third party in a way that should not be reasonably accepted". Furthermore, the statute is intended to be "supplemental" to common law rather than a replacement, and the remedy remains available even in the presence of alternative remedies.[311]

As suggested by a renowned South African author, Cassim,[312] it is contended that the court in *Gore* adopted a conservative approach to piercing the veil for the reason that the King Group was a sham, and due to that deceitful arrangement, brought the affairs of the King Group within the ambit of 'unconscionable abuse' under section 20(9) of the 2008 Act.[313]

In the *Gore* case, the court did not hesitate to pierce the corporate veil because it embraced South Africa's broad statutory position and was empowered to do so under the law.[314] Further, Binns-Ward J exhibited a wide judicial interpretation of section 20(9) of the 2008 Act.[315] Therefore, regardless of enjoying judicial tools to pierce the veil, the attitude of courts can particularly determine whether piercing is restrictive or wide in nature. By denoting the impact that statute has, the sheer importance and magnitude of a statutory provision to piercing the corporate veil is clear to see.[316] This means that although *Gore* applied traditional and conservative English common law concepts, it ultimately (and as a basis) still adopted a wide approach to piercing the

[308] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 34.
[309] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 34.
[310] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 34.
[311] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 34.
[312] Rehana Cassim' 'Hiding behind the veil' (2013) De Rebus 32 at 37.
[313] Rehana Cassim' 'Hiding behind the veil' (2013) De Rebus 32 at 37.
[314] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC).
[315] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 34-37.
[316] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 34.

veil by willingly applying the wide powers conferred by section 20(9).[317] Due to its fundamental guidance, South African courts will somewhat rely on English law developments on piercing. However, it must be logical and based on the overarching framework of section 20(9).

The *Gore* case did not only mark the first instance where the statutory remedy of section 20(9) was interpreted, but it sent a clear warning to directors, shareholders and other controllers that the veil will be pierced when unconscionable abuse of separate legal personality occurs.[318] Indeed and conclusively, the courts would apply the statutory remedy with less reticence than the common law remedy.[319]

Before *Gore case*, there was mounting uncertainty and confusion regarding section 20(9) of the 2008 Act. To recap, they were namely: the meaning of unconscionable abuse, whether common law piercing overrides statutory piercing, who is an 'interested person' and is piercing the veil still an exceptional remedy which is used as a last resort.[320] However, *Gore* provided valuable and extensive insight into the issues that South African courts face.[321] When courts rely on section 20(9), considering the sphere of unconscionability, it requires both a procedural ad substantive element.[322] This clearly shows how South African courts, when given the circumstance, are willing and able to pierce the veil.

As confirmed in the *Cape Pacific* case,[323] the courts are willing to disregard the separate legal personality of a company when there is evidence of fraud or improper use of the corporate structure. This case illustrates the court's willingness to apply section 20(9) in a manner that balances legal certainty with justice.[324] The *Lipschitz*[325] *case* as mentioned above reinforces the principle that a company's assets are separate from those of its shareholders. The court held that the corporate veil could be pierced in cases of improper conduct, thereby supporting the notion that section

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[317] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 24.
[318] Rehana Cassim, 'Hiding behind the veil' (2013) De Rebus 32 at 37.
[319] Rehana Cassim, 'Hiding behind the veil' (2013) De Rebus 32 at 37.
[320] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 33-35.
[321] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 30-37.
[322] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC).
[323] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A).
[324] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A).
[325] *Lipschitz and Another NNO v Wolpert and Abrahams* [1977] ZASCA 20.

20(9) serves as a tool for holding directors and shareholders accountable for their actions that harm third parties or the company itself.[326] The *Sasol* case above, which dealt with the issue of whether the corporate veil could be pierced due to the actions of the company's directors, and the court ruled that the separate legal personality of the company could be disregarded if it was used to perpetrate a fraud or if the directors acted in bad faith, further illustrates the application of section 20(9) in ensuring that corporate structures are not misused to the detriment of creditors or other stakeholders.[327]

Therefore, section 20(9) of the 2008 Act allows for the piercing of the corporate veil even when a company has been formed for a legitimate purpose, if it is subsequently misused. This is aligned with the common law position on the matter. Furthermore, section 20(9) and other provisions of the 2008 Act work together to ensure that when third parties suffer damages due to contraventions of the 2008 Act, there is a stronger motivation for the courts to pierce the corporate veil and assign liability to the appropriate parties.

Chapter 3 below explores the duties of directors to the company as defined by common law and the 2008 Act, as well as whether these duties extend or are owed to shareholders.

2.5 CONCLUSION

One of the fundamental principles of company law is that a company possesses a separate legal personality distinct from its directors and shareholders. Consequently, directors and shareholders are generally not liable for the company's debts, and vice versa. Similarly, if a wrong is committed against the company, the company has the right to pursue a claim against the wrongdoer. This principle underpins the concept of limited liability, which fosters investor confidence. However, since a company is a legal fiction, there are situations – such as when a company operates as a sham or is incorporated for illegal, fraudulent, or improper purposes – where courts may lift or pierce the corporate veil. This action disregards the company's juristic personality and may impose liability on the directors behind it.

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[326] *Lipschitz and Another NNO v Wolpert and Abrahams* [1977] ZASCA 20.
[327] *Sasol Oil (Pty) Ltd v Nationwide Poles* CC 2006 (3) SA 400 (CAC).

Under common law, piercing the corporate veil is considered an extreme remedy, used only as a last resort. However, section 20(9) of the 2008 Act has codified the doctrine of piercing the veil, serving as a supplement to common law. This provision challenges the notion that the remedy should only be applied in exceptional circumstances. Nonetheless, a court will not invoke section 20(9) unless the "unconscionable abuse" pertains to a specific right, liability, or obligation.

Section 20(9) of the 2008 Act aims to clarify and expand upon common law by addressing issues of fraud, dishonesty, and improper conduct. I appreciate the introduction of the 2008 Act and the decision in the *Gore* case for how they apply and interpret the concept of piercing the corporate veil. The *Gore* case, in particular, helped to broaden the understanding of section 20(9) and gave it more importance and meaning in legal discussions. This is clear from the way section 20(9) is written, as it uses broad language that considers a wide range of situations. One significant benefit of having this law is that it offers more certainty and clarity. It seems that the lawmakers intended to support the idea of piercing the corporate veil, but it is unfortunate that there have not been many recent court cases interpreting section 20(9) since *Gore case*. In South Africa, the approach to piercing the corporate veil is more flexible compared to many other countries. South Africa officially recognises piercing the veil as a legal principle rather than just a general idea. Additionally, it provides guidelines that align with South Africa's open and constitutional society, highlighting various corporate governance issues.

Thus, in cases where shareholders seek to hold directors liable for damages incurred, they may request the court to pierce the corporate veil of the company, either under common law or section 20(9), to examine the actions (or omissions) of those shielded by it. The courts will exercise caution in this regard, intervening only when the specific circumstances of each case warrant it, after considering the infringed rights, the nature of the unconscionable abuse, and relevant policy considerations.

CHAPTER 3: COMMON LAW AND STATUTORY FIDUCIARY DUTIES OF COMPANY DIRECTORS

3.1. INTRODUCTION

The previous chapter established that a fundamental principle of company law is the separate legal personality of a company, distinct from its directors and shareholders.[328] Consequently, directors and shareholders are generally not liable for the company's debts, and vice versa. Similarly, the company, not its shareholders, typically has the right to pursue claims for wrongs committed against it. This principle underpins the concept of limited liability, fostering investor confidence.[329] However, because a company is a legal fiction, courts may lift or pierce the corporate veil in situations where a company operates as a sham or is incorporated for illegal, fraudulent, or improper purposes.[330] This disregards the company's legal personality and may impose liability on the directors, who are empowered to manage the company's affairs.[331]

Given the powers of directors, the immediate question is whether and how the 2008 Act makes directors accountable for their exercise, a matter relevant to shareholder protection. Power without accountability invites abuse; therefore, those with greater power must be held responsible. It is generally accepted that "with great power comes great responsibility". [332] Thus, this chapter will focus on the duties imposed on directors and the measures in the 2008 Act designed to make them accountable to shareholders.

This discussion is significant because, although fiduciary duties and the duty to act with care and skill are owed to the company, arguments have been made that directors' duties may also extend to the company's shareholders, who ultimately benefit from its profits.[333] Therefore, understanding to whom directors' duties are owed is crucial, as it influences who has locus standi to initiate legal actions for the enforcement of these duties and to hold directors accountable in cases of breach.

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[328] *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) para 461-463.
[329] *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530.
[330] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 34.
[331] *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC) para 34.
[332] *Australian Securities and Investments Commission v Healey* [2011] FCA 717 para 14.
[333] Pergamon Press Ltd v Maxwell [1970] 2 All ER 809 para 814.

3.2. DUTIES OF THE DIRECTORS UNDER COMMON LAW

Directors play a pivotal role in corporate governance, entrusted with substantial authority to manage the company for the benefit of shareholders and stakeholders.[334] However, this authority is limited by the powers outlined in the company's governing documents and their fiduciary duties. These duties are categorised into fiduciary duties and the duty to exercise reasonable care, skill, and diligence. The latter, based on *Aquilian* liability, arises from delictual (negligent) conduct.[335]

A fiduciary relationship is rooted in trust, where a fiduciary acts in the best interests of another.[336] This principle was confirmed in *Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd*,[337] which established that directors owe fiduciary duties to the company they govern.[338] However, these duties do not extend to the company's subsidiaries. Furthermore, common law recognises that both executive and non-executive directors share the same fiduciary responsibilities.[339] In *Howard v Herrigel and Another NNO*,[340] Goldstone JA stated:

> “In my opinion it is unhelpful and even misleading to classify company directors as 'executive' or 'non-executive' for purposes of ascertaining their duties to the company or when any specific or affirmative action is required of them. No such distinction is to be found in any statute. At common law, once a person accepts an appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf. That is the general rule and its application to any particular incumbent of the office of director must necessarily depend on the facts and circumstances of each case”.

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334 Irene-Marié Esser and Piet Delport,’The Protection of Stakeholders: The South African Social and Ethics Committee and the United Kingdom’s Enlightened Shareholder Value Approach: Part 1’ (2017) De Jure 97 At 98-99.
335 *Ex parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T); *Du Plessis NO v Phelps* 1995 (4) SA 165 (C).
336 *In re Equitable Fire Insurance Co Ltd* [1925] 1 Ch 407 (CA) para 427-429.
337 *Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C).
338 *Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C).
339 Hendrik Stephanus Cilliers, ‘Corporate law’ (Butterworths 2000).
340 *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A).

3.2.1. FIDUCIARY DUTIES

Directors must act honestly, in good faith (*bona fide*), and in the company's best interests.[341] While good faith and acting in the company's best interests are distinct obligations, courts often do not consistently apply this distinction.[342] Directors' fiduciary duties include, but are not limited to, avoiding conflicts of interest, not exceeding their authority, exercising powers with discretion, using powers for their intended purpose, and acting in good faith.[343]

3.2.1.1. DUTY TO AVOID CONFLICT OF INTEREST

Directors have a fundamental duty to avoid conflicts of interest and must act in good faith (*bona fide*)[344] and in the company's best interests.[345] This obligation is strictly enforced, and directors may be compelled to surrender any personal gains, even from hypothetical conflicts.[346] In *Treasure Trove Diamond v Hyman*,[347] the court held that issuing shares to gain control, rather than raise capital, does not serve the company's best interests. Conflicts of interest typically involve interference with a company's economic or corporate opportunities, or actions (omissions) contrary to the "secret profit rule".[348]

The "secret profit rule" prohibits directors from profiting from their position without the company's knowledge and consent.[349] Directors must disclose any personal financial interests they or related parties have in matters before the board and recuse themselves from related discussions and decisions. Failure to do so can render the transaction voidable unless shareholders subsequently ratify it or a court declares it

[341] Stephanus Cilliers, 'Corporate law' (Butterworths 2000) 141.
[342] *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) para 18, *Fabrics Ltd v Millman NO* 1972 (4) SA 592 (A) para 596.
[343] *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) para 18, *Fabrics Ltd v Millman NO* 1972 (4) SA 592 (A) para 596.
[344] *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173, *Phillips v Fieldstone Africa (Pty) Ltd* (2004) 1 All SA 150 (SCA).
[345] *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) para 627.
[346] *Robinson v Randfontein Estates Gold Mining Co. Ltd* 1921 AD 168.
[347] *Treasure Trove Diamond v Hyman* 1928 AD 464.
[348] Maleka Femida Cassim,'Da Silva v C H Chemicals (Pty) Ltd: Fiduciary Duties of Resigning Directors' (2009) 126 SALJ 61-70.
[349] Raymond Charles Beuthin and Sergio Mario Luiz, Beuthin's Basic Company Law (Butterworths 2000) 198-199.

valid.[350] Directors are held to high standards of conduct and must carefully adhere to these requirements. Disclosure alone is insufficient; directors must also consider whether the conflict is manageable or whether they should resign.[351] Moreover, directors are obligated to identify and secure economic opportunities for the company, and the "corporate opportunity rule" prevents directors from appropriating opportunities that rightfully belong to the company, whether for their own or another's benefit, even after resignation. Profits generated in such circumstances are considered acquired on behalf of the company, allowing the company to seek restitution unless a majority of shareholders agree to the director retaining the benefits.[352]

The "secret profit rule" further prohibits a director from gaining any profit—beyond monetary benefits—resulting from their position unless such profit is obtained or kept with the company's knowledge and consent. Directors must report all profits earned during their tenure and while performing their duties.[353] Additionally, they are not permitted to serve as directors for competing companies, as this would create a conflict of interest.[354] In *Regal (Hastings) v Gulliver*[355] Lord Macmillan held that what had to be established was:

> "(i) That what the directors did was so related to the affairs of the company that it can properly be said to have been done in the course of their management and in utilisation of their opportunities and special knowledge as directors; and (ii) that what they did resulted in profit to themselves".[356]

Lord Macmillan argued that the necessary conditions were met, which consequently prevented the directors from keeping any personal profits gained from the transaction.[357]

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[350] *Magnus Diamond Mining Syndicate v Macdonald and Hawthorne* 1909 ORC 65 para 81-82 *and Big Catch Fishing Tackle Proprietary Limited and Others v Kemp and Others* [2019] ZAWCHC para 32.
[351] *African Claim & Land Co Ltd v Langermann* 1905 TS 494 para 505; *Robinson v Randfontein Estates Gold Mining Co. Ltd* 1921 AD 168 para 179-180, 200-202 and *Kruger Investments Group Limited and Another v Nuberry Holdings Limited and Others* [2015] ZAWCHC 159 para 37–40.
[352] *Robinson v Randfontein Estates Gold Mining Co.* Ltd 1921 AD 168 para 268.
[353] *Parker v McKenna* (1974) LR 10 Ch App 96 para 118.
[354] *Sibex Construction (SA) (Pty) Ltd and Another v Injectaseal CC* 1988 (2) SA 54 (T*), Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) para 198-199.
[355] *Regal (Hastings) v Gulliver* [1967] 2 AC 134 n (HL).
[356] *Regal (Hastings) v Gulliver* [1967] 2 AC 134 n (HL).
[357] *Regal (Hastings) v Gulliver* [1967] 2 AC 134 n (HL).

3.2.1.2. DUTY NOT TO EXCEED THE LIMITATION OF THEIR POWER

A director must refrain from acting illegally, beyond their powers (ultra vires), or dishonestly. Directors are required to perform their duties within the confines of the company's Memorandum of Incorporation, applicable company law, common law, other relevant legislation, and directives established by shareholders through special resolutions. [358] When exercising their powers, a director must ensure that they do not engage in actions or transactions that exceed the company's capacity. [359] In *Ashbury Railway Carriage & Iron Co Ltd v Riche*[360] and *Rolled Steel Products (Holdings) Ltd v British Steel Corporation*[361]the principle was established such:

> "…objects and purposes foreign to, or inconsistent with, the memorandum of association are ultra vires of the corporation itself".[362]

Directors are considered to breach their fiduciary duty if they exercise powers that do not exist or if their actions exceed the authority granted to them.[363] It is immaterial whether they believe their actions serve the best interests of the company. The central question regarding proper purpose is whether the conduct is inconsistent with the appropriate fulfillment of their responsibilities.[364] All relevant circumstances must be considered, including the director's awareness and the corporation's financial condition. The court ultimately determines whether an action was appropriate in the specific context at the time. Directors are required to exercise their powers judiciously. For instance, when refusing to register shares, directors must consistently act in good faith and in the best interests of the company.[365] Such actions require a formal resolution, as mere inaction is insufficient.[366] Notably, the 2008 Act does not differentiate between executive and non-executive directors in its definition of a

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[358] AraújoJorge, 'Corporate Governance Regulation in South Africa" in Campbell D and Woodley S (ed) Trends and Developments in Corporate Governance' (The Comparative Law Yearbook of International Business 2004) at 17-18.
[359] Stephanus Cilliers, 'Corporate law' (Butterworths 2000) 133-144.
[360] *Ashbury Railway Carriage & Iron Co Ltd v Riche* 1875 LR 7 HL 653 694.
[361] *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* 1986 Ch 246 (CA) 295- 296, 303-307.
[362] *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* 1986 Ch 246 (CA) 295- 296, 303-307; *Ashbury Railway Carriage & Iron Co Ltd v Riche* 1875 LR 7 HL 653 694.
[363] *Cullerne v The London & Suburban General Permanent Building Society 1890* 25 QB 485 (CA) 488, 490; *Sparks & Young Ltd v John Hoatson* 1906 27 NLR 634, 642.
[364] *Bester v Wright; Bester v Mouton; Bester v Van Greunen* 2011 2 All SA 75 (WCC).
[365] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty)* 2014 5 SA 179 (WCC).
[366] Piet Delport, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis South Africa 2016).

director under both statutory and common law. This implies that both categories of directors are held to the same standards in fulfilling their duties.[367]

3.2.1.3. DUTY TO EXERCISE UNFETTERED DISCRETION AND PROPER PURPOSE

Directors have a fiduciary duty to exercise independent judgment and apply their minds objectively to the company's business.[368] In other words, a director must not act as a mere 'puppet' for another party.[369] Directors are also prohibited from entering into contracts or agreements with each other to act in a predetermined manner, such as committing to vote a certain way at future board meetings.[370] Even when a director is appointed to represent specific shareholders, such as a nominee director, they remain obligated to act in the best interests of the company. This duty may override the interests of those who nominated them if the two conflict.[371]

A director must ensure that they exercise their powers solely for the purpose for which they were granted, specifically for a "proper purpose".[372] Consequently, directors should utilise their powers for the benefit of the company rather than for their own personal interests. In *Piercy v S Mills & Co Ltd*,[373] Justice Peterson articulated the following perspective:

> "Directors are not entitled to use their powers to issue shares merely to maintain their control or that of their associates over the company's affairs, or solely to undermine the wishes of the existing majority of shareholders. This is precisely what has occurred in the present case. I have no concern with the merits of the dispute between the directors and the plaintiff. The plaintiff and his associates held a majority of the company's shares, and they were entitled, as long as that majority remained, to have their views prevail in accordance with the company's regulations. It was not permissible for the directors, in order to convert a minority into a majority and solely to counter the wishes of the existing majority, to issue the shares that are in dispute in this action".

Courts are generally reluctant to interfere with the internal affairs of companies and prefer not to "act as a kind of supervisory board over decisions within the powers of

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[367] Piet Delport, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis South Africa 2016).
[368] Stephanus Cilliers, 'Corporate law' (Butterworths 2000) 141-144.
[369] *Fulham Football Club Ltd v Cabra Estates plc* [1994] 1 BCLC 363.
[370] Farouk Cassim, 'Contemporary Company Law' (Juta and Company 2022) 480.
[371] *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 (4) SA 156 (W) para 163.
[372] Stephanus Cilliers, 'Corporate law' (Butterworths 2000) 141-142.
[373] *Piercy v S Mills & Co Ltd* 1920 1 Ch 77.

the management honestly arrived at". However, judicial intervention may occur when directors have acted dishonestly.[374] In *Extrasure Travel Insurance Ltd v Scattergood*,[375] it was held that evidence of a director's dishonesty or awareness of pursuing an unauthorised collateral purpose is not required. Instead, the court should (i) Identify the power being challenged, (ii) determine the proper purpose for which the power was conferred to the director, (iii) Investigate the substantial purpose for which the power was exercised, (iv) and decide whether the purpose was indeed proper.[376]

This approach allows courts to assess whether a director's actions, while within their powers, were motivated by an improper purpose that undermines the company's interests. By focusing on the substantial purpose rather than the director's state of mind, the court can objectively evaluate if the power was exercised for its intended purpose.[377] While courts are reluctant to intervene in management decisions made honestly, they will do so when presented with evidence that a director's actions, though within their authority, were driven by an improper motive that conflicts with the company's best interests. The *Extrasure Travel Insurance Ltd v Scattergood* test provides a framework for courts to make this determination.[378]

3.2.1.4. DUTY OF CARE, SKILL AND DILIGENCE

In fulfilling their functions and duties, directors must act with a certain level of skill and diligence. South African common law takes a relatively conservative approach to the duty of care and skill, [379] expecting directors to exercise the care and diligence comparable to that of a reasonable person managing their own affairs. [380] It is important to distinguish between 'care' and 'skill,' as they have different meanings. 'Skill' pertains to the knowledge, technical competence, or experience a director possesses, which varies from individual to individual and is thus subjectively

[374] *Howard Smith Ltd v Ampol Petroleum* Ltd 1974 AC 821 para 832E-F.
[375] *Extrasure Travel Insurance Ltd v Scattergood* [2003] 1 BCLC 598.
[376] *Extrasure Travel Insurance Ltd v Scattergood* [2003] 1 BCLC 598.
[377] *Extrasure Travel Insurance Ltd v Scattergood* [2003] 1 BCLC 598.
[378] *Extrasure Travel Insurance Ltd v Scattergood* [2003] 1 BCLC 598.
[379] Jean Jacques Du Plessis, 'A Comparative Analysis of Directors' Duty of Care, Skill and Diligence in South Africa and Australia' (2010) Acta Juridica 263.
[380] *Re Brazilian Rubber Plantations and Estates Ltd* (1911) 1 Ch 425 para 437.

assessed.[381] In contrast, 'care' refers to how that skill is applied, making it more amenable to objective evaluation. [382]

In the case of *Re City Equitable Fire Insurance Co Ltd*,[383] the court established three principles later referenced in *Fisheries Development Corporation of SA Ltd v Jorgensen*. [384] The principles articulated by Margo J can be summarised as follows:

> (a) The extent of a director's duty of care and diligence largely depends on the nature of the company's business and the obligations assigned to them. Consequently, the level of care required may differ between non-executive and executive directors. Non-executive directors are not typically expected to provide continuous attention to the company's affairs or attend every meeting. In contrast, executive directors are expected to focus on the day-to-day management of the company, thereby necessitating a higher standard of care.[385]
>
> (b) Directors are not required to possess specific business acumen, knowledge, expertise, or experience related to the company's operations. Instead, they are expected to exercise a degree of care and skill that an ordinary person would demonstrate in similar circumstances. However, they are not obligated to display a higher level of care and skill than what can reasonably be expected from someone with their knowledge and experience. [386]
>
> (c) When a director delegates certain duties to an official, they are justified in trusting that official to perform those duties honestly. Therefore, in the absence of any reasons to doubt, a director is entitled to rely on the judgment, advice, and information provided by management. [387] Nonetheless, they are required to exercise reasonable consideration in each instance.

Neville J articulated the courts' perspective on the duty of care and skill in *Re Brazilian Rubber Plantations and Estates Ltd*[388]as follows:

> "As long as directors act honestly, they cannot be held liable for damages unless they are found guilty of gross negligence. This statement regarding a director's liability lacks precision. Indeed, one cannot determine whether a director has been negligent, whether grossly or otherwise, without first establishing the extent of the duty that is alleged to have been neglected. A director's duty is defined as requiring them to act with a level of care that is reasonable given

[381] *Daniels v Anderson* (1995) 13 ACLC 614 (CA) NSW 665.
[382]Stephanus Cilliers, 'Corporate law' (Butterworths 2000) 142.
[383] *Re City Equitable Fire Insurance Co* [1925] Ch 407.
[384] *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 (4) SA 156 (W).
[385] *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 (4) SA 156 (W).
[386] Stephanus Cilliers, 'Corporate law' (Butterworths 2000) 149.
[387]Stephanus Cilliers, 'Corporate law' (Butterworths 2000) 149.
[388] *Re Brazilian Rubber Plantations and Estates Ltd* (1911) 1 Ch 425.

> their knowledge and experience. It is not necessary for a director to possess any special qualifications for their role. For instance, a director may manage a rubber company while being entirely ignorant of the rubber industry without incurring liability for any mistakes that may arise from such ignorance. However, if the director has knowledge of the rubber business, they are expected to leverage that knowledge when conducting the company's affairs. While a director is not obligated to take a specific role in the company's operations, any involvement they do undertake must be executed with reasonable care to ensure efficiency". [389]

Under common law, mere negligence or a mistake in judgment is insufficient to establish liability. [390] South African courts have adopted a relatively lenient stance in holding directors accountable for their duty of care and skill. [391] Directors who neglect their duty of care and skill may be held delictually liable to the company for any damages it incurs as a result of their actions. [392] Unlike fiduciary duties, which do not necessarily require proof of fault for liability to arise,[393] liability in this context is governed by the principles of *Lex Aquilia*. In the case of *Du Plessis NO v Phelps*,[394] Friedman J clarified that in addition to their statutory obligations, directors owe fiduciary duties to the company and a common law duty to exercise reasonable care in managing the company's affairs.[395] If a director fails to take reasonable care in managing the company's affairs, their liability is determined based on the principles of the *Lex Aquilia*.[396] The fundamental requirement for liability under the *Lex Aquilia* is fault – either intent (dolus) or negligence (culpa), which causes loss to the plaintiff.[397]

3.2.1.5. THE BUSINESS JUDGEMENT RULE

The business judgment rule limits directors' liability in assessing their duty of care and skill. This judicially created doctrine, originating in the United States, balances directors' duties with their right to make decisions on behalf of the company. It was

[389] *Re Brazilian Rubber Plantations and Estates Ltd* (1911) 1 Ch 425 para 436-437.
[390] *Re Brazilian Rubber Plantations and Estates Ltd* (1911) 1 Ch 425 para 436-437.
[391] Jean Kanamugire and Terence Vincent Chimuka,'The Directors' Duty to Exercise Care and Skill in Contemporary South African Company Law and the Business Judgment Rule' (2014) 5 Mediterr J Soc Sci 70 at 72.
[392] *In re City Equitable Fire Insurance Co Ltd* [1925] 1 Ch 407 (CA) para 427-429.
[393] *Symington v Pretoria-Oos Privaat Hospitaal Bedryf (Pty) Ltd* [2005] 4 All SA 403 (SCA).
[394] *Du Plessis NO v Phelps* 1995 (4) SA 165 (C).
[395] *Du Plessis NO v Phelps* 1995 (4) SA 165 (C).
[396] *Du Plessis NO v Phelps* 1995 (4) SA 165 (C).
[397] *Du Plessis NO v Phelps* 1995 (4) SA 165 (C).

developed to protect honest directors and officers from hindsight scrutiny of unsuccessful decisions and to encourage innovation and entrepreneurial activity. [398]

For the business judgment rule to apply, the following requirements must be met: (a) a business decision must have been made; (b) the decision was made in good faith, (c) the decision was made on an informed basis, and (d) the director had no conflicting financial interest. If these requirements are satisfied, the decision-maker may be exempted from liability, regardless of the outcome of their decision. The rule creates a presumption in favour of the board, shifting the burden of proof to the plaintiff to demonstrate that the director acted with gross negligence or in bad faith.[399] By providing this protection, the business judgment rule encourages directors to take calculated risks and make informed decisions in the company's best interests without fear of liability for honest mistakes. It recognises human fallibility and allows directors reasonable room for error in the complex task of managing a corporation.[400]

3.3. DUTIES OF THE DIRECTORS UNDER THE COMPANIES ACT 71 OF 2008

3.3.1. DUTY TO AVOID A CONFLICT OF INTEREST

The relevant sections of the 2008 Act that address directors' duties are sections 75 and 76, both of which relate to the obligation of directors to avoid conflicts of interest. This discussion focuses on section 76(2)(a), while section 75 will be addressed later in relation to the duty to disclose personal financial interests. Central to section 76(2)(a) is the directors' duty of loyalty and fidelity to the company, as well as their obligation not to profit personally from their position as directors. [401] Although it may initially seem that section 76(2)(a) aligns with the common law fiduciary duty to avoid conflicts of interest, it is important to recognise that the statutory duty is broader in scope. This is because the duty outlined in section 76(2)(a) is owed not only to the

[398] *Arson v Lewis* 437 A.2d 805 (Del. 1984).
[399] American Law Institute Principles of Corporate Governance and Structure: Restatement and Recommendations (1982), quoted by Lipton P and Herzberg A Understanding Company Law 19 ed (2018) at 393.
[400] Section 76(4)(a)(i)(iii) Companies Act 71 of 2008.
[401] *Phillips v Fieldstone* 2004(3) SA 465 (SCA) 479 para 31; Section 76(2)(a) of the Companies Act 71 of 2008.

company itself but also to its wholly owned subsidiary; in contrast, under common law, a director of a holding company does not have a fiduciary duty to its subsidiary. [402]

3.3.2. GENERAL DUTY OF DISCLOSURE

Section 76(2)(b) imposes a general duty on directors to disclose to the board any information material to the company. This provision restates the common law fiduciary duty to disclose material information, particularly the fair dealing rule.[403] The fair dealing rule requires a director to reveal any information they possess that those acting for the company do not have if it is likely to influence the company's decision on a particular matter.[404] Section 76(2)(b) is broadly worded, obligating a director to disclose any information that comes to their attention. If interpreted expansively, section 76(2) is akin to the common law fiduciary duty to avoid conflicts of interest. [405] This provision would, therefore, encompass the common law duties to avoid making secret profits, not misappropriate corporate opportunities, and not compete with the company. [406]

3.3.3. DUTY TO DISCLOSE PERSONAL FINANCIAL INTERESTS

Apart from requiring directors to disclose any material information to the company, section 75(5) of the 2008 Act also specifically mandates that directors disclose any personal financial interest that they or a related person has in a matter to be considered at a board meeting. [407] Under section 75(5)(a) and (b), the director must disclose the interest and its general nature before the matter is discussed by the board and must also disclose any material information known to them relating to the matter.[408] After making this disclosure, the director is then required by section 75(5)(d) and (e) to recuse themselves from the board meeting where the matter in which they or a related person has a personal financial interest will be considered.[409] Furthermore, section 75(5)(g) prohibits a director from executing a document on behalf of the company in relation to a matter in which they have a personal financial interest unless they are specifically requested or directed to do so by the board. [410]

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[402] *R v Milne and Erleigh* (7) 1951(1) SA 791 (A) 828.
[403] Section 76(2)(b) of the Companies Act 71 of 2008.
[404] Farouk Cassim, 'Contemporary Company Law' (Juta and Company 2012) 554.
[405] *Novick v Comair Holdings* Ltd 1979 (2) SA 116 (W) 153.
[406] Section 75(5) of the Companies Act 71 of 2008.
[407] Section 75(5) of the Companies Act 71 of 2008.
[408] Section 75(5)(a) and (b) of the Companies Act 71 of 2008.
[409] Section 75(5)(d) and (e) of the Companies Act 71 of 2008.
[410] Section 75(5)(g) of the Companies Act 71 of 2008.

Section 75(6) further stipulates that:

> "If a director of a company acquires a personal financial interest in an agreement or other matter in which the company has a material interest, or becomes aware that a related person has acquired such a personal financial interest, after the agreement or matter has been approved by the company, the director must promptly disclose to the board, or to the shareholders in the case of a company contemplated in subsection (3), the nature and extent of that interest, and the material circumstances relating to the director's or related person's acquisition of that interest".[411]

Section 75 encapsulates the common law fiduciary duty of a director to refrain from placing themselves in a position where their personal interests may conflict, or have the potential to conflict, with their obligations to the company.[412] A significant distinction between the statutory and common law duties pertains to the consequences of breaching that duty. Under common law, if a director breaches their duty by acting on behalf of the company in a matter where they have a conflicting interest or by failing to disclose that interest, the contract becomes voidable at the request of the company against the director or any third party who was aware of the director's breach of duty.[413] In contrast, section 75(7)(b) stipulates that if a transaction is approved without the necessary disclosure of a director's personal financial interest, the transaction will only be considered valid if it is subsequently ratified by an ordinary resolution of the shareholders after the interest has been disclosed, or if a court declares the transaction valid following an application by an interested party in accordance with section 75(8). In other words, the transaction remains invalid unless one of these conditions is satisfied.[414]

Similar to sections 234 to 241 of the previous Act (Companies Act 61 of 1973), the current 2008 Act generally mandates that disclosures be made to the company's board of directors. [415] Disclosure of interests to the company's shareholders is not required, except when the company has only one director who is not the sole shareholder. [416]

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[411] Section 75(6) of the Companies Act 71 of 2008.
[412] *Robinson v Randfontein Estates Gold Mining Co.* Ltd 1921 AD 168 para 177-178.
[413] Malcolm Stephen Blackman,Richard David Jooste and Gerrit Kruger Everingham, 'Commentary on the Companies Act' (2002) South African Law Journal 133.
[414] Sections 75(7)(b) and 75(8) of the Companies Act 71 of 2008.
[415] Sections 75(4) and 75(7) of the Companies Act 71 of 2008.
[416] Section 75(4) of the Companies Act 71 of 2008.

Under common law, a director must disclose any interest they have in a proposed contract to the shareholders at a general meeting.[417] The only exception to this requirement is that the company's articles may permit a director to act on behalf of the company in such matters, provided they disclose their interest to the other board members.[418] From a shareholder's perspective, the statutory requirement for disclosure solely to the board of directors rather than to the general meeting of shareholders raises concerns about the independence of the 'disinterested' board members who are responsible for evaluating the interests of one of their own.[419] In other words, directors may be more likely to favour the interests of fellow board members in their decision-making process.

While the concern for transparency and accountability is valid, it must be balanced against the need to allow companies to conclude transactions efficiently. The time-consuming requirement for disclosure to and approval by shareholders in a general meeting may be counterproductive and hinder the company's ability to operate effectively. The common practice under the previous corporate law regime, where companies included a provision in their articles allowing disclosure to the board of directors instead of the general meeting, was a pragmatic solution. In light of these considerations, section 75 of the 2008 Act, which addresses directors' personal financial interests, appears to strike a reasonable balance. The section requires disclosure to and approval by the board rather than the general meeting in most cases.[420] This approach maintains an appropriate level of oversight while enabling the company to make timely decisions.[421] Overall, section 75 seems to be a satisfactory compromise between the competing interests of transparency and efficiency in corporate governance.

[417] Malcolm Stephen Blackman,Richard David Jooste and Gerrit Kruger Everingham, 'Commentary on the Companies Act' (2002) South African Law Journal 133 para 8-327.
[418] Malcolm Stephen Blackman,Richard David Jooste and Gerrit Kruger Everingham, 'Commentary on the Companies Act' (2002) South African Law Journal 138-327.
[419] *Woolworths Ltd v Kelly* (1991) 4 ACSR 431 435 CA(NSW).
[420] Malcolm Stephen Blackman,Richard David Jooste and Gerrit Kruger Everingham, 'Commentary on the Companies Act' (2002) South African Law Journal 8-328.
[421] Malcolm Stephen Blackman,Richard David Jooste and Gerrit Kruger Everingham, 'Commentary on the Companies Act' (2002) South African Law Journal 8-327.

3.3.4. DUTY TO ACT IN GOOD FAITH, FOR A PROPER PURPOSE AND IN THE BEST INTERESTS OF THE COMPANY

One of the most fundamental common law fiduciary duties is the requirement for directors to act *bona fide* (in good faith) and in the company's best interests.[422] The duty to act *bona fide*, or in good faith, is a subjective obligation that necessitates the director to act honestly based on their own belief of what is in the company's best interests rather than what the court deems appropriate.[423] This duty is all-encompassing, extending to exercising all the director's powers within the company. However, the director's good faith alone is insufficient; they must also ensure that their actions are, in their honest belief, in the company's best interests.[424]

It is widely accepted that the concept of 'interests of the company' generally refers to the interests of the shareholders, in their capacity as shareholders, as a collective body. [425] This means that directors must make decisions that they genuinely believe will benefit the shareholders as a whole rather than favouring the interests of a particular group of shareholders or their own personal interests. [426]

The common law fiduciary duty to act bona fide in the best interests of the company has been reiterated in section 76(3) of the 2008 Act, which states:

> "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..." [427]

Paragraph (a) links the duty to act in good faith with the obligation to exercise power for a proper purpose.[428] This duty to act for a proper purpose is rooted in the common law fiduciary duty of directors, which prohibits them from exercising their powers for unauthorised or collateral purposes. The common law requires directors to utilise their powers solely for the purposes they were granted. It has been rightly noted that section

[422] *Da Silva v CH Chemicals (Pty) Ltd* 2008(6) SA 620 (SCA) 627.
[423] *Re Smith & Fawcett* Ltd [1967] CH 254 para 268.
[424] *Re Smith & Fawcett* Ltd [1967] CH 254 para 268.
[425] *Australian Growth Resources Corporation Pty Ltd v Van Reesema (*1988) 13 ACLR 261 271 SC(A).
[426] Stephanus Cilliers, 'Corporate law' (Butterworths 2000) 86.
[427] Section 76(3) of the Companies Act 71 of 2008.
[428] *Samuel v President Brand Gold Mining Co* Ltd 1969(3) SA 629 (A) para 678; *Hogg v Cramphorn Ltd* [1967] Ch 254.

76(3)(a) of the 2008 Act merely restates the common law and does not alter this aspect of directors' fiduciary duties.[429] Similarly, section 76(3)(b) does not appear to deviate from the common law duty to act in the company's best interests.

3.3.5. DUTY TO ACT WITH CARE, SKILL AND DILIGENCE

The 2008 Act establishes a statutory duty of care, skill and diligence under section 76(3)(c), which operates concurrently with the common law duty.[430] Specifically, section 76(3)(c) states:

> "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 –
>
> (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".

The standard of care required under section 76(3)(c)(i) and (ii) is somewhat unclear, and it is argued that Cassidy is correct in noting the ambiguity of this provision.[431] The first component of the test outlined in section 76(3)(c)(i) appears to establish an objective standard of care and skill. However, when considered alongside the second component of the test in section 76(3)(c)(ii), it seems that the first component is effectively diminished to a subjective standard. Consequently, differing opinions have emerged regarding the standard of care and skill imposed by section 76(3)(c). One perspective suggests that the section establishes "a less subjective test and a slightly more demanding standard of care on directors than the common law".[432] Conversely, another viewpoint posits that the section imposes an excessively subjective standard

429 Farouk Cassim, 'The division and balance of power between the board of directors and the shareholders: the removal of directors' (2013) 29 Banking Finance Law Review 151 at 152.
430 Section 76(3)(c) of the Companies Act 71 of 2008.
431 Julie Cassidy, 'Models for reform: the director's duty of care in a modern commercial world' (2009) Stell LR 373 at 383-384.
432 Farouk Cassim, 'The division and balance of power between the board of directors and the shareholders: the removal of directors' (2013) 29 Banking Finance Law Review 151 at 152.

akin to the common law test, contingent upon the level of knowledge, skill, and experience of the director whose conduct is being evaluated. [433]

It is argued that the ambiguity in section 76(3)(c) should be addressed through purposive interpretation, which considers not only the statute's language but also its objectives and policy, including its purpose and context. [434] This approach aligns with section 5(1) of the 2008 Act, which stipulates that the 2008 Act "must be interpreted and applied in a manner that gives effect to the purposes outlined in section 7". One of the aims of the 2008 Act is to foster the development of the South African economy by "promoting transparency and high standards of corporate governance, as well as encouraging the efficient and responsible management of companies".[435] It is contended that achieving this objective would be compromised if the courts were to interpret section 76(3)(c) as imposing an excessively subjective standard of care and skill akin to the common law standard. As previously mentioned, the subjective approach under common law has been criticised for establishing a low threshold regarding the required degree of care and skill. [436]

Consequently, section 76(3)(c) should be interpreted to impose a stricter standard of care and skill. This interpretation implies that section 76(3)(c)(i) establishes a minimum objective standard against which the conduct of every director will be evaluated, regardless of their individual level of skill and experience. In contrast, the subjective elements outlined in section 76(3)(c)(ii) would serve to elevate the standard when a director possesses greater skills and/or experience. This conclusion aligns with the views expressed by Sutherland[437] and others,[438] However, Sutherland does not explicitly mention purposive interpretation as a means to achieve this outcome.

433 Jean Jacques Du Plessis, 'A Comparative Analysis of Directors' Duty of Care, Skill and Diligence in South Africa and Australia' (2010) Acta Juridica 263 at 269-270.
434 *Venter v R 1907 TS* 910 para 914-915; *Dadoo v Krugersdorp Municipal Council* 1920 AD 530; *Jaga v Donges* 1950 (4) SA 653 (A) para 662-663.
435 Section 7(b)(iii) and (j) of the Companies Act 71 of 2008.
436 Vaness Finch, 'Company directors: who cares about care and skill' (1992) 55 Modern Law Review 179 at 200.
437 Philip Sutherland, 'The state of company law in South Africa' (2012) 1 Stellenbosch University Law Review 157 at 172
438 Julie Cassidy, 'Models for reform: the director's duty of care in a modern commercial world' (2009) Stell LR 373 at 386.

It is also important to recognise that the decision by the Department of Trade and Industry in South Africa (the DTI) to review and modernise company law was driven by the need to align South African legislation with international trends.[439] One of the objectives of the new company law is to enhance the competitiveness and development of the South African economy by ensuring compatibility and harmonisation with best practices in other jurisdictions.[440] Interpreting section 76(3)(c) in a manner that imposes a stricter standard of care and skill would bring South African corporate law in line with trends observed in other common law jurisdictions, such as England and Australia, where there has been a shift away from the overly subjective common law test of care and skill towards more rigorous standards.[441]

Notably, the wording of section 76(3)(c) of the South African Companies Act is similar to that of section 174 of the UK Companies Act 2006. Section 174 states:

> "(1) A director of a company must exercise reasonable care, skill and diligence.
>
> (2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with –
>
> (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
>
> (b) the general knowledge, skill and experience that the director has".

Section 174(2) introduces a dual objective and subjective test regarding knowledge, skill, and experience. It is asserted that section 174(2)(a) establishes a minimum objective standard for these attributes, which can be elevated by the subjective component of the test found in paragraph (b) of the same section, should the director possess any specialised knowledge, skill, or experience.[442] This approach to section 174(2) is significant in the context of the South African Companies Act's (2008 Act) section 76(3)(c), given that section 5(2) of the 2008 Act allows a court to consider foreign company law to the extent appropriate when interpreting the 2008 Act.

[439] Department of Trade and Industry Policy Paper South African Company Law for the 21st Century (GN 1183 in GG 26493 of 23 June 2004) at 3.
[440] *Automatic Self-Cleansing Filter Syndicate Co Ltd v* Cunninghame [1906] 2 Ch 34.)
[441] John Stuart McLennan,'Directors fiduciary duties and the 2008 Companies Bill' (2009) 1 TSAR 184 at 186.
[442] Sarah Worthington,'Sealey's Cases and Materials in Company Law'(Oxford University Press 2016) 331.

In light of the uncertainties surrounding statutory interpretation, it is suggested that the most effective way to address the ambiguity in section 76(3)(c) is for the legislature to amend this section of the 2008 Act to align it with section 60(1A) of the Banks Act 94 of 1990, which establishes a duty of care and skill for bank directors. [443] Specifically, section 60(1A)(c) of the Banks Act states:

> "Each director, chief executive officer, and executive officer of a bank has a duty to possess and maintain the knowledge and skill that can reasonably be expected of a person holding a similar position and performing similar functions as those carried out by the director, chief executive officer, or executive officer of that bank".

Section 60(1A)(d) goes further to explicitly states that:

> "Each director, chief executive officer, and executive officer of a bank has a duty to exercise the level of care in performing their functions related to the bank that can reasonably be expected of a diligent person holding the same position under similar circumstances, and who possesses both the knowledge and skills referenced in paragraph (c), as well as any additional knowledge and skills that the director, chief executive officer, or executive officer may possess".[444]

Section 60(1A) of the Banks Act aims to clarify the uncertainty at common law regarding the applicable test for determining whether the duty of care and skill has been discharged. While common law interpretations favour a subjective test, section 60(1A)(c) and (d) introduce an objective test for both the duty of skill and the duty of care.[445] Specifically, section 60(1A)(d), read in conjunction with section 60(1A)(c), establishes a minimum objective standard of care and skill expected from a director. This standard is based on what can reasonably be expected from a diligent person holding the same appointment under similar circumstances.[446] Furthermore, if a director possesses additional knowledge and skills, they will be measured against the standard of care and skill that can reasonably be expected from a diligent person holding the same appointment under similar circumstances and possessing both the

[443] Farouk Cassim, Cassim 'Company Law (Including Close Corporations)' (2003) Annual Survey of South African Law 549.
[444] Section 60(1A)(d) of the Banks Act 94 of 1990.
[445] Johannes De Jager, 'Comments on the effects of section 40 of the Banks Amendment Act 19 of 2003 on section 60 of the Banks Act 94 of 1990' (2005) 17 SA Merc LJ 170 at 174.
[446] Johannes De Jager, 'Comments on the effects of section 40 of the Banks Amendment Act 19 of 2003 on section 60 of the Banks Act 94 of 1990' (2005) 17 SA Merc LJ 170 at 174.

knowledge and skill mentioned in paragraph (c) and any such additional knowledge and skill.[447]

It is argued that amending section 76(3)(c) of the 2008 Act by adopting the wording of section 60(1A) of the Banks Act would address the uncertainty surrounding the interpretation of section 76(3)(c) of the 2008 Act. This would remove the ambiguity in section 76(3)(c)(ii) and ensure that courts do not impose a subjective standard on the statutory duty of care and skill, thereby preventing it from suffering the same weaknesses that afflict the common law duty.

The discussion has briefly outlined how the 2008 Act has restated the directors' duties at common law, highlighting some similarities and differences between the common law duties and the statutory duties. However, restating these common law duties in the 2008 Act would be insignificant for shareholder protection if no liability was imposed upon directors for breaching those duties. Therefore, it is crucial to examine the extent to which shareholders can hold directors accountable, considering common law principles and statutory provisions, for breaching their fiduciary duties. This will ultimately be dealt with in chapter 5.

3.4. PERSON(S) WHOM COMPANY DIRECTORS OWE THEIR FIDUCIARY DUTIES TO

When shareholders pursue personal lawsuits against company directors for financial losses attributed to the directors' actions, it creates the perception that directors owe a duty to the shareholders. Consequently, this chapter examines whether company directors have fiduciary duties toward shareholders. As previously mentioned, a company is a legal entity independent of its directors and shareholders upon incorporation.[448] This establishes that, as a general principle, company directors owe fiduciary duties to the company as a whole, which is recognised as a separate legal entity. This principle was upheld in *Peskin v Anderson*,[449] where the court affirmed that

[447] Johannes De Jager, 'Comments on the effects of section 40 of the Banks Amendment Act 19 of 2003 on section 60 of the Banks Act 94 of 1990' (2005) 17 SA Merc LJ 170 at 174.
[448] *Salomon v A Salomon and Co Ltd* [1897] AC 22 para 51; Companies Act 71 of 2008 sec 19(1).
[449] *Peskin v Anderson* [2000] EWCA Civ 326.

it is a fundamental tenet of company law that directors are fiduciaries solely to the company.[450] Justice Nugee reinforced this principle in the 2015 case of *Sharp & Others v Blank & Others*,[451] asserting that directors do not owe fiduciary duties to shareholders because they act as company agents and manage its business affairs.[452]

Even when a company is functioning as a going concern, directors do not owe fiduciary duties to the company's shareholders, individually or collectively, nor to creditors, employees, or a holding or subsidiary company, particularly when the subsidiary has its own independent board of directors.[453] Until a court or legislature decides to pierce the corporate veil, each company within a group is treated as a separate legal entity.[454] Furthermore, under common law, a director of a holding company does not have fiduciary duties toward its subsidiary.[455] Similarly, a director of a subsidiary owes fiduciary duties exclusively to that subsidiary and not to the parent company. Therefore, even though these companies are part of the same group, a director has fiduciary duties only to the company they are a board member.[456]

Section 76 of the 2008 Act comprehensively addresses the standards of conduct expected from company directors.[457] Specifically, section 76(2)(a) of the 2008 Act imposes a duty on directors to refrain from using their position or any information obtained in that capacity for personal gain or to benefit any individual other than the company or its wholly owned subsidiary.[458] Additionally, directors are prohibited from maliciously harming the company or its subsidiary. Including wholly owned subsidiaries and subsidiaries in the directors' standard of conduct signifies an expansion of common law principles. This duty extends beyond the confines of the company for which the director serves.[459] Moreover, the provision's language

[450] *Peskin v Anderson* [2000] EWCA Civ 326.
[451] *Sharp & Others v Blank & Others* [2015] EWHC 3220 (Ch).
[452] *Sharp & Others v Blank & Others* [2015] EWHC 3220 (Ch) para 9.1.
[453] Piet Delport, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis South Africa 2016); Farouk HI Cassim, Maleka Femida, Rehana Cassim, Richard Jooste, Joane Shev & Jacqueline Yeats, *Contemporary Company Law* (Juta and Company Ltd 2022); Lindi Coetzee, 'The fiduciary relationship between a company and its directors' (2014) 35 OBITER 305.
[454] Lindi Coetzee, 'The fiduciary relationship between a company and its directors' 305.
[455] *Bell v Lever Bros* Ltd [1932] AC 161.
[456] Lindi Coetzee, 'The fiduciary relationship between a company and its directors' 305.
[457] Companies Act 71 of 2008 sec 76.
[458] Companies Act 71 of 2008 sec 76(2)(a)(i)-(ii).
[459] Piet Delport, *Henochsberg on the Companies Act 71 of 2008* 290; Lindi Coetzee, 'The fiduciary relationship between a company and its directors' 306.

suggests a positive duty owed to wholly owned subsidiaries and a negative duty to subsidiaries.[460] While fiduciary duties are extended, they remain distinct responsibilities toward each entity when a subsidiary acts as an agent or when the directors of a holding company are the same as those of its subsidiary.[461] Directors are responsible for managing and directing the company's business, affairs, and assets; however, they do not oversee the affairs or assets of the shareholders.[462]

This position is reinforced by section 66(1) of the 2008 Act, which stipulates that only the board of directors is authorised to manage the company's business and affairs. Consequently, directors are tasked with the operation of the company.[463] The 2008 Act further empowers directors to perform any functions necessary for the effective management of the company.[464] As previously noted, the 2008 Act defines the company as a legal entity distinct from its shareholders, endowing it with all the legal powers and capacities of a natural person. However, since the company is an abstract concept or hypothetical entity, it requires a natural person (the director) to act as its representative. The law recognises this individual as the company's agent and the embodiment of the company's legal personality, as articulated by Judge Viscount Haldane.[465]

Company directors, rather than shareholders, are the fiduciaries responsible for making decisions on behalf of the company. This responsibility includes acting in the company's best interest by promoting or safeguarding its rights when they are at risk. This principle was established in *Foss v Harbottle*,[466] where two shareholders of the Victoria Park Company initiated legal action, claiming that the company's directors and other shareholders had engaged in fraudulent practices by inflating the land sale price. The court found that in this instance, the board of directors, not the shareholders, were

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[460] Piet Delport, *Henochsberg on the Companies Act 71 of 2008* 290; Lindi Coetzee, 'The fiduciary relationship between a company and its directors' 306; Piet Delport, *The New Companies Act Manual* (LexisNexis 2011).
[461] Piet Delport, *Henochsberg on the Companies Act 71 of 2008* 290.
[462] Companies Act 71 of 2008 sec 66(1).
[463] Companies Act 71 of 2008 sec 66(1).
[464] Companies Act 71 of 2008 sec 19(1)(a).
[465] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC 705 para 713; Brighton Mupangavanhu, 'Diminution in Share Value and Third-Party Claims for Pure Economic Loss: The Question of Director Liability to Shareholders' 116.
[466] *Foss v Harbottle* 67 ER 189.

entitled to convene a general meeting to pursue a claim. Thus, only the board of directors has the authority to initiate legal proceedings on behalf of the company for any wrongs committed against it.[467]

If a wrong is inflicted upon the company, individual shareholders are not permitted to sue for losses incurred, as these losses merely reflect the company's own losses. This limitation is a consequence of the principle that directors do not owe fiduciary duties to shareholders. This principle serves to protect directors from being subjected to numerous legal actions from shareholders or third-party creditors. If directors were to owe fiduciary duties to shareholders, they would face a multitude of claims, each unique to individual shareholders, which would create conflicts between their duties to the company and to the shareholders.[468]

In the 2015 case of *Sharp & Others v Blank & Others*, Justice Nugee dismissed shareholder claims, affirming that directors generally do not owe fiduciary duties to shareholders unless they have a special relationship. More recently, in 2019, [469] the court in *Hlumisa Investments* rejected the notion that shareholders could claim damages from directors or third parties when the company's share price declines due to their actions. This concept is known as the principle of reflective loss, as the shareholder's loss is considered merely a reflection of the company's loss rather than a personal loss suffered by the shareholder. [470]

If a wrong has been done to the company, individual shareholders are not permitted to sue for such losses because they are merely a reflection of the losses suffered by the company itself.[471] This is one of the ramifications of the principle that directors do not owe any fiduciary duty to the shareholders. This principle was put in place to shield directors and guarantee that they are not unreasonably subjected to a plethora of legal proceedings by shareholders or third-party creditors.[472] If company directors had any fiduciary duties to the shareholders, they would be subject to a plethora of legal

[467] *Foss v Harbottle* 67 ER 189.
[468] *Foss v Harbottle* 67 ER 189.
[469] *Sharp & Others v Blank & Others* [2015] EWHC 3220 (Ch).
[470] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83.
[471] *Sharp & Others v Blank & Others* [2015] EWHC 3220 (Ch) para 9.3.
[472] *Peskin v Anderson* [2001] 2 BCLC 1 para 30; Brighton Mupangavanhu, 'Diminution in Share Value and Third-Party Claims for Pure Economic Loss: The Question of Director Liability to Shareholders' 116.

proceedings or claims from shareholders, with each shareholder having a unique claim. Thus, placing directors in a position where they owe a fiduciary duty to shareholders would be uncalled-for and unjustifiable as it would put the director in a position where his irrefutable duty to the company conflicts with his duty to the shareholders.[473]

The court in *De Bruyn v Steinhoff International Holdings N.V. and Others* affirmed that, as a general principle, the fiduciary duties of a company's directors are owed to the company itself rather than to its shareholders. It was highlighted that directors are responsible for managing and controlling the company's affairs and assets, establishing a legal relationship that necessitates these fiduciary duties being directed toward the company. Consequently, the company, not the shareholders, is entitled to pursue claims against directors in case of a breach.[474] Furthermore, the court indicated that directors may owe fiduciary duties to the company and shareholders only under exceptional circumstances. Such circumstances may arise when a distinct factual or personal relationship exists between directors and shareholders, as seen in family-owned companies where shareholders place trust in a family member and seek their guidance. There is no exhaustive list of these exceptional relationships; rather, they must be evaluated case-by-case.[475]

In this case, the court determined that no unique factual relationship existed between the directors and shareholders; instead, the relationship was solely between the company and its directors, thereby limiting fiduciary duties to the company alone. Any losses resulting from a director's breach of duty are enforceable by the company, which is the entity to which these duties are owed.[476] The shareholders were found to lack the legal standing or interest necessary to initiate a claim against the directors, thus failing to establish a cause of action for a delictual claim under common law.[477] In conclusion, it is posited that the overarching principle is that directors owe their fiduciary duties exclusively to the company they are appointed to serve rather than to individual or collective shareholders. This reflects the well-established principle

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[473] *Sharp & Others v Blank & Others* [2015] EWHC 3220 (Ch) para 40.
[474] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ) para 138-139.
[475] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ) para 138-139.
[476] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ) para 151.
[477] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ) para 151; *Sharp & Others v Blank & Others* [2015] EWHC 3220 (Ch) para 40.

articulated in the landmark case of *Salomon*,[478] which asserts the distinct legal personality of a company that is separate from its members. Directors are not custodians of the shareholders' interests but rather of the company's affairs and assets. However, a special factual relationship between the directors and shareholders must be demonstrated to deviate from this fundamental principle.[479]

Having explored the statutory and common law duties imposed on directors in South Africa, it is clear that the Companies Act, 2008, alongside established legal principles, sets a rigorous standard for director conduct and accountability.[480] Directors are expected to act in good faith, avoid conflicts of interest, exercise independent judgment, and apply reasonable care and skill in managing the affairs of the company. Breaches of these duties can result in personal liability, as highlighted by both statutory provisions and recent case law.[481] With this foundation in mind, it is essential to examine the specific remedies and enforcement mechanisms available under the Companies Act. The focus now shifts to Chapter 4, which delves into the interpretation and application of section 218(2) of the Companies Act by South African courts.

3.5. CONCLUSION

Directors are endowed with significant authority to manage a company in a manner that benefits shareholders and other stakeholders. However, this authority is not unlimited; it is constrained by the company's memorandum of incorporation, common law, and statutory fiduciary duties. Under common law, fiduciary duties are unique and impose strict liability, mandating that directors act with good faith and prioritise the company's best interests.

Conversely, the duty of care and skill is delictual, necessitating a demonstration of ‘fault’ through either intent (dolus) or negligence (culpa) for liability to arise. To ascertain whether the duty of care and skill has been violated, a subjective evaluation

[478] *Salomon v A Salomon and Co Ltd* [1897] AC 22.
[479] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ) para 151.
[480] Section 76 Companies Act No. 71 of 2008.
[481] Section 76 Companies Act No. 71 of 2008.

is employed to assess a director's skills, knowledge, or experience. In contrast, an objective evaluation is utilised to gauge the level of care exercised by the director in their actions. In common law, directors owe fiduciary duties and the duty of care and skill exclusively to the company, which does not extend to subsidiaries or shareholders and third parties, as established in cases such as *Percival v Wright*,[482] *Pergamon Press Ltd v Maxwell*,[483] and *Cohen v Segal*.[484]

This principle has largely been preserved in the partial codification of directors' duties under the 2008 Act, where sections 76 and 77 indicate that these duties are owed to the company, thus positioning the company as the appropriate plaintiff to pursue claims against those who cause it harm. The partial codification seeks to enhance accountability and foster efficient, responsible management. In instances where the 2008 Act does not explicitly address a duty or its consequences, the common law remains applicable to supplement such duties. The 2008 Act includes provisions under which directors may be liable to the company or other parties for damages directly resulting from their conduct.

Additionally, liability for breaches of fiduciary duties and the duty of care and skill is extended to prescribed officers and members of board committees. Notably, directors now have duties toward subsidiaries and wholly owned subsidiaries. Nevertheless, despite the enactment of the 2008 Act, it is argued that shareholders in South Africa may encounter challenges in imposing personal liability on directors for losses stemming from mismanagement, largely depending on the cause of action and the legislative framework upon which their claims are based, including common law principles such as the 'no reflective loss' principle.

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[482] *Percival v. Wright* (1902) 2 Ch. 421.
[483] *Pergamon Press Ltd v Maxwell* [1970] EWCA Civ J0713-2.
[484] *Cohen, NO v Segal* 1970 (3) SA 702 (W).

CHAPTER 4: UNDERSTANDING THE PROVISIONS OF SECTION 218(2) OFTHE COMPANIES ACT AS INTERPRETED BY THE SOUTH AFRICAN COURTS

4.1. INTRODUCTION

The previous chapter examined the scope and nature of directors' duties, reflecting on the *sui generis* nature of fiduciary duties and their imposition of strict liability. It further discussed the duty of care and skill within South Africa's common law. The chapter then reviewed the partial codification of such duties within the Companies Act 71 of 2008 (the 2008 Act) and the effect this has had on such duties. It was observed that shareholders might encounter challenges in holding directors personally liable for any losses they have incurred, as directors' duties are owed to the company. Consequently, the company itself is the appropriate party to initiate legal action in these situations.

When directors engage in decision-making processes that approve misleading financial statements, shareholders frequently bear the repercussions through a decline in their share value. Common law in South Africa stipulates that, under these cases, a shareholder lacks a legal basis to claim personal damages against a director solely because the company in which they hold shares has incurred losses. The SCA in *Itzikowitz v Absa Bank Ltd* reaffirmed that this principle (the proper plaintiff principle) remains applicable in contemporary South African law. Consequently, it is established within South African company law that shareholders do not possess personal claims for damages in such cases; rather, only the company that has suffered the loss is entitled to pursue claims against the third-party responsible for the loss.[485] Despite the SCA clarifying the distinctions between wrongs committed against a company and those against a shareholder, instances persist where shareholders seek damages from directors for pure economic losses incurred by them.[486]

[485] Patrick Bracher, 'Claim by Shareholders Against Directors Under Section 218(2) of Companies Act fails' available at <https://www.financialinstitutionslegalsnapshot.com/> (accessed 15 September 2024).

[486] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83; *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43; *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* [2017] ZALMPPHC 27; *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).

The 2008 Act introduced various measures attributing general or personal liability to the company itself or its directors.[487] Section 218(2) of the 2008 Act is frequently cited as the legislative foundation for the personal liability of directors to shareholders. Failures at the directorship level, particularly in cases involving negligent or fraudulent financial misstatements, have led to aggrieved shareholders attempting to recover damages and losses under this section.[488] Although section 218(2) provides a potential avenue for shareholders to seek redress against directors for damages, it is crucial to recognise that actions by directors causing harm to shareholders are likely to also result in losses for the company. Therefore, the "no reflective loss" principle (which asserts that shareholders cannot seek compensation for losses that merely mirror the losses incurred by the company) may apply, which could preclude shareholders from recovering damages if their losses reflect those suffered by the company.[489]

In the case of *Blue Farm Fashion Limited v Rapitrade (Pty) Ltd and Others*[490] (hereinafter the *Blue Farm* case), the court acknowledged some ambiguity in section 218(2). When considered in isolation, this section might suggest that a shareholder could pursue a personal claim against a director for pure economic losses resulting from a director's contravention.[491] Some courts have interpreted section 218(2) as permitting claimants – such as creditors or others affected by directors' violations of any provision of the 2008 Act – to personally claim against directors for resulting losses, particularly in cases of reckless trading.[492] This raises the question of whether a shareholder can initiate an action against a director under section 218(2) due to a decrease in share value resulting from a fiduciary's breach of duty as outlined in the 2008 Act.[493] Therefore, this chapter investigates whether section 218(2) provides a suitable legal avenue for shareholders to seek redress against directors for pure

[487] Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake (5772/2016) [2017] ZALMPPHC.
[488] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake* (5772/2016) [2017] ZALMPPHC.
[489] Carias 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 PhD thesis, University of Cape Town, 2017).
[490] *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd* (22288/2014) [2016] ZAWCHC 35.
[491] Brighton Mupangavanhu, 'Diminution' In Share Value And Third-Party Claims For Pure Economic Loss: The Question Of Director Liability To Shareholders' (2019) 31 Sa Mercantile Law Journal 110.
[492] *Chemfit Fine Chemicals (Pty) Ltd ta SA Premix v Maake & others* [2017] ZALMPPHC 27; *Rabinowitz v Van Graan and Others* 2013 (5) SA 315 (GSJ).
[493] *Chemfit Fine Chemicals (Pty) Ltd ta SA Premix v Maake & others* (5772/2016) [2017] ZALMPPHC 27; *Rabinowitz v Van Graan and Others* 2013 (5) SA 315 (GSJ.

economic losses they have suffered due to the directors' misdemeanours or omissions.

A critical analysis of the remedy provided by section 218(2) is essential to address this question. Thus, this chapter will provide an understanding of the provisions of section 218(2) of the 2008 Act as interpreted by the South African courts. It will include a concise discussion of the scope and interpretation of this section, evaluating whether it offers a suitable legal avenue for shareholders to hold directors personally liable for pure economic losses they have incurred. Furthermore, this chapter will differentiate between cases of diminished share price and those involving reckless trading. Recently, shareholder litigants have successfully pursued remedies for pure economic losses based on section 218(2) in reckless trading cases. Therefore, clarifying whether shareholders can seek remedy under section 218(2) for pure economic losses related to drops in share value is crucial for establishing legal certainty, as previously argued by other scholars in corporate law.

4.2. UNDERSTANDING SECTION 218 (2) OF THE COMPANIES ACT

Section 218 (2) of the 2008 Act states that:

> "any individual who contravenes any provision of the Act is liable for any loss or damage suffered as a result of that contravention".[494]

However, this section does not independently create liability; it requires a breach of another specific provision within the 2008 Act. For example, the SCA has clarified that section 22(1) imposes duties on the company, not its directors, to avoid reckless trading. Consequently, claims under section 218(2) are unlikely to succeed without identifying a specific provision breached by the directors. As demonstrated in recent case law, claims based on reflective losses were dismissed due to a lack of direct contravention by the directors.[495]

Although section 218(2) was included in the 2008 Bill, the explanatory memorandum does not address its inclusion, [496] nor was it mentioned in the 2004 White Paper,

[494] Section 218(2) Companies Act 71 of 2008.
[495] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83.
[496] Companies Act 71 of 2008 (South African Government, 2008).

"South African Company Law for the 21st Century".[497] Consequently, the scope of section 218(2) has been debated since enactment. Consequently, the scope of section 218(2) has been debated since enactment. Despite its drafting simplicity, the section has significant implications. The drafters' intention to create a straightforward general remedy has inadvertently led to controversies.[498] Section 218(2) is titled "Civil Actions" and offers a remedy for parties affected by losses resulting from another individual's contravention of the 2008 Act.[499]

Essentially, section 218(2) allows individuals who claim to have incurred losses to seek compensation, provided they establish a connection between the losses and a violation of any provision of the 2008 Act. [500] Courts and scholars have characterised the remedy offered by section 218(2) in various ways. It has been called a general provision, or one of general application. It has been called a general provision,[501] or, as Jooste describes it, one of general application.[502] Cassim views section 218(2) as a broad remedy that supplements the specific liability provisions in section 77 the 2008 Act. Stein agrees, highlighting that section 218(2) is expansive enough to allow for pure economic claims against directors who violate any provision of the 2008 Act.[503] Phatudi J, in the *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake* case, articulated that a proper interpretation of the civil liability established under section 218(2) results in a liability that is sui generis.[504]

The repetition of "any" in section 218(2) emphasises its broad scope.[505] The general enabling nature of this section, attributable to its wording regarding the individuals

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[497] South African Company Law for the 21st Century: Guidelines for Corporate Law Reform (South African Government, 2004).
[498] Ian Cox, 'South Africa: The Misfit- Section 218(2) of the Companies Act 71 of 2008' available at <http://www.mondaq.com/southafrica/x/194898/Directors+Officers/THE+MISFIT+Section+218+2+Of+The+C ompanies+Act+71+Of+2008> (accessed 15 September 2024).
[499] Section 218(2) of the Companies Act 71 of 2008.
[500] Brighton Mupangavanhu, 'Diminution' In Share Value and Third-Party Claims for Pure Economic Loss: The Question Of Director Liability To Shareholders' (2019) 31 SA Mercantile Law Journal 110.
[501] Patrick Bracher, 'Claim by Shareholders Against Directors Under Section 218(2) of Companies Act fails' available at <https://www.financialinstitutionslegalsnapshot.com/> (accessed 15 September 2024).
[502] Richard Jooste, 'Financial assistance to directors – the Companies Act 71 of 2008' (2010) 165 Acta Juridica 180.
[503] Stein The New Companies Act Unlocked (2011) 407.
[504] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake* [2017] ZALMPPHC 27 30.
[505] Cassim F Contemporary Company Law 3rd ed (2022) 582.

within its purview, has led to increased shareholder claims against directors.[506] Section 218(2) exposes directors to personal liability to the company and other persons, including shareholders. In *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake* case, the court held that a proper interpretation of the civil liability made available under section 218(2) results in in *sui generis* liability against "any person," encompassing directors, shareholders, and creditors who wish to claim against any individual who "contravenes" the 2008 Act.[507] Liability is triggered upon violation of any provision of the Act, and claimants relying on section 218(2) need not prove fraud or gross negligence.[508]

In *Hlumisa Investment Holdings (RF) Limited and Another v Kirkinis*, [509] the court acknowledged the broad wording of section 218(2) but asserted that its application should be limited to "damage suffered by that person as a result of that contravention".[510] This requires a direct link between the damages claimed and a specific contravention. To be held liable under section 218(2), an individual, including a director, must have "contravened" a provision of the 2008 Act. [511] To prevent frivolous claims, the contravention should involve a breach of a mandatory, rather than a directory, requirement. [512]

Some courts have been reluctant to fully apply section 218(2) to all contraventions of the 2008 Act.[513] Rehana Cassim suggests that this section imposes strict liability even if the defendant innocently contravened the Act, as long as the plaintiff suffered damages.[514] However, classifying the sui generis liability imposed by section 218(2) as "strict liability" is controversial and has unfortunate consequences for defendants/respondents. Additionally, section 218(2) may lead to interpretive

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[506] *Hlumisa Investment Holdings (RF) Limited and Another v Kirkinis and Others* [2018] ZAGPPHC 676; *Itzikowitz v Absa Bank Limited* (20729/2014) [2016] ZASCA 43.
[507] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake* (5772/2016) [2017] ZALMPPHC 27.
[508] Alewyn Petrus Grové, 'Company Directors: Fiduciary Duties and the Duty of Care and Skill' (published LLM thesis, University of Pretoria, 2012) 40.
[509] *Hlumisa Investment Holdings (RF) Limited and Another v Kirkinis* [2018] ZAGPPHC 676 para 26.
[510] *Hlumisa Investment Holdings (RF) Limited and Another v Kirkinis* [2018] ZAGPPHC 676 para 26.
[511] *Hlumisa Investment Holdings (RF) Limited and Another v Kirkinis* [2018] ZAGPPHC 676 26.
[512] Gemma Cremen, 'paying the piper' available at <https://www.hoganlovells.com/en/publications/paying-the-piper> (accessed 15 September 24).
[513] *Itzikowitz v ABSA Bank* 2016 4 SA 432 (SCA).
[514] Rahim Cassim, 'A Critical Analysis of the Removal of Directors by the Board of Directors and the Judiciary under the Companies Act 71 of 2008' (published PhD thesis, University of South Africa, 2018) 253.

challenges due to the wording of certain provisions of the 2008 Act. This is regarding whether a director has contravened a provision of the 2008 Act, entitling a person other than the company to bring an action under this section.[515] Section 218(2) may also lead to interpretive challenges regarding whether a director has contravened a provision, entitling a person other than the company to bring an action. As held in *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake*, attributing an alleged contravention requires considering the nature of the contravention within the ambit of section 218(2).[516]

Due to the lack of specificity regarding actionable contraventions, a shareholder initiating a lawsuit must detail the specific contraventions and the losses incurred.[517] However, it would be adequate for the applicant to demonstrate that a "loss or damage" has been incurred "as a result of that contravention" as contemplated in section 218(2).[518] As emphasized in *Rabinowitz v Van Graan*, [519] a director can only be held liable under section 218(2) for losses suffered due to a contravention of the 2008 Act. Consequently, section 218(2) would not apply to breaches of common law fiduciary duties. *Rabinowitz v Van Graan* clarifies the grounds on which directors may incur personal liability to parties other than the company. While the term "contravenes" is not defined, its judicial usage implies a violation inconsistent with the 2008 Act and its regulations.[520] "Contravene" encompasses any offense under the 2008 Act and instances of non-compliance that may not constitute an offense. [521] The term "contravention" in section 218(2) is not restricted to criminal violations but includes contraventions that lead to losses, [522] which can be pursued under section 218(2).[523]

[515] Carias 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 PhD thesis, University of Cape Town, 2017).
[516] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake* [2017] ZALMPPHC 27 23.
[517] *Rabinowitz v Van Graan* and Others 2013 (5) SA 315 (GSJ); *Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd and Others* [2014] 3 All SA 454 (GJ) para 41.
[518] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake* [2017] ZALMPPHC 27 32
[519] *Rabinowitz v Van Graan* and Others 2013 (5) SA 315 (GSJ).
[520] *Chemfit Fine Chemicals (Pty) Ltd SA Premix v Maake* [2017] ZALMPPHC 27 30.
[521] Piet Delport and Quintus Vorster, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis 2012).
[522] *Chemfit Fine Chemicals (Pty) Ltd SA Premix v Maake* [2017] ZALMPPHC 27 30.
[523] *Rabinowitz v Van Graan* 2013 (5) SA 315.

The provisions under section 218(2) extend beyond common law, allowing claims by various stakeholders, including shareholders directly.[524] Section 218(2) offers potential recourse where common law may fall short, as in *Itzikowitz v Absa Bank Ltd*,[525] where the delictual claim struggled due to demonstrating wrongfulness in claims for pure economic loss. However, a claim under section 218(2), alongside section 22, could withstand the exception stage.[526]

Section 5 of the 2008 Act stipulates that its provisions should be interpreted to fulfil the purpose in section 7. Section 5(1) indicates that a purposive or contextual approach is appropriate.[527] This context includes the national environment, relevant common law principles, and public policy.[528] Interpreting section 218(2) so broadly as to undermine common law rules and permit a remedy for reflective loss would be inconsistent with interpreting the 2008 Act in a way that promotes its "spirit, purport, and objects".[529] Based on the 2008 Act, common law rules regarding fault, foreseeability, liability, causation, and the proper-plaintiff rule are not altered or disregarded by section 218(2).[530]

If section 218(2) is indeed a general remedy, as asserted by various courts and scholars, the question arising from the judgments is whether it should be interpreted broadly or narrowly.[531] In *Blue Farm case*, Matame J concluded that a narrow interpretative approach should be adopted due to its ambiguous language.[532] Matame J explained that a narrow interpretation is warranted when the language is unclear, as is the case with section 218(2) of the 2008 Act.[533] A broad interpretation could lead to an absurd outcome that the legislature likely did not intend. This was reaffirmed

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524 Chanté Ashley Cockrill, 'A shareholder's personal claim against directors for causing pure economic losses through diminution in share value: A South African critical analysis' (published LLM thesis, University of Western Cape, 2020).
525 *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43.
526 Yehuda Kleitman, 'Director Liability' available at <https://withoutprejudice.co.za/article/5043/view> (accessed 15 October September 2024).
527 Section 5(1) of the Companies Act 71 of 2008; Brighton Mupangavanhu, 'Diminution' In Share Value and Third-Party Claims for Pure Economic Loss: The Question Of Director Liability To Shareholders' (2019) 31 SA Mercantile Law Journal 110.
528 Brighton Mupangavanhu, 'Diminution' In Share Value and Third-Party Claims for Pure Economic Loss: The Question Of Director Liability To Shareholders' (2019) 31 SA Mercantile Law Journal 110.
529 Section 7 of the Companies Act 71 of 2008; Mupangavanhu (2019)125.
530 Brighton Mupangavanhu, 'Diminution' In Share Value and Third-Party Claims for Pure Economic Loss: The Question of Director Liability to Shareholders' (2019) 31 SA Mercantile Law Journal 110.
531 Brighton Mupangavanhu, 'Diminution' In Share Value and Third-Party Claims for Pure Economic Loss: The Question of Director Liability to Shareholders' (2019) 31 SA Mercantile Law Journal 110.
532 *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd and Others* (WCC) para 31.
533 *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd and Others* (WCC) para 29.

in *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake*, [534] and in *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkins and Others*, [535] the court noted that an overly broad interpretation could result in a director being held liable to parties they are unaware of. I align with the judges' preferred approach to interpreting section 218(2). [536]

4.3. SUITABILITY OF THE SECTION 218(2) GENERAL REMEDY

4.3.1 A DISTINCTION BETWEEN REDUCTION OF SHARE VALUE CASES AND RECKLESS TRADING CASES

The SCA in *Itzikowitz v Absa Bank Limited* did not take the opportunity to clearly delineate the applicability of the section 218(2) remedy in relation to reckless trading cases versus cases involving a decline in share value.[537] The rationale behind the court's decision to avoid making this distinction remains unclear. It is possible that the court believed the time had not yet come to address this issue. Despite this omission, it is essential to differentiate between the applicability of section 218(2) to reckless trading cases and cases involving a reduction in share value.[538] I concur with the perspective that, regardless of the court's reluctance to clarify this matter, the resulting ambiguity will likely encourage shareholder litigants to assert claims against directors for reductions in share value within the expansive scope of section 218(2).[539] It is hoped that the SCA will eventually clarify this matter, explicitly distinguishing the applicability of section 218(2) to reckless trading cases from its inapplicability in cases concerning reductions in share value.

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[534] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake* [2017] ZALMPPHC 27 39; *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd and* Others [2016] ZAWCHC para 35.
[535] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
[536] Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake [2017] ZALMPPHC 27 39; *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd and Others* [2016] ZAWCHC para 35.
[537] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43.
[538] Brighton Mupangavanhu, 'Diminution' in Share Value and Third-Party Claims for Pure Economic Loss: The Question of Director Liability to Shareholders' (2019) 31 SA Mercantile Law Journal 110.
[539] Brighton Mupangavanhu, 'Diminution' in Share Value and Third-Party Claims for Pure Economic Loss: The Question of Director Liability to Shareholders' (2019) 31 SA Mercantile Law Journal 110.

4.3.2. SECTION 218 (2) REMEDY AND REDUCTION OF SHARE VALUE CASES

Cases involving pure economic loss require particular attention in corporate law primarily due to their inherent limitations. There has never been a universally accepted definition of “pure economic loss” or its various synonyms.[540] Pure economic loss is typically understood as financial loss incurred by a plaintiff without any accompanying physical harm to their person or property.[541] In *Telematrix (Pty) Ltd v Advertising Standards Authority SA* (hereinafter referred to *Telematrix* case), Harms JA provided a comprehensive definition, describing pure economic loss as “loss that does not arise directly from damage to the plaintiff's person or property but rather as a consequence of the negligent act itself, such as loss of profit, incurring additional expenses, or a decrease in property value.[542] South African courts have adopted a cautious approach when addressing issues related to pure economic loss.[543] In *Itzikowitz v Absa Bank*,[544] Ponnan JA reiterated this cautious stance by referencing the judgment of the Constitutional Court in *Country Cloud Trading CC v MEC, Department of Infrastructure Development* (hereinafter referred to the *Country Cloud Trading* case). In that case, the court highlighted the general reluctance of South African courts to recognise claims for pure economic loss, particularly when such recognition would extend the law of delict.[545]

The court in *Country Cloud Trading*[546] stressed that:

> Our legal system is generally hesitant to acknowledge claims for pure economic loss, particularly when doing so would represent an extension of the law of delict. The concept of wrongfulness must be clearly demonstrated. To date, it has been recognized only in specific categories of cases, such as intentional interference with contractual relations or negligent misstatements, where the plaintiff can demonstrate a right or a legally recognized interest that has been infringed by the defendant.[547]

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[540] Alosha Herath, ‘Pure Economic Loss‘(2017).
[541] *Country Cloud Trading cc v MEC: Department of Infrastructure Development* [2013] ZASCA 22.
[542] *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73.
[543] Johan Scott, ‘An Unsuccessful Long Shot Aimed at Effecting Liability for Causing Pure Economic Loss: Itzikowitz v ABSA Bank 2016 4 SA 432 (SCA)’ (2017) 80 Journal of Contemporary Roman-Dutch Law 1.
[544] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43.
[545] Johan Scott, ‘An Unsuccessful Long Shot Aimed at Effecting Liability for Causing Pure Economic Loss: Itzikowitz v ABSA Bank 2016 4 SA 432 (SCA)’ (2017) 80 Journal of Contemporary Roman-Dutch Law 1.
[546] *Country Cloud Trading cc v MEC: Department of Infrastructure Development* [2013] ZASCA.
[547] *Country Cloud Trading cc v MEC: Department of Infrastructure Development* [2013] ZASCA.

The court in *Country Cloud Trading,* further stated that "if claims for pure economic loss are too freely recognised, there is a risk of liability in an indeterminate amount for an indeterminate time to an indeterminate class".[548] This judgment favours a more restrictive approach to liability for pure economic loss. It represents the latest in a long line of South African rulings grappling with this issue. South African courts have been cautious about imposing indeterminate liability for causing pure economic loss, as this could lead to an uncontrolled expansion of liability.[549] The courts are mindful of the potential "floodgates of liability" that could open if pure economic loss claims are allowed too readily.[550]This restrictive stance is based on policy considerations. Allowing claims for pure economic loss without clear limits could expose defendants to unpredictable and potentially unlimited liability. It may be difficult or impossible for parties to insure against such risks adequately.[551] Consequently, the courts have sought to maintain a "bright line" rule limiting liability in this area.[552]

However, the courts have acknowledged that a completely rigid exclusion of liability for pure economic loss is unsatisfactory. As the law develops, the courts have recognised certain exceptions and qualifications to the general rule. In particular, liability may be imposed where there is a sufficiently close relationship between the parties, such that the defendant can be said to have assumed responsibility for the plaintiff's economic interests. The plaintiff's vulnerability or inability to protect itself from the risk of loss is also relevant. So, while the courts remain cautious about expanding liability for pure economic loss, they are willing to recognise exceptions where the policy considerations favour imposing a duty of care.[553] The precise boundaries of this area of law continue to be worked out through the incremental development of the common law.[554]

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548 *Country Cloud Trading cc v MEC: Department of Infrastructure Development* [2013] ZASCA para 24.
549 *Country Cloud Trading cc v MEC: Department of Infrastructure Development* [2013] ZASCA.
550 *Country Cloud Trading cc v MEC: Department of Infrastructure Development* [2013] ZASCA.
551 *Country Cloud Trading cc v MEC: Department of Infrastructure Development* [2013] ZASCA.
552 Chanté Ashley Cockrill, 'A shareholder's personal claim against directors for causing pure economic losses through diminution in share value: A South African critical analysis' (published LLM thesis, University of Western Cape, 2020).
553 Lowvells Hogan, 'Extension of delictual liability for pure economic loss: Are courts adopting the correct approach?' <https://www.hoganlovells.com/en/publications/extension-of-delictual-liability-for-pure-economic-loss-are-courts-adopting-the-correct-approach > (accessed 14 September 2024).
554 Lowvells Hogan, 'Extension of delictual liability for pure economic loss: Are courts adopting the correct approach?' <https://www.hoganlovells.com/en/publications/extension-of-delictual-liability-for-pure-economic-loss-are-courts-adopting-the-correct-approach > (accessed 14 September 2024).

In *Itzikowitz v Absa Bank*, the appellant was unable to invoke the provisions of section 218(2) of the Act to recover losses resulting from the devaluation of its shareholding due to the respondent's actions.[555] The court decided that a shareholder cannot recover an amount equivalent to the decrease in the market value of their shares or the anticipated reduction in dividends. Such losses should be legally understood as merely reflecting the losses incurred by the company.[556] The court clarified that the shareholder does not experience any personal loss except indirectly through the company, as evidenced by the decrease in the value of the company's net assets.[557]

As established in chapter 3 above, section 76(3) imposes a duty on directors to act in good faith and in the company's best interests. It codifies common law fiduciary duties, requiring directors to avoid conflicts of interest and act with the care expected of an ordinarily prudent person.[558] Section 77(2) also allows a director to be held liable for losses or damages sustained by the company due to their actions, but only in accordance with common law principles. It establishes that claims related to breaches of fiduciary duties must follow established legal principles and cannot support reflective loss claims. [559] Therefore, when section 218(2) is interpreted within its context, particularly when a plaintiff relies on a breach of section 76(3) to establish the defendant's liability for damages under section 218(2), it is essential to consider the provisions of section 77(2). This section explicitly mandates that a claim for a breach of section 76(3) must be pursued "in accordance with the principles of common law".[560] Consequently, the reference to common law in section 77(2) implies that reflective loss claims cannot be brought under this section, as common law does not recognise such claims. The plaintiffs in *Hlumisa Investment Holdings (RF) Limited v Kirkinis* argued that the 2008 Act permits a reflective loss claim, which is otherwise prohibited by common law when the claim is based on section 76(3).[561]

Under common law, there is no automatic liability to third parties for breaches of statutes that result in pure economic loss unless the statute itself provides otherwise.

[555] *Itzikowitz v ABSA Bank* 2016 4 SA 432 (SCA) para 6.
[556] *Itzikowitz v ABSA Bank* 2016 4 SA 432 (SCA) para 12
[557] *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) [1982] Ch 204 para 222–223.
[558] Section 76(3) of the Companies Act 71 of 2008.
[559] Section 77(2) of the Companies Act 71 of 2008.
[560] *Hlumisa Investment Holdings (RF) Limited v Kirkinis* [2018] ZAGPPHC 676 para 40.
[561] *Hlumisa Investment Holdings (RF) Limited v Kirkinis* [2018] ZAGPPHC 676 para 49.

Instead, one must apply the principles of delict concerning wrongfulness in the context of losses arising from statutory breaches.[562] Judge Brand JA, in the Supreme Court of Appeal's judgment in *Country Cloud Trading*, stated that "wrongfulness in the context of delictual liability for pure economic loss ultimately depends on an evaluation based on legal and public policy considerations".[563] Therefore, inquiry revolves around whether these policy considerations necessitate declaring harmful conduct as wrongful, thereby rendering the defendant liable for the loss, or whether they dictate that the harm should remain with the plaintiff.[564]

Under South African law, the *Aquilian* action generally applies to claims for damages resulting from pure economic loss. Therefore, the elements of delict must be demonstrated for a plaintiff to successfully establish a case for pure economic loss. These elements include harm, conduct, causation, fault, and wrongfulness.[565] When addressing issues of pure economic loss, it appears that the courts emphasise the element of wrongfulness. The primary challenge of determining liability for pure economic loss – often referred to as the limitation problem – is typically resolved by applying the principles related to the assessment of wrongfulness, in which policy considerations play a critical role.[566] In this context, the court will usually ascertain whether a legal duty exists, guided by examining various policy factors.[567] There is no inherent right to be free from pure economic loss; thus, conduct that results in pure economic loss is not considered prima facie wrongful.[568] In *Itzikowitz v Absa Bank* , the court initiated its reasoning on the issue of pure economic loss by highlighting, with reference to Harms JA's judgment in *Steenkamp v Provincial Tender Board Eastern Cape*, the widely accepted view that conduct leading to such loss is not to be regarded

[562] Michael Kleitman, 'Director Liability' available at <https://withoutprejudice.co.za/article/5043/view> (accessed 15 September 2024).
[563] *Country Cloud Trading cc v MEC: Department of Infrastructure Development* [2013] ZASCA para 16.
[564] *Country Cloud Trading cc v MEC: Department of Infrastructure Development* [2013] ZASCA para 18.
[565] Max Loubser, Rob Midgley, André Mukheibir, Liezel Niesing, and Devina Peruma, *The Law of Delict in South Africa* (Oxford University Press 2018) 25.
[566] Johan Scott, 'An Unsuccessful Long Shot Aimed at Effecting Liability for Causing Pure Economic Loss: Itzikowitz v ABSA Bank 2016 4 SA 432 (SCA)' (2017) 80 Journal of Contemporary Roman-Dutch Law 1.
[567] Alosha Herath, 'A Pure Economic Loss' (2017).
[568] *Country Cloud Trading cc v MEC: Department of Infrastructure Development* [2013] ZASCA para 22.

as prima facie wrongful.[569] Instead, its wrongfulness is contingent upon the existence of a legal duty.[570]

As previously discussed, there is no indication in section 218(2) that the legislature intended to modify common law or permit claims for shareholder value loss to be pursued under this section.[571] Consequently, section 218(2) does not apply to situations where shareholders experience losses due to a decline in share price. Indeed, as the Constitutional Court aptly noted in *Country Cloud Trading*:

> "Until we are satisfied that the department wronged Country Cloud, its claim does not get off the ground." Absa's primary argument is fundamentally straightforward: it asserts that any damage, if it occurred, was suffered by AMU, and that the appellant, being merely a shareholder distanced from that company, cannot sue to recover AMU's loss. In the terms articulated in *Country Cloud*, the appellant has not been wronged by Absa".[572]

In *Hlumisa Investment Holdings (RF) Limited v Kirkinis,* the court expressed that permitting a claim for the diminution of share value under section 218(2) of the 2008 Act represents "an enormous departure from clearly established legal principles". The court noted that if the legislature intended to deviate from the common law position, it would have explicitly stated something akin to "notwithstanding anything in the common law".[573] Furthermore, the court indicated that even if the plaintiffs could assert a claim for a breach of section 76(3) under section 218(2), they would need to demonstrate that section 218(2) had modified the common law to allow for reflective loss claims. The court concluded that there was no evidence suggesting the legislature intended to alter the common law to permit reflective loss claims under this section. Justice Molopa-Sethosa stated that the plaintiffs' reliance on section 218(2) to support a reflective loss claim did not constitute a legally sustainable claim and did not circumvent the exception raised by the defendants.[574]

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569 *Steenkamp v Provincial Tender Board, Eastern* Cape 2006 3 SA 151 (SCA) 155F.
570 Alosha Herath, 'A Pure Economic Loss' (2017).
571 Patrick Bracher, 'Claim by Shareholders Against Directors Under Section 218(2) of Companies Act fails' available at <https://www.financialinstitutionslegalsnapshot.com/> (accessed 15 September 2024).
572 *Country Cloud Trading cc v MEC: Department of Infrastructure Development* [2013] ZASCA para 43.
573 *Hlumisa Investment Holdings (RF) Limited v Kirkinis* [2018] ZAGPPHC 676; *Itzikowitz v Absa Bank Ltd* [2016] ZASCA para 43.
574 *Hlumisa Investment Holdings (RF) Limited v Kirkinis* [2018] ZAGPPHC 676; *Itzikowitz v Absa Bank Ltd* [2016] ZASCA para 43.

The case of *De Bruyn v Steinhoff International Holdings N.V. and Others* has significant implications regarding applying section 218(2) of the 2008 Act. This case arose in the Steinhoff corporate scandal, where accounting irregularities led to a dramatic decline in share prices, resulting in substantial losses for shareholders, including Ms. De Bruyn. In this case, the court addressed whether shareholders could hold directors personally liable under section 218(2) for breaches of their duties as outlined in section 22(1), which prohibits reckless trading. The court concluded that while section 218(2) provides a right of action for contraventions of the 2008 Act, it does not specify the nature of that right or who may exercise it. This means that the substantive provisions of the 2008 Act must be consulted to determine the applicable rights and liabilities.[575]

The court emphasised that section 22(1) imposes duties on the company rather than directly on its directors. Therefore, interpreting section 22(1) as imposing liability on directors would introduce a prohibition not explicitly stated in the 2008 Act. The court also highlighted that section 77(2) of the 2008 Act, which pertains to the liability of directors, aligns with common law principles, reinforcing that any claims for losses due to reckless or fraudulent trading must be pursued by the company itself, not by individual shareholders.[576]

Furthermore, the court noted that the common law principle of reflective loss, which holds that shareholders cannot claim for losses that merely reflect a company's losses, remains intact. Thus, the claims brought by Ms. De Bruyn and other shareholders were ultimately deemed impermissible under the current legal framework, as they sought to recover losses associated with the decline in share value rather than direct losses suffered by the company.[577]

The *De Bruyn v Steinhoff International Holdings N.V. and Others* case reaffirms the limitations on shareholder claims against directors under the Act 2008, emphasising that any actionable claims must be grounded in the substantive provisions of the 2008 Act and that the common law (principle of reflective loss) continues to govern such disputes.[578]

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[575] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
[576] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
[577] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
[578] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).

4.3.3. APPLICABILITY OF SECTION 218 (2) REMEDY TO RECKLESS TRADING CASES

The remedy provided by section 218(2) of the 2008 Act has been successfully utilised by litigants primarily in cases involving a breach of the statutory reckless trading provision under section 22(1) of the 2008 Act. Prior to the enactment of the 2008 Act, reckless trading in South African corporate law was regulated by the Companies Act 61 of 1973 (the "1973 Act"). Section 424(1) of the 1973 Act allowed for the piercing of the corporate veil and empowered courts to impose personal liability on directors and any other parties involved in the reckless and fraudulent trading of the company. However, the 1973 Act has since been repealed and replaced by the 2008 Act, which currently governs reckless trading.[579]

In 2008, the 2008 Act was enacted, introducing several statutory prohibitions and addressing misconduct by the company or its members and directors.[580] An example of such a prohibition is found in the provisions of sections 22(1)(a) and (b).[581] Sections 22 and 77(3)(b) of the 2008 Act were specifically introduced to address issues of reckless and fraudulent trading by companies.[582] The 2008 Act was enacted in 2011 and has provided a new interpretation of reckless and fraudulent trading. The provisions of Schedule 5, item 9(1), in conjunction with item 9(4) of the 2008 Act, stipulate that Chapter 14 of the 1973 Act continues to apply regarding the winding-up and liquidation of both solvent and insolvent companies until a date determined by the Minister. Section 424(1) of the 1973 Act, which is part of Chapter 14, thus remains in effect despite the repeal of the 1973 Act due to the retention of Chapter 14. Section 424(1) applies to companies in the process of winding up and liquidation, regardless of their solvency. However, if a company is not undergoing winding-up, then section 22 of the 2008 Act, rather than section 424 of the 1973 Act, will be applicable.[583]

Section 22(1) of the 2008 Act prohibits a company from conducting its business recklessly, with gross negligence, with the intent to defraud any individual, or for any

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[579] Simphiwe Phungula, 'Lessons to be Learned from Reckless and Fraudulent Trading by a Company: Section 424(1) of the Companies Act 61 of 1973 and Sections 22 and 77(3)(b) of the Companies Act 71 of 2008' (2016) 28 SA Merc LJ 238.
[580] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake* [2017] ZALMPPHC 27 para 23.
[581] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake* [2017] ZALMPPHC 27 para 23.
[582] Simphiwe Phungula, 'Lessons to be Learned from Reckless and Fraudulent Trading by a Company: Section 424(1) of the Companies Act 61 of 1973 and Sections 22 and 77(3)(b) of the Companies Act 71 of 2008' (2016) 28 SA Merc LJ 238.
[583] Farouk Cassim, *Contemporary Company Law* (Juta 2022) 588.

fraudulent purpose.[584] Essentially, this section forbids a company from managing its affairs recklessly or fraudulently. Additionally, section 76(3) stipulates that directors must exercise their powers and perform their functions in good faith, for a proper purpose, and in the company's best interests, which they are responsible for managing.[585] Section 76(3) also encompasses a crucial duty of care, skill, and diligence. If directors permit the company to operate recklessly or fraudulently with the intent to deceive a third party, they would be violating their fiduciary duties as outlined in section 76.[586]

Furthermore, section 77 establishes the liability of directors in relation to common law principles concerning breaches of fiduciary duties.[587] This liability pertains to any loss, damage, or costs incurred by the company. Directors become liable when there is a violation of common law principles stemming from a breach of fiduciary obligations that results in the company suffering “any loss, damages, or costs”.[588] Section 77(3)(b) of the 2008 Act specifies that a director is liable for any loss, damages, or costs sustained by the company as a direct or indirect result of the director having “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)”.[589] According to section 78(6) of the 2008 Act, a company is not permitted to indemnify a director for any liability arising from section 77(3)(b). Therefore, reckless trading can lead to a company director being held personally accountable for any loss, damages, or costs that the company directly or indirectly incurs.[590]

Section 22(1) of the 2008 Act corresponds to a portion of section 424(1) of the 1973 Act; however, there is a key distinction between these two provisions. While section 22(1) explicitly prohibits a company from conducting its business in a particular manner, section 424 does not contain such a prohibition. Instead, section 424(1) addresses the repercussions of a company operating recklessly or fraudulently by imposing personal liability on the wrongdoer, typically a director, for the company's

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584 Section 22(1) of the Companies Act 71 of 2008.
585 Section 76(3) of the Companies Act 71 of 2008.
586 Section 76(3) of the Companies Act 71 of 2008.
587 Section 77 of the Companies Act 71 of 2008.
588 *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake* [2017] ZALMPPHC 27 para 28.2.
589 Section 77(3)(b) of the Companies Act 71 of 2008.
590 Section78(6) of the Companies Act 71 of 2008.

debts if that individual was knowingly involved in the reckless or fraudulent conduct of the company's business.[591]

While section 22(1) establishes a prohibition against reckless trading, it does not impose personal liability on directors by itself. The assignment of personal liability to directors for reckless trading can be considered a crucial precaution against severe mismanagement of a company's business and affairs. This burden of personal liability is appropriately placed, given that the responsibility for managing a company's business and affairs rests with its board of directors.[592]

The SCA *Venator Africa (Pty) Ltd v Watts and Another* confirmed that section 218(2) does not create a standalone cause of action against directors for the company's reckless trading as prohibited under section 22(1).[593] The court emphasised that section 22(1) imposes obligations on the company itself rather than directly on its directors. As such, the directors could not be held personally liable under section 218(2) unless their actions had contravened a specific provision of the 2008 Act.[594] The court further clarified that while section 218(2) allows for liability in cases of contravention, it must be linked to a breach of a specific statutory duty. The SCA noted that the principles of corporate law, including the company's separate legal personality and the directors' limited liability, must be respected. Consequently, the court concluded that the appellant failed to identify a valid statutory breach attributable to the directors that would invoke liability under section 218(2).[595]

The core issue in the *Venator Africa (Pty) Ltd v Watts and Another* case centered on the interpretation of section 218(2) in conjunction with section 22(1) of the 2008 Act in South Africa. Section 218(2) indicates that a violation of the 2008 Act resulting in loss or damage makes the violator liable. However, this liability is contingent upon a breach of specific provisions within the Act.[596] Furthermore, section 22(1) explicitly prohibits companies from engaging in reckless business practices or fraudulent activities. The

[591] Carl Stein, *The New Companies Act Unlocked* (Siber Ink 2008) 4.
[592] Section 66 (1) of the Companies Act 71 of 2008.
[593] *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
[594] *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
[595] *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
[596] *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.

court in *Venator Africa (Pty) Ltd v Watts and Another* case illustrated that this duty lies with the company rather than directly with the directors, thereby challenging the assumption that directors can be personally liable under this section without evidence of additional statutory breaches.[597]

The court in *Venator Africa (Pty) Ltd v Watts and Another* further elaborated on directors' responsibilities primarily through references to section 77. It was found that section 76(3) mandates that directors act in good faith and in the best interests of the company, codifying common law fiduciary duties. Directors must avoid conflicts of interest, exercise the care expected of a reasonably prudent person, and operate within their powers.[598] The *Venator Africa (Pty) Ltd v Watts and Another* case reinforced the autonomy of the corporate entity while clarifying the conditions under which directorial liability may be invoked. By reaffirming the limitations of sections 218(2) and 22(1), the judgment upholds foundational legal principles within company law, ensuring that directors are held accountable only under clearly defined statutory breaches.[599]

Furthermore, it was held that sections 77(2) and 77(3)(b) outline the liability of directors for losses or damages incurred by the company due to their actions. Specifically, section 77(3)(b) states that a director is liable for any loss, damage, or costs sustained by the company as a direct or indirect result of acquiescing to business practices that violate section 22(1) (i.e., conducting business recklessly, with gross negligence, or with intent to defraud).[600] The case emphasises that while directors bear significant responsibilities in managing and guiding the company, they must diligently uphold their duties to avoid personal liability and protect its interests. This framework not only safeguards the company and its stakeholders but also maintains the integrity of the business environment by enforcing strict compliance with these legislated duties.[601] However, section 77 holds directors accountable for direct and indirect consequences arising from their acquiescence to prohibited company activities.[602] This provision aligns with a broader statutory scheme that prioritises specific liabilities over general

597 *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
598 *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
599 *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
600 *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
601 *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
602 *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.

ones and underscores the necessity for precise legal grounds when asserting directorial liability.

Various scholars analysing the interpretation of section 218(2) suggest that directors may be held personally liable under this provision of the 2008 Act if section 22(1) is violated.[603] In this context, Cassim emphasises that “a further important statutory provision that must not be overlooked in this context is section 218(2)”.[604] Myburgh argues that section 218(2) serves as the foundation for holding a director accountable for losses or damages caused by contravening section 22(1) of the 2008 Act, particularly when such actions involve reckless trading, gross negligence, intent to defraud, or other fraudulent purposes.[605] Moreover, it appears that some High Courts are willing to permit personal claims against directors under section 218(2) in cases of “reckless trading”.[606] Thus, section 218(2) of the 2008 Act can be regarded as a significant statutory provision in section 22(1) of the same Act.

In *Rabinowitz v Van Graan and Others*, the court was required to determine whether a third party could hold a director liable for a breach of section 22(1) in conjunction with section 218(2) of the Act 2008.[607] The case indicated that a third party should be able to invoke section 218(2) to sue a director personally for damages and losses incurred due to the company's reckless or fraudulent trading in violation of section 22. This is significant because the prohibition in section 22 is directed at the “company” rather than the “directors”. Legal counsel for any director sued under section 218(2) alongside section 22 would naturally acknowledge that section 22 refers specifically to “the company” and not to “the directors”. However, the court have rejected this argument, which asserts that the company, as an artificial entity, can only act through natural persons, such as its directors.[608]

603 Section 22 of the Companies Act 71 of 2008.
604 Farouk Cassim, *Contemporary Company Law* (Juta 2022) 582.
605 Emile Myburgh E, ‘Holding delinquent directors personally liable’ available at < https://www.derebus.org.za/holding-delinquent-directors-personally-liable/> (accessed 15 September 2024).
606 *Chemfit Fine Chemicals (Pty) Ltd ta SA Premix v Maake & others* [2017] ZALMPPHC 27; *Rabinowitz v Van Graan & others* 2013 (5) SA 315 (GSJ) 22.
607 *Rabinowitz v Van Graan and Others* 2013 (5) SA 315 (GSJ).
608 *Rabinowitz v Van Graan and Others* 2013 (5) SA 315 (GSJ); *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd and Others [*2016] ZAWCHC 35.

Consequently, this allows a third party who has suffered a loss to initiate action against the directors under section 218(2) of the 2008 Act, which serves as the enabling provision.[609] Similarly, in *Chemfit Fine Chemicals (Pty) Ltd ta SA Premix v Maake & others*, the defendant directors were ordered to pay damages amounting to R3,126,344.41 under section 218(2) of the 2008 Act in a personal claim where the directors were found liable for allowing the company to trade while insolvent.[610] While shareholders (as third parties) are prohibited from claiming for pure economic loss resulting from a decrease in share value, other third parties, such as creditors, are permitted to claim in the context of section 22(1), despite the fact that section 22(1), when read alongside section 77(3)(b), suggests that the company is the appropriate plaintiff.

In the *Rabinowitz v Van Graan and Others* case,[611] Du Plessis AJ ruled that a third party could hold a director personally liable under the Act for either acquiescing in or being aware of conduct that falls within the scope of section 22(1), which prohibits reckless or fraudulent business practices. This interpretation underscores that directors can be held accountable for their knowledge and involvement in such conduct.[612] Similarly, in the *Blue Farm Fashion Limited v Rapitrade (Pty) Ltd and Others* case,[613] the plaintiff argued that it had initiated a civil action against the directors, asserting that they should be held personally liable for losses because they were knowingly complicit in the reckless or fraudulent conduct of the company's business, as outlined in sections 77(3)(b) and (c) of the 2008 Act. The court recognised these sections as providing a basis for personal liability when directors fail to uphold their statutory duties.[614]

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,[615] O'Regan J emphasised that section 218(2) allows for claims against directors, but it does not create a standalone cause of action. Instead, liability must be linked to specific

[609] *Blue Farm Fashion Limited v Rapitrade (Pty) Ltd and Others* [2016] ZAWCHC 35 para 15.
[610] *Blue Farm Fashion Limited v Rapitrade (Pty) Ltd and Others* [2016] ZAWCHC 35 para 45
[611] *Rabinowitz v Van Graan and Others* 2013 (5) SA 315 (GSJ).
[612] *Rabinowitz v Van Graan and Others* 2013 (5) SA 315 (GSJ).
[613] *Blue Farm Fashion Limited v Rapitrade (Pty) Ltd and Others* [2016] ZAWCHC 35.
[614] *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd and Others* [2016] ZAWCHC 35 22.
[615] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) 490 (CC) para 507 C – D.

breaches outlined in other sections of the 2008 Act.[616] The court reiterated that section 77(3)(b) holds directors accountable for losses sustained by the company as a result of their acquiescence in reckless trading. Thus, it is primarily the company that has the right to pursue claims for damages, not individual shareholders.[617]

The SCA further clarified this position by stating that there must be a direct link between the contravention and the loss claimed.[618] In instances where the company incurs losses due to a director's breach of duty, it is the company itself that possesses the right of action. The SCA dismissed appeals from shareholders seeking to hold directors personally liable under section 218(2), emphasising that such claims would undermine the company's ability to recover losses from its directors.[619] Recent cases indicate that a director may be held personally liable under section 218(2) of the 2008 Act in conjunction with section 22(1), provided that the plaintiff can demonstrate a specific violation of the 2008 Act and establish a causal link between the loss incurred and the reckless or fraudulent trading.[620]

4.4. CONCLUSION

It has been established that shareholders, as a general principle, cannot hold directors personally liable for declines in share price due to the common law's prohibition against reflective loss claims. In investigating the suitability of relying on section 218(2) for shareholders seeking to hold directors personally liable for reductions in share price, it was further established that the principle against reflective loss, which originates from English law, is applicable in South Africa. Thus, common law dictates that only the company has *locus standi* (the right to bring a lawsuit) to sue directors for breaches of their fiduciary duties that result in a decrease in the company's assets, such as a stock market share price decline.

This chapter affirms a statutory interpretation principle: a statute does not modify existing common law more than necessary. It was argued and established that there is nothing in section 218(2) of the 2008 Act indicating that the legislature intended to amend common law to permit an extension of personal liability under this section for

[616] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) 490 (CC) para 507 C – D.
[617] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) 490 (CC) para 507 C – D.
[618] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) 490 (CC) para 507 C – D.
[619] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) 490 (CC) para 507 C – D.
[620] Chanté Ashley Cockrill, 'A shareholder's personal claim against directors for causing pure economic losses through diminution in share value: A South African critical analysis' (published LLM thesis, University of Western Cape, 2020).

shareholders experiencing pure economic loss due to declines in share value attributed to directors' actions on behalf of the company. Such an extension would be undesirable, as it could lead to an influx of personal claims from shareholders against directors contrary to legislative intent. However, the principle against reflective loss does not obstruct claims when the losses suffered by the shareholder and the company are distinguishable. In such cases, a shareholder may have a valid personal claim against a director.

Furthermore, a distinction between cases involving “diminution in share price” and those involving “reckless trading”, where section 218(2), read in conjunction with section 22(1) of the 2008 Act, has been successfully employed by litigants to hold directors personally liable for causing pure economic losses to third parties. The chapter examined several cases, including *Blue Farm Fashion Limited* and *Chemfit Fine Chemicals (Pty) Ltd ta SA Premix v Maake & others* where sections 218(2) and 22(1) were applied to hold directors personally liable for losses incurred by creditors or third parties due to the company trading under insolvent conditions. In *Rabinowitz v Van Graan*,[621] the court affirmed that a director could be held personally liable under section 218(2) when read together with section 22(1) of the 2008 Act.

Therefore, stakeholders who suffer harm due to reckless conduct by directors are not left without remedies, as such contraventions typically incur personal liability under section 218(2) of the 2008 Act.[622] However, the court stated that the plaintiff must allege and prove the specific contravention of the Act 2008 and establish the causal relationship between the alleged misconduct and the damages suffered. Contraventions of this nature consistently attract the personal liability of directors within the meaning and purpose of section 218(2) and related provisions. Extending liability under section 218(2) to every breach of a statutory duty would open the door to a flood of claims that the legislature never intended, creating the risk of unjust and potentially devastating lawsuits.[623]

[621] *Rabinowitz v Van Graan & others* 2013 (5) SA 315 (GSJ) 22.
[622] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) 490 (CC).
[623] *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.

CHAPTER 5: PROBING THE LIABILITY OF COMPANY DIRECTORS AGAINST CLAIMS BY SHAREHOLDERS

5.1. INTRODUCTION

The previous chapter focused on the question of whether shareholders who incur pure economic losses due to the actions or decisions of company directors can bring personal claims against those directors. It critically analysed the remedy provided by section 218(2) of the 2008 Act, along with various related issues surrounding this provision. The chapter further examined the scope and interpretation of section 218(2), assessing its suitability as a remedy for holding directors personally liable for decreases in share price. It also distinguished between cases involving share price diminution and those related to reckless trading.

Thus, this chapter will build upon this discussion by analysing the extent to which shareholders can hold directors accountable, considering common law principles and relevant statutory provisions. Additionally, the chapter will assess statutory and non-statutory provisions that may impose duties on directors towards shareholders to determine the circumstances under which shareholders can hold directors personally liable.

5.2. LIABILITY OF COMPANY DIRECTORS TO SHAREHOLDERS UNDER COMMON LAW READ WITH SECTION 218(2) OF THE COMPANIES ACT 71 OF 2008

5.2.1. THE *FOSS V HARBOTTLE* PRINCIPLE READ WITH SECTION 218(2) OF THE COMPANIES ACT 71 OF 2008

As discussed in chapter 3, in 1843, the landmark United Kingdom case of *Foss v Harbottle* established the legal principle that only the company, rather than its individual members, has the standing to sue for wrongs committed against it.[624] This principle was further elucidated in *Edwards v Halliwell*,[625] which articulated several key points. The court held that the proper plaintiff in an action concerning a wrong alleged

[624] *Foss v Harbottle* (1843) 2 Hare 461.
[625] *Edwards v Halliwell* [1950] 2 All ER 1064.

to have been done to a corporation is, prima facie, the corporation itself.[626] If the alleged wrongdoing involves a transaction that could be binding on the corporation and all its members by a simple majority vote, no individual member may initiate a lawsuit regarding that matter.[627] If the majority supports the transaction, then there is no basis for a claim; conversely, if the majority opposes it, there is no valid reason for the company not to pursue legal action.[628] The rule does not apply if the alleged wrongdoing is beyond the powers of the corporation (ultra vires), as a majority cannot validate such a transaction.[629] The rule also does not apply if the transaction in question requires approval by a special resolution, as a simple majority cannot authorise actions needing a greater consensus.[630] An exception exists when the actions taken amount to fraud and those responsible are in control of the company.[631] In such cases, minority shareholders may bring an action on behalf of themselves and others, as denying them this right would prevent their grievances from being addressed in court due to the control exercised by the wrongdoers.[632]

The case of *Wallersteiner v Moir*[633] aligns with the principles established in *Foss v Harbottle*, affirming that the rule from *Foss v Harbottle* is straightforward to apply when a company is defrauded by external parties.[634] In such instances, the company itself is the sole entity entitled to sue. Similarly, when the fraud is perpetrated by insiders of a minor nature, the company remains the only party withstanding to initiate legal action.[635] However, complications arise when insiders who control the company's affairs – such as directors holding a majority of shares – commit fraud.[636] In these cases, it becomes unclear who can seek damages, as those directors are themselves the wrongdoers.[637] If a board meeting is convened, they are unlikely to authorise any legal proceedings against themselves. Likewise, at a general meeting, they would

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626 *Edwards v Halliwell* [1950] 2 All ER 1064.
627 *Edwards v Halliwell* [1950] 2 All ER 1064 para 1066-1067.
628 *Edwards v Halliwell* [1950] 2 All ER 1064 para 1066-1067.
629 *Edwards v Halliwell* [1950] 2 All ER 1064 para 1066-1067.
630 *Edwards v Halliwell* [1950] 2 All ER 1064 para 1066-1067.
631 *Edwards v Halliwell* [1950] 2 All ER 1064.
632 *Edwards v Halliwell* [1950] 2 All ER 1064 para 1066-1067.
633 *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849.
634 *Foss v Harbottle* (1843) 2 Hare 461.
635 *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849.
636 *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849.
637 *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849 para 857D-F.

likely vote against any proposal for the company to sue them.[638] Nevertheless, since the company is the entity that has suffered harm, some mechanism must be found to enable it to pursue legal action; otherwise, the law would fail to serve its purpose, resulting in injustice without remedy.[639]

The case underscored the necessity for remedies available to minority shareholders when the company experiences damages.[640] In *Prudential Assurance Co Ltd v Newman Industries Ltd and Others*,[641] it was established that a shareholder cannot initiate legal action to recover damages for wrongs done to the company. Instead, if justice necessitates that a minority action be permitted, the appropriate course of action would be to file a derivative action on behalf of the company.[642] Additionally, it was noted in *obiter* that a shareholder is unable to bring a personal claim based on reflective loss.[643]

Furthermore, it was stated in *obiter* that a shareholder cannot pursue a personal claim based on reflective loss.[644] The rationale for this conclusion is articulated in the *Law of South Africa (LAWSA)*, which explains that since a shareholder's shares represent merely the right to participate in the company according to the terms of the memorandum of incorporation, this right remains unaffected by any wrongdoing committed against the company.[645] Therefore, a personal claim by a shareholder against the wrongdoer to recover an amount equivalent to the decrease in the market value of their shares, or corresponding to the anticipated reduction in dividends, is fundamentally flawed.[646]

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[638] *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849 para 857D-F.
[639] *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849 para 857D-F.
[640] Lauren Cheryl Sparis, 'Can Directors Be Held Personally Liable to Shareholders in the Context of South African Law?' (LLM mini dissertation, University of Pretoria 2019).
[641] *Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2)* [1982] 1 All ER 354 (CA).
[642] *Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2)* [1982] 1 All ER 354 (CA).
[643] Bas Jan de Jong, 'Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis' (2013) 14 European Business Organization Law Review 97.
[644] Cassim Williams, 'Attributes or Consequences of The Company's Corporate Personality' in W A Joubert (ed), *The Law of South Africa* vol 4(1) (LexisNexis 2012) 67.
[645] Cassim Williams, 'Attributes or Consequences of The Company's Corporate Personality' in W A Joubert (ed), *The Law of South Africa* vol 4(1) (LexisNexis 2012) 67.
[646] Cassim Williams, 'Attributes or Consequences of The Company's Corporate Personality' in W A Joubert (ed), *The Law of South Africa* vol 4(1) (LexisNexis 2012) 67.

This concept was however articulated in *Prudential Assurance Co Ltd v Newman Industries Ltd and Others*[647] as follows:

> "Such a 'loss' is merely a reflection of the loss incurred by the company. The shareholder does not experience any personal loss; their only 'loss' arises through the company due to the decrease in the value of the net assets of the company. The plaintiff's shares represent merely a right to participate in the company according to the terms outlined in the articles of association. The shares themselves, which constitute this right of participation, are not directly impacted by the wrongdoing. The plaintiff continues to hold all of the shares as their own, completely unencumbered property".[648]

However, the judgment recognised an exception to the principle in *Foss v Harbottle*,[649] stating that when a company has incurred a loss and lacks a cause of action to recover that loss – such as in cases where the company has been liquidated – a shareholder may initiate a lawsuit regarding that loss, provided the shareholder has a valid cause of action.[650] This includes situations where the shareholder has experienced a loss due to a decrease in the value of their shareholding. Furthermore, if the company suffers a loss due to a breach of duty owed to it, and a shareholder experiences a distinctly separate loss resulting from a breach of duty owed independently to that shareholder, both the company and the shareholder are entitled to sue for their respective losses.[651]

The principle established in *Foss v Harbottle* is not absolute, and in the Irish case of *Fanning v Murtagh*,[652] Irvine J identified four exceptions to this principle that permit derivative actions.[653] These exceptions can be summarised into the following categories:

a) **Ultra vires acts**: Actions taken by the company that exceed its legal authority.

b) **Special majority requirements**: Situations where a special majority is needed for certain decisions, and a simple majority is insufficient.

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[647] *Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2)* [1982] 1 All ER 354 (CA para 366-367.

[648] *Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2)* [1982] 1 All ER 354 (CA para 366-367.

[649] *Foss v Harbottle* (1843) 2 Hare 461.

[650] *Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2)* [1982] 1 All ER 354 (CA para 222-223.

[651] *Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2)* [1982] 1 All ER 354 (CA para 222-223.

[652] *Fanning v Murtagh* [2009] 1 IR 551.

[653] *Fanning v Murtagh* [2009] 1 IR 551.

c) **Personal rights exception**: Instances where a shareholder's individual rights, as defined in the company's constitution, are infringed upon.

d) **Fraud by those in control**: Cases where fraud is committed by individuals who control the company, preventing them from ratifying their own wrongful actions.

These exceptions allow minority shareholders to take legal action on behalf of the company when specific circumstances arise that would otherwise prevent the company from pursuing a claim. In essence, directors of a company cannot leverage their control to condone actions that are *ultra vires* or illegal. Shareholders retain the ability to prevent the company from acting ultra vires before a transaction is finalised.[654] Regarding the second exception, if a company's founding documents specify that a special majority is necessary for a particular course of action and the directors disregard this requirement, a single shareholder may initiate legal action as an exception to the *Foss v Harbottle* principle.[655] The "personal rights" exception asserts that if the company denies a shareholder rights granted to them in the company's constitution or founding documents, that shareholder can file a lawsuit on behalf of themselves and all other shareholders affected by the denial of those rights.[656] One rationale for limiting derivative claims is to avoid multiple claims that could easily be ratified by the majority shareholders on behalf of the company.[657] The final exception, 'fraud by those in control', exists because fraud cannot be ratified. However, this exception does not extend to cases of negligence.[658]

The court in *McLelland v Hulett*[659] and *Kalinko v Nisbet* [660] recognised an exception to the principle established in *Foss v Harbottle*, indicating that when double jeopardy is not a concern and shareholders experience a decline in the value of their shares, the ongoing application of the *Foss v Harbottle* rule would constitute an "unwarranted technical obstruction to the course of justice".[661] Consequently, adherence to the rule was deemed inappropriate. These cases were cited by the applicant in *Letseng*

[654] *Parke v The Daily News Ltd [1962] Ch 927 and Smith v Croft* (No 2) [1988] Ch 114.
[655] *Edwards v Halliwell* [1950] 2 All ER 1064.
[656] *Pender v Lushington* (1877) 6 Ch D 70.
[657] *Cooks v Deeks* [1916] 1 AC 554.
[658] *Pavlides v Jensen* [1956] 2 All ER 518.
[659] *McLelland v Hulett* 1992 (1) SA 456 (D).
[660] *Kalinko v Nisbet* 2002 (5) SA 766 (W).
[661] *McLelland v Hulett* 1992 (1) SA 456 (D) para 467B – H.

Diamonds Ltd v JCI Ltd and Others.[662] In this case, the applicant, a shareholder in JCI Ltd, faced financial difficulties due to multiple lawsuits against the company. To address this, JCI Ltd secured a loan from Investec Bank Ltd, which included a raising fee of 30 percent on the total increase in the value of assets provided as collateral and required a change in the board of directors.[663] The applicant sought to have the agreements between JCI Ltd and Investec Bank Ltd declared invalid. In Judge Blieden's ruling, the *Foss v Harbottle* rule was referenced and articulated differently, stating that a third party cannot interfere with the terms of an agreement between two other parties.[664] Judge Blieden also noted that allowing individual minority shareholders to pursue claims against directors could lead to chaos within corporate governance, as there were numerous shareholders involved.[665] Thus, it was concluded that such claims could not be entertained without undermining the established principles governing corporate actions.[666]

By relying on the decisions in *McLelland v Hulett*[667] *and Kalinko v Nisbet,*[668] Blieden J noted that the judges did not adequately consider the implications of allowing individual minority shareholders to pursue claims against directors. He emphasised that such relief should only be granted in exceptional cases, like *McLelland v Hulett*, where the plaintiff had no other remedy available.[669] In contrast, the current case involved thousands of shareholders, and permitting individual claims would lead to "anarchy in the affairs of the company".[670]

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[662] *Letseng Diamonds Ltd v JCI Ltd; Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd* 2007 (5) SA 564 (W).
[663] *Letseng Diamonds Ltd v JCI Ltd; Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd* 2007 (5) SA 564 (W).
[664] *Letseng Diamonds Ltd v JCI Ltd; Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd* 2007 (5) SA 564 (W).
[665] *Letseng Diamonds Ltd v JCI Ltd; Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd* 2007 (5) SA 564 (W).
[666] *Letseng Diamonds Ltd v JCI Ltd; Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd* 2007 (5) SA 564 (W).
[667] *McLelland v Hulett* 1992 (1) SA 456 (D).
[668] *Kalinko v Nisbet* 2002 (5) SA 766 (W).
[669] *McLelland v Hulett* 1992 (1) SA 456 (D).
[670] *Letseng Diamonds Ltd v JCI Ltd; Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd* 2007 (5) SA 564 (W) para 61.

The principles in *Foss v Harbottle*[671] and *Prudential Assurance Co Ltd v Newman Industries Ltd and Others*[672] have been consistently applied in numerous South African cases, often presented to the court as grounds for exception, such as in the 1997 case of *Golf Estates (Pty) Ltd v Malherbe and Others*.[673] In this case, the plaintiff, who was the sole shareholder of Fancourt Properties (Pty) Ltd, sued the first and second defendants, the joint curators, for damages resulting from a decrease in the value of his shareholding due to actions and omissions by the defendants.[674] The defendants challenged the plaintiff's claim on the grounds that he lacked a cause of action; they argued that the court order authorising the curators to enter into the disputed agreement remained valid, and until it was overturned, any claims against the curators were not actionable.[675] Regarding the first ground of exception, the court upheld the *Foss v Harbottle* principle, noting that the plaintiff did not argue that the wrongdoing was committed by insiders who controlled the company and prevented it from taking legal action.[676] Furthermore, the plaintiff lacked a cause of action because his loss was merely a reflection of the loss suffered by the company.[677] Consequently, the court upheld the defendants' first exception and applied the *Foss v Harbottle* principle.

In the recent case of *Itzikowitz v ABSA Bank*,[678] Gary Itzikowitz sought to recover the diminished value of his shareholding in Compass Projects (Pty) Ltd, a company that held shares in Quantum Properties Group, which in turn owned A Million Up (Pty) Ltd (AMU). Itzikowitz alleged that the decline in the value of his shares was due to the reckless, intentional, or negligent conduct of ABSA.[679] His claim was framed as a delictual action for pure economic loss. However, the SCA referenced a decision from the Constitutional Court, which indicated that the law is generally hesitant to recognise claims for pure economic loss, particularly when such recognition would extend the

[671] *Foss v Harbottle* (1843) 2 Hare 461.
[672] *Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2)* [1982] 1 All ER 354 (CA).
[673] *Golf Estates (Pty) Ltd v Malherbe and Others* 1997 (1) SA 873 (C).
[674] *Golf Estates (Pty) Ltd v Malherbe and Others* 1997 (1) SA 873 (C).
[675] *Golf Estates (Pty) Ltd v Malherbe and Others* 1997 (1) SA 873 (C) para 878.
[676] *Golf Estates (Pty) Ltd v Malherbe and Others* 1997 (1) SA 873 (C) para 879.
[677] *Golf Estates (Pty) Ltd v Malherbe and Others* 1997 (1) SA 873 (C) para 881.
[678] *Itzikowitz v ABSA Bank Ltd 2016 (4) SA 432 (SCA).*
[679] *Itzikowitz v ABSA Bank Ltd* 2016 (4) SA 432 (SCA).

law of delict.[680] The court emphasised that proving the element of wrongfulness is essential. [681] It cited the ruling in *Dadoo Ltd and Others v Krugersdorp Municipal Council* which established that a company is a separate legal entity from its members, meaning that property owned by the company cannot be considered as belonging to its shareholders.[682]

The court further referenced the *Foss v Harbottle* principle[683] and upheld the principle established in *Prudential Assurance Co Ltd v Newman Industries Ltd and Others*,[684] asserting that a shareholder cannot recover damages solely because the company in which they have invested has suffered losses.[685] Notably, the judgment pointed out that both Booysen J and Claassen J, in their respective rulings, overlooked Chief Justice Innes's assertion in *Dadoo Ltd and Others v Krugersdorp Municipal Council* that the concept of a company as a separate legal entity distinct from its shareholders is fundamentally significant.[686] Instead, their focus was primarily on the potential for double recovery, considering the absence of such risk as an exception to the *Foss v Harbottle* rule. The court cited *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*, which held that "the absence of indeterminate liability itself will not automatically give rise to the imposition of liability".[687] Similarly, the mere lack of risk for double jeopardy did not grant the shareholder an entitlement that they did not originally possess.[688] Therefore, based on these considerations, the appeal was dismissed by establishing that the proper plaintiff for a wrong done to a company is the company itself, [689] thereby preventing individual shareholders from initiating legal action on behalf of the corporation.[690]

This principle is complemented by the majority rule, which allows the majority of shareholders to ratify actions that may otherwise be deemed wrongful, thus limiting

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680 *Country Cloud Trading CC v MEC, Department of Infrastructure* Development 2015 (1) SA 1 (CC) para 23.
681 *McLelland v Hulett* 1992 (1) SA 456 (D) and *Kalinko v Nisbet and Others* 2002 (5) SA 766 (W).
682 *Itzikowitz v ABSA Bank Ltd* 2016 (4) SA 432 (SCA) para 9.
683 *Foss v Harbottle* (1843) 2 Hare 461.
684 *Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2)* [1982] 1 All ER 354 (CA para 366-367.
685 *Itzikowitz v ABSA Bank Ltd* 2016 (4) SA 432 (SCA) para 11-12.
686 *Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2)* [1982] 1 All ER 354 (CA para 366-367.
687 *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA).
688 *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 25.
689 *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA).
690 *Foss v Harbottle* (1843) 2 Hare 461.

minority shareholders' recourse.[691] In contrast, section 218(2) of the 2008 Act introduces a statutory remedy that allows any interested party, including shareholders, to hold directors accountable for losses incurred due to breaches of the 2008 Act.[692] It is therefore submitted that this provision challenges the *Foss v Harbottle* principle by enabling shareholders to seek redress in circumstances where they might have been previously barred from doing so under common law. The exceptions to the *Percival v Wright* principle, as discusses below, further illustrate this alignment with section 218(2), as they recognise situations where minority shareholders can act despite majority ratification.[693] For instance, if a director's actions constitute fraud on the minority, section 218(2) provides a pathway for shareholders to pursue claims against directors personally.[694]

As discussed in chapter 1, several cases have invoked section 218(2) while discussing the *Foss v Harbottle* principle, underscoring its significance in contemporary corporate governance. In the *De Bruyn v Steinhoff International Holdings N.V. and Others* Case,[695] shareholders attempted to hold the company's directors personally liable for a decline in share value due to alleged fraudulent activities; however, the High Court dismissed their application, highlighting the challenges in effectively utilising section 218(2).[696] Similarly, in the *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* Case,[697] minority shareholders sought to claim damages against directors for losses incurred from mismanagement, but the Supreme Court of Appeal ruled against them, reinforcing that claims based on reflective loss were not permissible under section 218(2).[698] The case of *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* further examined the applicability of section 218(2) concerning claims related to share value diminution due to director misconduct.[699] The court upheld exceptions to the shareholders' claims, indicating that while section 218(2) provides a pathway for accountability, its effectiveness is

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691 *Foss v Harbottle* (1843) 2 Hare 461.
692 Section 218(2) of the Companies Act 71 of 2008.
693 *Percival v Wright* [1902] 2 Ch 421.
694 *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ); *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
695 *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
696 *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
697 *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
698 *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
699 *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.

constrained by existing legal principles regarding reflective loss.[700] It submitted that collectively, these cases illustrate how section 218(2) serves as a critical tool for minority shareholders to challenge director misconduct and seek accountability in ways that traditional common law principles may not allow.[701]

5.2.2. THE *PERCIVAL V WRIGHT* PRINCIPLE READ WITH SECTION 218(2) OF THE COMPANIES ACT 71 OF 2008

A well-established common law principle is that directors' duties are owed to the company itself, rather than to shareholders or third parties.[702] The fundamental obligation of directors is to act in the bona fide interests of the company and its shareholders collectively.[703] This principle was affirmed in the controversial UK case of *Percival v Wright*, where shareholders sought to sell their shares and requested the company secretary to find suitable buyers.[704] After selling their shares, they learned that the board of directors had been negotiating the sale of the entire company, which would have increased the value of their shares had they retained them. The plaintiffs claimed that the directors breached their fiduciary duties by failing to inform them of these negotiations. However, Swinfen Eady J ruled that the directors did not owe individual duties to the shareholders, even if their actions were deemed unfair.[705]
Gower affirmed that the British common law position maintains that directors' duties are owed solely to the company, and the common law has been hesitant to recognise that these duties are owed to individual shareholders.[706] However, he diverged from the principle established in *Percival v Wright* by acknowledging that when directors are also appointed to act as agents for the shareholders concurrently with their role as agents for the company, a duty does indeed arise to the shareholders individually.[707]
The principle established in *Percival v Wright* was adopted into South African common

[700] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
[701] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ); *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
[702] *Percival v Wright* [1902] 2 Ch 421.
[703] *SA Fabrics Ltd v Millman NO* 1972 (4) SA 592 (A)
[704] *Percival v Wright* [1902] 2 Ch 421.
[705] *Percival v Wright* [1902] 2 Ch 421.
[706] Davies Paul Lyndon and Worthington Sarah, *Gower and Davies' Principles of Modern Company Law*, Sweet & Maxwell 2012) 506-507.
[707] Davies Paul Lyndon and Worthington Sarah, *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell 2012) 506-507.

law in the case of *Cohen v Segal*,[708] where Boshoff J stated that directors are statutory entities. He emphasised that directors occupy a fiduciary position towards the company and must exercise their powers in good faith solely for the benefit of the company as a whole, rather than for any ulterior motives.[709]

In the New Zealand case of *Coleman v Myers*,[710] the decision in *Percival v Wright was* rejected by Mahon J of the Supreme Court. The plaintiffs initiated legal action concerning the non-disclosure of material information related to a share purchase offer made by the company's managing director, Myers, as part of his takeover bid for the entire equity capital. After Myers became the sole shareholder, he liquidated certain company assets and declared a capital dividend that significantly exceeded his acquisition costs. The plaintiffs contended that their shares had been purchased at a gross undervaluation and sought to have the contract annulled or to receive damages based on actionable non-disclosure.[711] However, their claims were unsuccessful. In his judgment, Mahon J stated in *obiter* that the ruling in *Percival v Wright* was incorrectly decided and should not have been followed.[712]

In the case of *Brunninghausen v Glavanics*,[713] the appeal court unanimously chose not to follow the *Percival v Wright* decision. The court reaffirmed the rule established in *Foss v Harbottle*, which states that only the company, and not its members, can sue for wrongs committed against it. However, it acknowledged that when a transaction pertains solely to another shareholder and does not involve the company, a director may indeed owe a fiduciary duty to that shareholder. In *Peskin v Anderson*,[714] it was confirmed that "directors will only have a fiduciary duty to shareholders if there exists a special factual relationship between the directors and the shareholders that gives rise to such obligations". Although these judgments do not deviate from the general principle that directors' fiduciary duties are typically owed exclusively to the company, the decisions in cases such as *Coleman v Myers*,[715] *Brunninghausen v Glavanics*,[716]

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[708] *Cohen, NO v Segal* 1970 (3) SA 702 (W).
[709] *Cohen, NO v Segal* 1970 (3) SA 702 (W).
[710] *Coleman v Myers* [1977] 2 NZLR. 225.
[711] *Coleman v Myers* [1977] 2 NZLR. 225.
[712] *Allen v Hyatt* (1914) 30 TLR 444.
[713] *Brunninghausen v Glavanics* (1999) 46 NSWLR 538.
[714] *Peskin v Anderson* [2001] 1 BCLC 372.
[715] *Coleman v Myers* [1977] 2 NZLR. 225.
[716] *Brunninghausen v Glavanics* (1999) 46 NSWLR 538.

and *Peskin v Anderson*[717] demonstrate an increasing willingness among courts to impose fiduciary obligations on directors that are owed directly to shareholders.

The *Percival v Wright* principle establishes that directors of a company do not owe fiduciary duties to individual shareholders, meaning they are not required to disclose negotiations that may affect share value when purchasing shares from those shareholders.[718] This principle is significant in the context of corporate governance as it allows directors to act in the best interests of the company rather than individual shareholders. In contrast, it is my submission that section 218(2) of the 2008 Act introduces a statutory remedy that allows any interested party, including shareholders, to hold directors accountable for losses incurred due to breaches of the Act.[719]

This provision challenges the *Percival v Wright* principle by enabling shareholders to seek redress in situations where they might have been previously barred from doing so under common law.[720] Exceptions to the *Percival v Wright* principle may align with section 218(2) in that they recognise circumstances where minority shareholders can act despite majority ratification, particularly if a director's actions constitute fraud against the minority. For example, cases such as *De Bruyn v Steinhoff International Holdings N.V. and Others*[721] and *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others*[722] have invoked section 218(2) while discussing the implications of the *Percival v Wright* principle, highlighting its relevance in contemporary corporate governance.[723] In these cases, shareholders sought to hold directors accountable for misconduct that led to financial losses, illustrating how section 218(2) can serve as a critical tool for challenging director misconduct and seeking accountability.[724] However, courts have emphasised the limitations of section 218(2), particularly regarding reflective loss claims, thus indicating that while it provides a pathway for shareholder action, its effectiveness is constrained by existing legal principles.[725]

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717 *Peskin v Anderson* [2001] 1 BCLC 372.
718 *Percival v Wright* [1902] 2 Ch 421.
719 Section 218(2) of the Companies Act 71 of 2008.
720 Section 218(2) of the Companies Act 71 of 2008.
721 *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
722 *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
723 *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ); *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
724 *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ); *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
725 *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ); *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.

5.3. LIABILITY OF COMPANY DIRECTORS TO SHAREHOLDERS UNDER SOUTH AFRICAN STATUTORY LAW

5.3.1. SECTION 424 OF THE COMPANIES ACT 61 OF 1973 READ WITH SECTION 218(2) OF THE COMPANIES ACT 71 OF 2008

Prior to the partial codification of directors' duties in the 2008 Act, these duties were not formally codified. However, section 424 of the 1973 Act imposed statutory liability on directors and others without limitation concerning fraudulent or reckless trading, unlawful distributions to shareholders, investor protection, and loans to directors or controlling companies.[726] Section 424 of the 1973 Act provides that a creditor can seek a court declaration that directors may be held personally liable for the company's debts, provided they were knowingly involved in such conduct. This applies in cases where the company's business was operated recklessly or with the intent to defraud creditors or for any fraudulent purpose.[727] Reckless trading is defined as conducting business in a manner that demonstrates a lack of genuine concern, failing to consider the consequences of one's actions, and exhibiting a disregard for potential outcomes. This section can be invoked when a company's business is conducted recklessly or with the intent to defraud its creditors.[728] Notably, the conduct in question does not need to pertain specifically to the company's financial affairs.[729]

Section 424 of the 1973 Act and section 218(2) of the 2008 Act serve different purposes and have distinct implications for director liability, highlighting notable differences between the two provisions. Section 424 allows creditors to apply to the court to hold directors personally liable for the company's debts if they were knowingly involved in reckless or fraudulent conduct while managing the business.[730] This provision is primarily aimed at protecting creditors by ensuring that directors cannot hide behind the corporate veil when engaging in misconduct that harms creditors. In contrast, section 218(2) provides a broader statutory remedy that enables any

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[726] Section 424 of the Companies Act 61 of 1973.
[727] Section 424 of the Companies Act 61 of 1973.
[728] *Engelbrecht NO and Others v Zuma and Others* [2015] 3 All SA 590 (GP) paras 19 and 43.
[729] *Gordon NO and Rennie NO v Standard Merchant Bank Ltd and Others* 1984 (2) SA 519(C) para 527B.
[730] Section 424 of the Companies Act 61 of 1973.

interested party, including shareholders, to hold directors accountable for losses incurred due to breaches of the Companies Act.[731] While both sections aim to enhance accountability among directors, section 218(2) allows for claims based on statutory breaches rather than solely focusing on reckless or fraudulent conduct as outlined in section 424. Furthermore, section 424 retains its relevance primarily in liquidation scenarios,[732] whereas section 218(2) applies more generally to any contravention of the 2008 Act.[733] The interpretation of these sections has evolved through case law, with courts emphasising that while section 424 directly addresses creditor protection in cases of misconduct, section 218(2) empowers shareholders and other interested parties to seek redress for a wider range of breaches.[734] In many cases, civil liability arising from such conduct also leads to criminal liability for the same actions.[735]

As noted in the previous chapter, the 2008 Act stipulates that Chapter 14 of the 1973 Act will remain applicable for the winding up of insolvent companies, allowing for section 424 to be invoked in such cases.[736] While the scope of this section is broad, it can only be applied when a company is insolvent and undergoing liquidation.[737] In the case of *Engelbrecht NO and Others v Zuma and Others*,[738] the court primarily relied on section 424 of the 1973 Act,[739] which allows for the personal liability of directors for debts incurred by the company if they were knowingly involved in reckless or fraudulent conduct. This section was invoked to hold the directors accountable for their actions that led to financial losses for the company.[740] Additionally, the case referenced section 77 of the 2008 Act, which outlines the duties and liabilities of directors, emphasising their responsibilities in managing the affairs of a company.[741] The court also considered principles related to corporate governance and fiduciary duties, reinforcing the importance of due care and diligence in director conduct. The ruling highlighted that the term "creditor" does not refer to a creditor with a proven

[731] Section 218(2) of the Companies Act 71 of 2008.
[732] Section 424 of the Companies Act 61 of 1973.
[733] Section 218(2) of the Companies Act 71 of 2008.
[734] Section 218(2) of the Companies Act 71 of 2008; Section 424 of the Companies Act 61 of 1973.
[735] Section 424 of the Companies Act 61 of 1973.
[736] Companies Act 71 of 2008.
[737] *Engelbrecht NO and Others v Zuma and Others* [2015] 3 All SA 590 (GP).
[738] *Engelbrecht NO and Others v Zuma and Others* [2015] 3 All SA 590 (GP).
[739] *Mafikeng Mail (Pty) Ltd v Centner* 1995 (4) SA 603 (W); *Engelbrecht NO and Others v Zuma and Others* [2015] 3 All SA 590 (GP).
[740] *Mafikeng Mail (Pty) Ltd v Centner* 1995 (4) SA 603 (W); *Engelbrecht NO and Others v Zuma and Others* [2015] 3 All SA 590 (GP).
[741] *Engelbrecht NO and Others v Zuma and Others* [2015] 3 All SA 590 (GP).

claim in liquidation proceedings, as clarified in *Mafikeng Mail (Pty) Ltd v Centner*,[742] thereby shaping the interpretation of director liability within this context.[743]

Alternatively, in all other situations, section 424 can only be invoked if the action was initiated before the 2008 Act took effect on May 1, 2011.[744] Liability under section 424 may be attributed to anyone found to have knowingly participated in the reckless conduct of the business, extending beyond just directors to include juristic persons.[745] The standard for negligence concerning reckless trading is objective, as established in *Howard v Herrigel and Another NNO*.[746] However, in the case of *Philotex (Pty) Ltd and Others v Snyman and Others*; *Braitex (Pty) Ltd and Others v Snyman and Others*,[747] it was held that the standard implies more than mere negligence, requiring at least gross negligence.[748] The court aligned the test for negligence closer to a subjective-objective dichotomy based on the duty of care and skill. When the cause of action arises from negligence, the test is objective regarding the behaviour of a reasonable person; however, it becomes subjective when evaluating skills and knowledge.[749]

In imputing liability, the court in *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* case found that a causal link between the alleged conduct and the resulting liabilities was not necessary.[750] However, in *L & P Plant Hire BK en Andere v Bosch en Andere*, the SCA examined a similar provision in the Close Corporations Act[751] and stated in *obiter* that the purpose of this measure is to protect creditors.[752] The court indicated that a restrictive interpretation should apply to a creditor's claim, considering only conduct that negatively impacts the creditor's claim. The court concluded that a causal link must

[742] *Mafikeng Mail (Pty) Ltd v Centner* 1995 (4) SA 603 (W).
[743] *Engelbrecht NO and Others v Zuma and Others* [2015] 3 All SA 590 (GP).
[744] *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA).
[745] *Cooper NNO v SA Mutual Life Assurance Society* 2001 (1) SA 967 (SCA).
[746] *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) para 674H.
[747] *Philotex (Pty) Ltd and Others v Snyman and Others*; *Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) para 144.
[748] Richard Stevens and Philip de Beer, 'The Duty of Care and Skill, and Reckless Trading: Remedies in Flux?' (2016) 28 SA Merc LJ 250.
[749] *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) para 143.
[750] *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) para 142.
[751] Section 64 of the Close Corporations Act 69 of 1984.
[752] *L & P Plant Hire BK en Andere v Bosch en Andere* 2002 (2) SA 662 (SCA) para 39-40.

exist between the reckless conduct and the close corporation's inability to pay its debts.[753]

In *Saincic and Others v Industro-Clean (Pty) Ltd & Another*,[754] Harms JA referred to the *dicta* in *L & P Plant Hire* and asserted that a causal link is necessary concerning creditors' claims.[755] However, it has been argued that the imposition of liability should not depend on this requirement and should not be interpreted as a general necessity. In *Saincic and Others v Industro-Clean (Pty) Ltd & Another*,[756] it was concluded that there were no relevant provisions in section 424 indicating any distinction between it and the requirements applicable in cases of fraud or other wrongful acts.[757] In both instances, the court limited its findings regarding creditors, stating that if the company could meet its financial obligations, the creditors would lack a cause of action. Thus, while causation is an element to consider, its presence or absence should not be significant unless the company appears capable of paying its debts.[758]

Section 424 supplements rather than replaces the remedies available under common law.[759] This section can also be applied alongside section 423, which grants creditors the right to take action against directors of companies whose conduct has resulted in losses for those creditors. Under section 424, the burden of proof lies with the claimant, who must establish their case on a balance of probabilities.[760] However, section 424 applies only to individuals who are "knowingly a party" to the reckless or fraudulent conduct of the company's business.[761] To be considered a party to the company's business means participating in the shared pursuit of the company's objectives. For instance, an auditor of the company cannot be deemed a 'party' to the operation of the company's business, even if their actions were fraudulent or reckless. In *Howard v Herrigel and Another*,[762] Goldstone JA stated that a director has a duty to protect and

[753] *L & P Plant Hire BK en Andere v Bosch en Andere* 2002 (2) SA 662 (SCA) para 39-40.
[754] *Saincic and Others v Industro-Clean (Pty) Ltd & Another* 2009 (1) SA 538 (SCA).
[755] *L & P Plant Hire BK en Andere v Bosch en Andere* 2002 (2) SA 662 (SCA) para 39-40.
[756] *Saincic and Others v Industro-Clean (Pty) Ltd & Another* 2009 (1) SA 538 (SCA).
[757] Piet Delport and Quintus Vorster, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis 2012).
[758] Piet Delport and Quintus Vorster, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis 2012).
[759] *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) at 142, *Engelbrecht NO and Others v Zuma and Others* [2015] 3 All SA 590 (GP) para 16.
[760] *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) at 142, *Engelbrecht NO and Others v Zuma and Others* [2015] 3 All SA 590 (GP) para 16.
[761] Piet Delport and Quintus Vorster, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis 2012).
[762] *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A).

safeguard the company's affairs and may thus be considered a 'party' to any reckless or fraudulent conduct without having actively participated in the company's operations.[763]

The phrase "with intent to defraud for any fraudulent purpose" generally refers to a misrepresentation that creates the belief that the company will be able to meet its financial obligations.[764] Alternatively, as noted in *Engelbrecht NO and Others v Zuma and Others*,[765] the court referred to this as "intentional deceit". When a company incurs debts during its operations, and the directors are aware that there is no reasonable prospect of settling those debts, the company's business is considered to be conducted with the intent to defraud its creditors.[766] However, this terminology does not encompass situations where the directors are aware of the risk that the company may be unable to repay its debts but genuinely believe that it will somehow manage to do so.[767]

If found guilty of an offense under section 424, the penalty is either a fine or imprisonment for a period not exceeding 24 months, or both, as stipulated in section 216(b) of the 2008 Act.[768] Additionally, under section 242(4), the delinquent director (or another party found guilty) may be held criminally liable. However, sections 22 and 77(3)(b) have replaced section 424 in the 2008 Act,[769] and these will be discussed below.

5.3.2. SECTION 22 READ WITH SECTION 218(2) OF THE COMPANIES ACT 71 OF 2008

As previously discussed in this study, it is important to note that if directors violate their statutory fiduciary duties under section 77(2)(a) and (b), as well as section 77(3), it is the company that would have a claim, since these duties are owed exclusively to the

[763] *Powertech Industries Ltd v Mayberry* 1996 (2) SA 742 (W) at 749-751; *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) para 674B-D.
[764] *S v Ostilly* (1) 1977 (4) SA 699 (D) para 724 – 728.
[765] *Engelbrecht NO and Others v Zuma and Others* [2015] 3 All SA 590 (GP) [2015] 3 All SA 590 (GP) para 19.
[766] *Heneways Freight Services (Pty) Ltd v Grogor* 2007 (2) SA 561 (SCA) para 4.
[767] *Ozinsky NO v Lloyd* 1992 (3) SA 396 (C) para 415-418.
[768] The Companies Act 71 of 2008.
[769] The Companies Act 71 of 2008.

company.[770] This aligns with the common law position discussed above. Section 22 prohibits companies from engaging in reckless or fraudulent conduct.[771] This section is closely related to sections 77(3)(b) and 77(4)(a)(i); if found guilty, a director will be liable to the company for any loss, damage, or costs resulting directly or indirectly from trading in violation of section 22.[772] This liability is statutory in nature, similar to that established under section 424 of the 1973 Act. However, under section 77(3)(b), it must be demonstrated that a director "acquiesced" in the operation of the company's business despite being aware that it was conducted in a manner prohibited by section 22(1).[773] In contrast, section 424 requires that a director be considered a 'party to' reckless trading. As previously discussed, the ruling in *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others*[774] indicated that "being a party to" the company's business does not necessitate the 'taking of positive steps'; mere agreement to participate in the business may suffice.[775]

However, section 22 differs significantly from section 424, except in the interpretation of terms such as "fraudulent purpose", "recklessly", and "intent to defraud".[776] Unlike section 424, section 22 does not require that the conduct in question be objectively unreasonable, nor does it assess the causal effects of the wrongful conduct.[777] Consequently, since section 22 does not necessitate the proof of certain elements typically associated with a delict, it seems peculiar for a claimant, such as a shareholder, to attempt to enforce the duty of care and skill outlined in section 77(3)(b) to attribute liability, especially since this would only give rise to a claim against the company itself.[778]

[770] Section 77 of the Companies Act 71 of 2008.
[771] Section 22 of the Companies Act 71 of 2008.
[772] Section 77 of the Companies Act 71 of 2008.
[773] Richard Stevens and Philip de Beer, 'The Duty of Care and Skill, and Reckless Trading: Remedies in Flux?' (2016) 28 SA Merc LJ 250.
[774] *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA).
[775] *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) at para 143.
[776] *Motor Industry Bargaining Council v Botha and Another* (34198/2013) [2016] ZAGPPHC 615 para 62-63.
[777] Richard Stevens and Philip de Beer, 'The Duty of Care and Skill, and Reckless Trading: Remedies in Flux?' (2016) 28 SA Merc LJ 250.
[778] Richard Stevens and Philip de Beer, 'The Duty of Care and Skill, and Reckless Trading: Remedies in Flux?' (2016) 28 SA Merc LJ 250.

Furthermore, section 22 is limited to “a company” and does not contain a provision similar to that of “a person who is willingly a party” as found in section 242. In *Rabinowitz v Van Graan and Others* it was determined that “a company” in this context refers to the board of directors.[779] Nonetheless, in the recent case of *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* the court held that section 22 “imposes duties upon the company and not on its directors”.[780] It is argued, however, that the manner in which a company can act without its directors remains somewhat unclear.[781]

A further distinction between section 424 and section 22 is that creditors can initiate action against directors or any individual under section 424.[782] In contrast, a creditor would not have the same ability under section 22 or section 77(3)(b). If a creditor or shareholder prefers not to rely on section 77(3)(b), they may instead pursue a claim under section 218(2).[783] However, in such cases, they must establish causation, demonstrating that the violation of the provision directly resulted in the loss or damage incurred.[784]

Section 218(2) establishes a sui generis liability and enables any individual to hold accountable any person who violates any provision of the 2008 Act for any resultant loss or damage.[785] In the case of *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others*,[786] it was held that since section 218(2) does not specify which provision was breached, the claimant must clearly identify, with adequate details, the specific contravention linked to the actions of the director(s) and the precise nature of the damages or losses incurred.[787] Moreover, various rulings have affirmed that third parties, including shareholders, may pursue claims against directors under section 218(2) for breaches of their fiduciary duties to the company, despite the principle that such duties are owed primarily to the company itself.[788] The Supreme Court of Appeal

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[779] *Rabinowitz v Van Graan and Others* [2013] ZAGPJHC 151.
[780] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83.
[781] Piet Delport and Quintus Vorster, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis 2012).
[782] The Companies Act 71 of 2008.
[783] Section 218(2) of the Companies Act 71 of 2008.
[784] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83.
[785] Section 218(2) of the Companies Act 71 of 2008; *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* [2017] ZALMPPHC 27.
[786] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* [2017] ZALMPPHC 27.
[787] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* [2017] ZALMPPHC 27
[788] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* [2017] ZALMPPHC 27. *Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd and Others* [2014] 3 All SA 454 (GJ) para 41; *Grancy Property Limited and Another v Gihwala and Others*; *In Re: Grancy Property Limited and Another v*

recognised in *Gihwala and Others v Grancy Property Ltd and Others*[789] that the relationship between shareholders and their elected directors encompasses a "bond of trust".[790]

In *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others*,[791] the court, referencing the ruling in *Gentiruco AG v Firestone SA (Pty) Ltd*,[792] found that when a statute explicitly establishes liability for violating a specific section, as section 77(3)(b) does for breaches of section 22, a more general provision within the same statute, such as section 218(2), cannot be invoked to establish co-liability. Furthermore, if there is no common law claim available – such as in cases governed by the 'no reflective loss' rule – then section 218(2) cannot serve as a foundation for such liability.[793]

In *Lewis Group v Woollam and Others*,[794] the court rendered a somewhat arbitrary judgment by asserting that the obligation of company directors to act honestly and in accordance with their fiduciary duties extends not only to the company but also to individual shareholders. This conclusion was based on section 218(2) of the 2008 Act.[795] However, this interpretation does not align with the prevailing legal consensus, as discussed in this chapter, which maintains that directors owe fiduciary duties primarily to the company.[796] Additionally, breaches of a director's fiduciary duty typically do not result in direct personal losses or damages for shareholders. Therefore, it has been argued that section 218(2) does not imply that directors owe their fiduciary duties directly to shareholders.[797]

Gihwala and Others [2014] ZAWCHC 97 para 10;, *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) and *Viraland Inc v Ole Media Group (Pty) Ltd and Another* [2016] ZAWCHC para 62; *Motor Industry Bargaining Council v Botha and Another* [2016] ZAGPPHC 615 para 60.

789 *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA).

790 *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA).

791 *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83.

792 *Gentiruco AG v Firestone SA (Pty) Ltd* [1972] 1 All SA 201 (A) para 603.

793 *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83.

794 *Lewis Group v Woollam and Others* [2017] 1 All SA 192 (WCC).

795 *Lewis Group v Woollam and Others* [2017] 1 All SA 192 (WCC).

796 *Lewis Group v Woollam and Others* [2017] 1 All SA 192 (WCC) para 49.

797 Cassim Rehana, 'The Launching of Delinquency Proceedings under the Companies Act 71 of 2008 by Means of the Derivative Action: Lewis Group Limited v Woolman 2017 (2) SA 547 (WCC)' (2017) *Orbiter* 673, 678.

5.3.3. SECTION 218(2) OF THE SOUTH AFRICAN COMPANIES ACT AS COMPARED WITH SECTION 1324(10) OF THE AUSTRALIAN CORPORATIONS ACT

Any analysis of section 218(2) of the 2008 Act must incorporate a comparative examination of section 1324(10) of the Australian Corporations Act 2001 (hereinafter referred to as the ACA), given their analogous enforcement mechanisms for statutory breaches. This cross-jurisdictional perspective underscores the necessity of evaluating remedial frameworks that empower external stakeholders—such as creditors or shareholders—to seek redress for losses directly caused by fiduciary violations, even where traditional remedies like derivative actions remain inaccessible. Section 218(2) and section 1324(10) of the ACA share functional similarities as statutory mechanisms for enforcing corporate accountability, though their operational frameworks differ significantly.[798]

In literal terms, section 218(2) of the 2008 Act imposes liability on any person who contravenes the Act for loss or damage resulting from such contravention, but its application is constrained by judicial interpretation.[799] South African courts have interpreted this section narrowly, requiring alignment with common law principles such as causation, foreseeability, and fault.[800] Courts require claimants to identify specific substantive breaches of the Act rather than relying solely on section 218(2) as an independent cause of action.[801] For instance, directors cannot be held liable under section 22(1) (reckless trading) through section 218(2), as the duty under section 22(1) rests solely on the company, not its directors.[802]

The Supreme Court of Appeal affirmed this in *Venator Africa v Watts*,[803] emphasising that liability under section 218(2) must align with the Act's delineation of duties and common law principles of causation and foreseeability. Another instance is in the *Steinhoff* case, where shareholders could not rely solely on section 218(2) to claim damages for share price depreciation caused by director misconduct, as the court

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[798] Australian Securities and Investments Commission Act 2001 (Cth).
[799] Section 218(2) of the Companies Act 71 of 2008.
[800] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ); *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
[801] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ); *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
[802] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ); *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
[803] *Venator Africa (Pty) Ltd v Watts and Another* (053/2023) [2024] ZASCA 60.

emphasised the need to preserve core company law principles.[804] The section is not a standalone remedy but functions alongside substantive provisions of the Act and common law.[805]

In contrast, section 1324(10) provides broader remedial flexibility. It empowers courts to grant injunctive relief or award damages to affected parties—including shareholders, creditors, or regulators like ASIC—when a contravention of the Act occurs.[806] Crucially, it enables external stakeholders—such as creditors or shareholders lacking standing for derivative actions—to pursue direct claims against directors for statutory breaches if they demonstrate a causal link between the breach and their losses.[807] This contrasts with South Africa's approach, where shareholders in cases like *Steinhoff* and *African Bank* were barred from claiming share price losses under section 218(2) due to the absence of explicit statutory authorisation for such claims.[808] Unlike section 218(2), section 1324(10) explicitly allows damages as an alternative or adjunct to injunctions, even for external parties who might not qualify for derivative actions.[809] For example, creditors could theoretically pursue directors for breaches of statutory duties if they demonstrate direct causation of loss.[810] The Australian framework prioritises preserving the status quo through interim injunctions, provided there is a “serious question to be tried”.[811]

5.3.4. SECTION 20(6) READ WITH SECTION 218(2) OF THE COMPANIES ACT 71 OF 2008

Regarding section 20 of the 2008 Act,[812] which addresses the validity of company actions, section 20(6) states that each shareholder of a company is entitled to seek damages from any individual who intentionally, fraudulently, or through gross negligence causes the company to act in a manner that is inconsistent with this Act or any limitations, restrictions, or qualifications outlined in this section, unless such

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[804] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
[805] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
[806] The Australian Corporations Act 2001.
[807] The Australian Corporations Act 2001.
[808] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ); *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
[809] Lombard S and Joubert T, ‘The Legislative Response to the Shareholders v Stakeholders Debate: A Comparative Overview’ (2014) 14 Journal of Corporate Law Studies 211.
[810] The Australian Corporations Act 2001.
[811] The Australian Corporations Act 2001.
[812] Section 20 of the Companies Act 71 of 2008.

actions have been ratified by the shareholders as per the provisions of the subsection 2.[813]

Unlike section 77, which assigns liability to directors in relation to the company, section 20(6) allows any shareholder to institute a claim for damages against "any person", including directors, who intentionally, fraudulently, or through gross negligence cause the company to engage in actions that are inconsistent with the 2008 Act, or any limitations, restrictions, or qualifications outlined in the company's Memorandum of Incorporation.[814] This is contingent upon the company not having ratified such actions in accordance with section 20(2). This provision deviates from the common law principle established in *Ashbury Railway Carriage and Iron Co Ltd v Richie*,[815] which held that ultra vires actions taken on behalf of the company were void *ab initio* and thus could not be ratified.[816] However, section 20(3) explicitly prohibits the ratification of any action that contravenes the 2008 Act. Consequently, shareholders are unable to ratify actions taken by directors that breach their statutory duties.[817] Furthermore, under common law, the ratification of a fraudulent act should not be allowed, raising uncertainty about whether this position has been altered by the section.[818]

Section 218(2) imposes liability on any person who contravenes any provision of the Act, making them liable for any loss or damage suffered as a result of that contravention.[819] This section is significant as it allows for civil action against directors and other parties who may have acted improperly, but it does not create liability in itself; rather, it requires a breach of another specific provision of the Act to be actionable.[820] In conjunction with section 218(2), section 20(6) provides that each shareholder has a claim for damages against any person who intentionally, fraudulently, or due to gross negligence causes the company to act in a way that results in harm.[821] This section emphasises the duty of directors to act with care and

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[813] Section 20 of the Companies Act 71 of 2008.
[814] Section 77 of the Companies Act 71 of 2008.
[815] *Ashbury Railway Carriage and Iron Co Ltd v Richie* (1875) LR 7 HL 653.
[816] *Ashbury Railway Carriage and Iron Co Ltd v Richie* (1875) LR 7 HL 653.
[817] *Edwards v Halliwell* [1950] 2 All ER 1064 para 1066-1067.
[818] Piet Delport and Quintus Vorster, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis 2012).
[819] Section 218(2) of the Companies Act 71 of 2008.
[820] Section 218(2) of the Companies Act 71 of 2008.
[821] Section 20(6) of the Companies Act 71 of 2008.

integrity in their management of the company, reinforcing the duty to avoid reckless or fraudulent behaviour.[822]

Recent case law illustrates the interaction between these sections. For instance, in *Venator Africa (Pty) Ltd v Watts and Another*,[823] the Supreme Court of Appeal clarified that section 218(2) cannot be invoked without identifying a specific provision of the Act that has been contravened by the directors. The court emphasised that while section 22(1) imposes duties on the company regarding its operations, it does not impose direct liability on directors themselves under section 218(2).[824] Similarly, in cases like *Hlumisa Investment Holdings (RF) Ltd v Kirkinis and Others*,[825] the courts have reiterated that there must be a clear link between the alleged misconduct and the losses suffered by shareholders or creditors.[826]

5.3.5. SECTION 77 READ WITH SECTION 218(2) OF THE COMPANIES ACT 71 OF 2008

Section 77 of the 2008 Act delineates the statutory liability of directors and prescribed officers. This section also extends to the company's audit committee, members of any board committees, and alternate directors.[827] Section 77(2) specifies that a director may be held liable according to common law principles concerning breaches of fiduciary duty for any loss, damages, or costs incurred by the company as a result of the director's failure to disclose a personal financial interest (section 75), avoid a conflict of interest (section 76(2)), or act in good faith and for a proper purpose, or in the best interests of the company (sections 76(3)(a) and (b)).[828] Section 77(2)(b) holds directors liable according to common law principles of delict for any loss, damages, or costs incurred by the company as a result of a director's breach of the duty of care and skill, as outlined in section 76(3)(c), any provision of the 2008 Act,[829] or any provision of the company's Memorandum of Incorporation.[830]

Section 77(3) enumerates specific circumstances under which directors may be held liable for losses sustained by the company, either directly or indirectly due to their

[822] Section 20(6) of the Companies Act 71 of 2008.
[823] *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
[824] *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
[825] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkinis and Others* [2020] ZASCA 83.
[826] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkinis and Others* [2020] ZASCA 83.
[827] Section 77(1)(b) of the Companies Act 71 of 2008.
[828] Section 77(2)(a) of the Companies Act 71 of 2008.
[829] Section 77(2)(b) of the Companies Act 71 of 2008.
[830] Section 77 (2)(b)(i), (ii) and (iii) of the Companies Act 71 of 2008.

actions.[831] These circumstances include, but are not limited to, acting on behalf of the company while knowing they lack the authority to do so;[832] allowing the company to continue its business operations despite being aware that such operations are conducted in violation of section 22;[833] and participating in an act or omission while knowing that it was intended to defraud a creditor, employee, or shareholder of the company.[834] The term "knowing" in section 77(3) indicates that "knowledge" on the part of the director is a necessary condition for establishing liability.[835] Liability under section 77 is joint and several with any other individual who may also be held liable.[836] It is important to note that if directors violate their statutory fiduciary duties and the duty of care and skill, it is the company itself that serves as the proper plaintiff to initiate proceedings to enforce liability under sections 77(2)(a) and (b)(i).[837] This is because the duties outlined in these sections are owed to the company rather than to shareholders or other third parties. Likewise, the directors' duties specified in section 77(3) are also owed to the company, meaning that any liability imposed on the directors is directed towards the company and not any other individual.[838] This reinforces the common law principle that directors (including non-executive directors) owe fiduciary duties to the company, and only the company has the authority to pursue actions against wrongdoers who cause it harm or prejudice.[839]

In essence, section 218(2) imposes liability on any person who contravenes any provision of the Act, making them liable for any loss or damage suffered as a result of that contravention.[840] This section is significant as it allows for civil action against directors and other parties who may have acted improperly, provided there is a clear link between the contravention and the loss incurred.[841] In conjunction with section 218(2), section 77 outlines the duties of directors and establishes the grounds for their

[831] Section 77 of the Companies Act 71 of 2008.
[832] Section 77(3)(a) of the Companies Act 71 of 2008.
[833] Section 77(3)(b) of the Companies Act 71 of 2008.
[834] Section77(3)(c) of the Companies Act 71 of 2008.
[835] Section 1 of the Companies Act 71 of 2008.
[836] Section 77(6) of the Companies Act 71 of 2008.
[837] Section 77 of the Companies Act 71 of 2008.
[838] Richard Stevens and Pieter de Beer, 'The Duty of Care and Skill, and Reckless Trading: Remedies in Flux' (2016) 28 SA Merc LJ 273.
[839] *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) para 678.
[840] Section 218(2) of the Companies Act 71 of 2008.
[841] Section 218(2) of the Companies Act 71 of 2008.

liability.[842] In other terms, as previously noted, section 77(2)(a) states that a director may be held liable for any loss, damages, or costs sustained by the company as a result of a breach of duty.[843] This includes failure to act in good faith, in the best interests of the company, or with the care, skill, and diligence that may reasonably be expected. Section 77(3) further clarifies that directors can be held liable for breaches of their fiduciary duties or any provisions of the Act.[844]

Recent case law, particularly *Venator Africa (Pty) Ltd v Watts and Another*, has examined the interplay between these sections.[845] In this case, the Supreme Court of Appeal emphasised that section 218(2) does not create liability on its own; rather, it requires an identifiable breach of another provision of the Act to be actionable. The court highlighted that while section 22(1) imposes a duty on companies to refrain from conducting business recklessly or with intent to defraud, it does not impose direct liability on directors under section 218(2).[846] The court's interpretation reinforces the autonomy of corporate entities and clarifies that claims against directors must be grounded in specific statutory breaches rather than general assertions of misconduct.[847]

5.3.6. LIABILITY OF DIRECTORS UNDER DELICTUAL LAW READ WITH SECTION 218(2) OF THE COMPANIES ACT 71 OF 2008

One of the advantages a company derives from its distinct juristic personality is limited liability. Directors benefit from a degree of protection, allowing them to operate as the company's “alter ego”, as their actions are perceived as those of the company itself.[848] However, South African law acknowledges the principle that individuals must be accountable for their delictual acts.[849] If a third party, such as a shareholder, suffers injury or loss due to a director’s wrongful acts or omissions, or if a director causes harm to a third party through fraud or negligence, the director may be held personally

[842] Section 77 of the Companies Act 71 of 2008.
[843] Section 77 (2)(a) of the Companies Act 71 of 2008.
[844] Section 77 (3) of the Companies Act 71 of 2008.
[845] *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
[846] *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
[847] *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
[848] *Lennard's Carrying Company Ltd v Asiatic Petroleum Company Ltd* [1915] AC 705 para 713.
[849] Havenga Michele, ‘Directors’ Co-liability for Delicts’ (2006) 18 SA Mercantile Law Journal 229.

liable to the shareholder under common law remedies stemming from the *actio doli* and *actio legis Aquiliae* for patrimonial losses arising from such fraud or negligence.[850] Therefore, while actions for breaches of directors' fiduciary duties are typically *sui generis*, claimants may choose to pursue a delictual claim rather than relying solely on company common or statutory law in appropriate circumstances.[851]

The agency approach conceptualises directors as agents of the company, suggesting that their liability should be evaluated within the context of the special relationship established between the company and its directors.[852] However, liability in these cases is not automatic; each situation must be assessed based on the specific facts and relevant policy considerations.[853] This leads to a lack of legal certainty regarding the conditions under which liability may be attributed to directors. In the Canadian case *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc*,[854] which involved a patent infringement action, it was determined that liability arises from the degree and nature of a director's personal involvement that effectively makes the delictual act their own.[855] Consequently, while outcomes may vary on a case-by-case basis, the claimant or shareholder must demonstrate that the director's conduct exhibited a deliberate, knowing, and willful aspect necessary for imposing liability.[856]

This principle was reaffirmed in *White Horse Distillers Ltd & Others v Gregson Associates Ltd & Others*,[857] where the court held that it must be established not only that the director committed the delictual act but also that they did so deliberately or recklessly in a manner that distinguishes their conduct from that of the company.[858] Imputing personal liability within the realm of delict is straightforward, provided that all elements of a delict, including causation and fault in the form of *dolus* or *culpa*, are

[850] Neethling Johann, Potgieter Johannes Marthinus and Visser Piet J, *Law of Delict* (LexisNexis, 2015) 3-6.
[851] *Cohen NO v Segal* 1970 (3) SA 702 (W).
[852] *Cohen NO v Segal* 1970 (3) SA 702 (W).
[853] *Cohen NO v Segal* 1970 (3) SA 702 (W).
[854] *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1979) 89 DLR (3d) 195 (Fed Ct App).
[855] *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1979) 89 DLR (3d) 195 (Fed Ct App).
[856] *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1979) 89 DLR (3d) 195 (Fed Ct App) para 230.
[857] *White Horse Distillers Ltd & Others v Gregson Associates Ltd & Others* [1975] QB 180.
[858] *White Horse Distillers Ltd & Others v Gregson Associates Ltd & Others* [1975] QB 180.

established.[859] It is argued that the *Aquilian* action serves as the appropriate foundation for asserting a delictual claim related to breaches of fiduciary duties. However, in *Body Corporate of Greenwood Scheme v 75/2 Sandown (Pty) Ltd*,[860] the court held that a delictual claim was not the suitable basis for addressing a director's wrongful conduct under section 424 of the 1973 Act.[861] The critical issue in delict has been identified as not whether the director committed the wrongful act, but rather whether they owed a duty of care to the injured party. In cases lacking a contractual basis for liability, this determination hinges on the existence of such a duty of care.[862] Additionally, lifting the corporate veil may lead to delictual liability under certain circumstances; however, the rules governing when to pierce the corporate veil are not clearly defined within company law, and policy considerations play a significant role in determining whether the veil will be disregarded in specific situations.[863]

However, the application of section 218(2) is not straightforward. Recent case law, such as *Venator Africa (Pty) Ltd v Watts and Another*,[864] clarifies that section 218(2) does not create liability on its own; it requires an identifiable breach of another specific provision of the 2008 Act to be actionable. The Supreme Court of Appeal emphasised that interpreting section 218(2) as imposing broad liability would create an untenable burden on directors, potentially deterring individuals from accepting directorships.[865] The court reinforced that while section 22(1) imposes duties on companies to refrain from conducting business recklessly, it does not impose direct liability on directors for breaches of this duty. Additionally, as indicated above, section 20(6) provides that shareholders have a claim for damages against any person who intentionally, fraudulently, or due to gross negligence causes the company to act in a manner that results in harm.[866] This section complements section 218(2) by allowing shareholders to pursue claims related to misconduct that affects the company's operations. However, both sections require a clear linkage between the alleged misconduct and

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[859] Van der Linde Kathleen, 'The Personal Liability of Directors for Corporate Fault – An Exploration' (2008) 20 SA Mercantile Law Journal 451.
[860] *Body Corporate of Greenwood Scheme v 75/2 Sandown (Pty) Ltd* 1999 (3) SA 480 (W).
[861] *Body Corporate of Greenwood Scheme v 75/2 Sandown (Pty) Ltd* 1999 (3) SA 480 (W) para 488I.
[862] Van der Linde Kathleen, 'The Personal Liability of Directors for Corporate Fault – An Exploration' (2008) 20 SA Mercantile Law Journal 451.
[863] Havenga Michele, 'Directors' Co-liability for Delicts' (2006) 18 SA Mercantile Law Journal 229.
[864] *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
[865] *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
[866] Section 20(6) of the Companies Act 71 of 2008.

the resulting loss.[867] In essence, while section 218(2) and section 20(6) provide avenues for holding directors accountable, they operate within a framework that preserves the legal distinction between a company and its directors. Claims against directors must be grounded in specific breaches of statutory duties or delictual principles rather than general assertions of misconduct.[868]

5.3.7. STATUTORY CRIMINAL LIABILITY – SECTION 214 OF COMPANIES ACT 71 OF 2008 AND SECTION 332 OF THE CRIMINAL PROCEDURE ACT 71 OF 1977 READ WITH SECTION 218(2) OF THE COMPANIES ACT 71 OF 2008

In addition to the civil liabilities established by the 2008 Act, section 214 specifies particular situations in which criminal liability may arise.[869] An individual will be considered guilty of an offense if they engage in the falsification of any company accounting records; knowingly provide false or misleading information with fraudulent intent in circumstances where the 2008 Act requires the provision of information or notice to another party; knowingly partake in an act or omission by a company designed to defraud a creditor, employee, or security holder, or for any other fraudulent objective; or participate in the preparation, approval, dissemination, or publication of a prospectus or written statement as outlined in section 101 that includes an "untrue statement", as defined in section 95.[870] Section 216 specifies that a person convicted of an offense under section 213(1) or section 214(1) may be subject to a fine or imprisonment for a term not exceeding 10 years, or both a fine and imprisonment. In other instances, the penalty may consist of a fine or imprisonment for a duration not exceeding 12 months, or both a fine and imprisonment.[871]

Directors may incur criminal liability under express statutory provisions within the 2008 Act as well as other relevant legislation. Additionally, section 332 of the Criminal Procedure Act 51 of 1977 also holds directors potentially criminally liable.[872] Prior to 1997, criminal liability could be attributed to any director for various offenses, including

[867] Section 218(2) of the Companies Act 71 of 2008.
[868] *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
[869] Section 214 of the Companies Act 71 of 2008.
[870] Section 214 of the Companies Act 71 of 2008.
[871] Section 216 of the Companies Act 71 of 2008.
[872] Criminal Procedure Act 51 of 1977.

both common-law crimes and statutory violations.[873] Section 332 outlines procedural and evidentiary provisions that facilitate the criminal prosecution of corporate entities.[874] It also establishes vicarious criminal liability for companies and their directors.[875] Specifically, section 332(1) addresses acts or omissions by a director while performing their duties on behalf of the company, treating these actions as conducted by the company itself, thereby eliminating the necessity for proving intent. Only in cases where *mens rea* is an essential element of the offense will the actual intent of the director be taken into account.[876]

In the past section 332(5) automatically attributed liability to directors for offenses committed by the company, regardless of their intent, unless they could demonstrate that they did not participate in the offense and could not have prevented it.[877] However, in 1977, the case of *S v Coetzee and Others* was brought before the Constitutional Court, which examined, among other issues, the constitutionality of section 332(5).[878] The majority of the court concluded that this section violated the right to be presumed innocent, as guaranteed by section 25(c) of the interim Constitution.[879] Furthermore, the court determined that this infringement could not be justified under the limitation clause and asserted that effective sanctions and increased responsibilities could achieve similar outcomes.[880] Justice Langa, however, argued that the provision served a legitimate purpose by protecting the public from risks associated with corporate actions and activities.[881] Ultimately, the majority ruled to invalidate the entire provision, meaning that directors can only be held liable for the company's conduct if there is an alternative legal basis for such liability, such as common-law accessory criminal liability.[882]

[873] Van der Linde Kathleen, 'The Personal Liability of Directors for Corporate Fault – An Exploration' (2008) 20 SA Mercantile Law Journal 451.
[874] Section 332(2)-(4) of the Criminal Procedure Act 51 of 1977.
[875] Section 322(1) of the Criminal Procedure Act 51 of 1977.
[876] Loxton David, 'Criminal Liability of Companies Survey: South Africa' (2008) Bowman Gilfillan available at <https://pdf4pro.com/view/criminal-liability-of-companies-survey-south-africa-bowman-4cd4d8.html> accessed 21 September 2024.
[877] *R v Van den Berg & Another* 1955 (2) SA 338 (A).
[878] *S v Coetzee and Others* 1997 (3) SA 527(CC).
[879] Sparis Lauren Cheryl, 'Can Directors Be Held Personally Liable to Shareholders in the Context of South African Law?' (Published LLM, University of Pretoria, 2019) 60-61.
[880] *S v Coetzee and Others* 1997 (3) SA 527 (CC) para 548G.
[881] *S v Coetzee and Others* 1997 (3) SA 527 (CC) para 548G-H.
[882] Van der Linde Kathleen, 'The Personal Liability of Directors for Corporate Fault – An Exploration' (2008) 20 SA Mercantile Law Journal 453-454.

Furthermore, under common law, directors can be held liable for crimes committed by the company as *socii criminis*.[883] This principle is based on the notion that if an individual is aware of the commission of an offense and has the ability to prevent it but fails to act, they can be deemed a joint wrongdoer. The scope of this liability is broad and encompasses various forms of participation, including roles such as "accomplice" or "joint wrongdoer".[884]

Section 218(2) allows for civil action against directors and other individuals when their actions lead to harm, but it does not create liability in itself; rather, it requires a breach of another specific provision of the 2008 Act to be actionable.[885] The court in *Venator Africa (Pty) Ltd v Watts and Another*,[886] has held that a clear link must exist between the contravention and the loss suffered, reinforcing that directors cannot be held liable under section 218(2) without identifying a specific statutory breach.[887] Section 214 of the 2008 Act addresses the consequences of reckless trading and allows for claims against directors if they knowingly carried on business in a manner that is fraudulent or reckless, resulting in losses to creditors or shareholders.[888] This section provides a mechanism for holding directors accountable for misconduct that directly impacts the financial health of the company and its stakeholders. It complements section 218(2) by specifying circumstances under which directors can be personally liable for their actions.[889] On the other hand, section 332 of the Criminal Procedure Act pertains to the powers of courts in relation to corporate offenses, including those involving fraud or misrepresentation.[890]

While this section does not directly address civil liability, it underscores the potential criminal implications of misconduct by directors, which can also lead to civil claims under sections 218(2) and 214.[891] The interaction between these sections highlights

[883] Van der Linde Kathleen, 'The Personal Liability of Directors for Corporate Fault – An Exploration' (2008) 20 SA Mercantile Law Journal 453-454.
[884] Skeen St Q (Stephen Thomas Quinton), 'Criminal Law' in Willem Adolf Joubert (ed), *LAWSA* Vol 6(2) (2004) 129; Van der Linde Kathleen, 'The Personal Liability of Directors for Corporate Fault – An Exploration' (2008) 20 SA Mercantile Law Journal 453-454.
[885] Section 218(2) of the Companies Act 71 of 2008.
[886] *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
[887] *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
[888] Section 214 of Companies Act 71 of 2008.
[889] Section 218(2) of the Companies Act 71 of 2008.
[890] Section 332 of the Criminal Procedure Act 71 of 1977.
[891] Section 332 of the Criminal Procedure Act 71 of 1977.

the importance of ensuring that claims against directors are grounded in specific breaches of statutory duties rather than general assertions of misconduct. For instance, in case of *Hlumisa Investment Holdings (RF) Ltd v Kirkinis and Others*,[892] the courts have reiterated that shareholders must demonstrate a direct link between the alleged contraventions and their losses to succeed in claims against directors.[893] In other words, while section 218(2) provides a broad framework for holding individuals accountable for contraventions of the 2008 Act, sections 214 and 332 add specificity regarding reckless conduct and potential criminal liabilities. Together, these provisions create a comprehensive legal framework aimed at enhancing accountability among directors while preserving the distinct legal identity of companies as separate entities from their directors.[894]

5.4. CONCLUSION

Directors who breach their fiduciary duties are held liable without fault, unless otherwise specified by statutes, as fiduciary duties impose a strict liability standard. This type of liability has been deemed necessary within South African company law. However, if the application of this liability is overly restrictive, it may hinder the effective enforcement of directors' fiduciary duties. Therefore, achieving legal certainty within reasonable limits of liability should be the objective.[895] A shareholder seeking to pursue a delictual claim must demonstrate that a duty of care was owed to them directly and must also establish intent or gross negligence on the part of the director. Additionally, delictual claims may lack legal certainty, as decisions are typically made on a case-by-case basis influenced by policy considerations.

[892] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83.
[893] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83.
[894] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83.
[895] Havenga Michele, 'Directors' Co-liability for Delicts' (2006) 18 SA Mercantile Law Journal 370.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1. INTRODUCTION

The primary objective of this research has been to highlight the significance and potential impact of section 218(2) of the 2008 Act. Considering the information presented in Chapters 2 through 5, it is essential to extract the key points that have emerged from this analysis. Consequently, the focus of this concluding chapter is to summarise the findings of the study, detailing the methodology employed to arrive at the conclusions drawn. The significance of each chapter in addressing the primary research question and its associated sub-questions will be detailed in subheading 6.2, which offers an overview of the chapters. Subparagraph 6.3 will subsequently outline the findings of this study, while subheading 6.4 will provide recommendations designed to establish a constructive framework for addressing specific issues identified during the research.

6.2. OVERVIEW OF KEY FEATURES IN CHAPTERS 1 - 5

Chapter 1 presented the legal problem/ central research question: whether shareholders can hold directors personally liable for losses incurred by either the shareholders themselves or the company due to the directors' misdemeanours or omissions under section 218(2) of the 2008 Act. Although the legal position appears to be established, there remain situations in which shareholders seek to hold directors personally liable for losses incurred by shareholders, particularly those reflected in declines in share prices The persistence of shareholder personal claims against directors for causing pure economic losses, even after the rulings in *Itzikowitz v Absa Bank Ltd*[896] and other cases, indicates that this issue merits further investigation makes. Shareholders are increasingly invoking section 218(2) of the 2008 Act to seek personal liability from directors for reductions in share price. Consequently, this study

[896] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43.

examined various related questions concerning section 218(2) of the 2008 Act, focusing on directors' personal liability and the protection of shareholders.

Chapter 2 established a conceptual framework that guides the overall focus of the study. To be specific, this chapter investigated whether shareholders who experience pure economic losses due to the actions or decisions of company directors can sustain personal claims against those directors. In answering this question, the legal nature of a company was considered, the distinction between company assets and shareholder assets, the legal characterisation of a share under South African law, the implications of the fiduciary relationship between directors and the company, and whether directors owe any fiduciary duties to shareholders. The chapter briefly explored the nature of the company to determine whether directors owe fiduciary duties solely to the company or if shareholders are also entitled to fiduciary duties from directors. It was established that fiduciary duties are generally owed to the company rather than its shareholders, unless a special relationship exists. A significant implication of this principle is that since these duties are owed only to the company, it is solely the company that has the right to enforce these duties against negligent or fraudulent directors. This principle was exemplified in the landmark case *Foss v Harbottle*,[897] which introduced the proper plaintiff rule, stating that when a company suffers a wrong, only the company itself has standing to sue. If a shareholder seeks redress for corporate wrongs, they must initiate a derivative action rather than a personal action. Consequently, a shareholder cannot personally claim damages from a fraudulent or negligent director for losses incurred due to a decline in the value of the company's share capital resulting from the director's breach of fiduciary duties.

Chapter 3 concentrated on the duties imposed on directors and the mechanisms within the Act intended to ensure that directors are accountable to shareholders. The discussion in this chapter centred on both common law and statutory duties of directors. This examination was significant because, although fiduciary duties and the duty to act with care and skill are owed primarily to the company, there is an argument that these duties also extend to the company's shareholders, who ultimately benefit from the company's profits. It was established that directors' duties are owed primarily to the company, rather than to individual shareholders. Consequently, it was affirmed

[897] *Foss v Harbottle* (1843) 2 Hare 461.

that the company, and not the shareholders, possesses the legal standing to initiate actions for the enforcement of these duties and to hold directors accountable in instances of breach.

Chapter 4 examined an understanding of the provisions of section 218(2) of the 2008 Act as interpreted by the South African courts. It included a discussion of the scope and interpretation of this section, evaluating whether it offers a suitable avenue for shareholders seeking to hold directors personally liable for declines in share price. As established in this study, the principle of “no reflective loss”, derived from English law, is applicable in South Africa.[898] Consequently, common law dictates that only the company possesses locus standi (or is the proper plaintiff) to sue directors for breaching their fiduciary duties to the company in a manner that results in a decrease in the company's assets, such as a reduction in share price on the stock market. This chapter reaffirmed a principle of statutory interpretation, namely that a statute does not modify existing common law more than necessary. It was argued and established that there is no indication within section 218(2) of the 2008 Act that the legislature intended to alter common law to permit an extension of personal liability under this section for shareholders suffering pure economic losses due to declines in share price attributed to directors' actions on behalf of the company. Such an extension would be undesirable as it could lead to an influx of personal claims from shareholders against directors, which was not the legislature's intention.[899]

However, the “no reflective loss” principle will not impede instances where the losses incurred by shareholders and those suffered by the company can be distinguished. In such cases, shareholders may have a personal claim against a director. Chapter 4 also differentiated between cases involving reduction in share price and those involving reckless trading, where section 218(2) read in conjunction with section 22(1) of the 2008 Act has been successfully utilised by litigants to hold directors personally liable for causing pure economic losses to third parties. The chapter reviewed several cases, including *Blue Farm Fashion Limited v Rapitrade (Pty) Ltd and*

[898] Carias 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 PhD thesis, University of Cape Town, 2017).
[899] *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83.

Others,[900] and *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake*,[901] where sections 218(2) and 22(1) were applied to hold directors personally liable for losses incurred by creditors or third parties due to the directors leading the company into insolvent trading conditions. In *Rabinowitz v Van Graan*,[902] the court affirmed that a director can be held personally liable under section 218(2) when read with section 22(1) of the 2008 Act.[903] Thus, shareholders who suffer harm due to reckless directors are not left without recourse, as violations of this nature typically result in personal liability under section 218(2) of the 2008 Act.

Chapter 5 explored the liability imposed on directors through statutory provisions that delineate the duties owed to shareholders, and it identified the conditions under which shareholders may hold directors personally liable. This chapter further developed the discussion by analysing common law legal principles and relevant case law in which shareholders have sought or successfully pursued personal claims against directors.

6.3. FINDINGS OF THE STUDY

One of the fundamental tenets of company law is that a company possesses a distinct legal personality that is separate from its members.[904] Consequently, shareholders' rights pertain to their participation in the company as outlined in the company's memorandum of incorporation and foundational documents; thus, the assets of the company are owned by the company itself and not by the shareholders.[905] In cases where a wrong is committed against the company, it is the company that has the standing to initiate claims against the wrongdoer, as established in the case of *Foss v Harbottle*.[906] Furthermore, in *Percival v Wright*,[907] it was determined that directors do not owe fiduciary duties to shareholders. Fiduciary obligations arise only in circumstances where a special factual relationship exists between directors and shareholders, as demonstrated in *Peskin v Anderson*.[908] Due to a company's separate

[900] *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd and Others* (WCC).
[901] *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake* (5772/2016) [2017] ZALMPPHC 27.
[902] *Rabinowitz v Van Graan* and Others 2013 (5) SA 315 (GSJ).
[903] Section 22 of the Companies Act 71 of 2008.
[904] *Salomon v Salomon & Co Ltd* [1987] AC 22 (HL); *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 550-551.
[905] *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) para 9.
[906] *Foss v Harbottle* (1843) 2 Hare 461.
[907] *Percival v Wright* [1902] 2 Ch 421.
[908] *Peskin v Anderson* [2001] 2 BCLC.

legal identity, company law restricts the imposition of personal liability on directors for damages inflicted on third parties while acting on behalf of the company, alongside other statutory provisions.

Prior to the enactment of the 2008 Act, directors' fiduciary duties were not explicitly codified; however, section 424 of the 1973 Act imposed statutory liability on directors and others concerning fraudulent or reckless trading. In such claims, proving causation is not required, and the burden of proof is determined based on a balance of probabilities. To establish liability for a breach of the duty of care and skill under section 77 of the 2008 Act, the appropriate plaintiff would be the company itself, meaning that shareholders cannot hold directors personally liable in this context.[909] Section 218(2) introduces a *sui generis* liability, allowing any individual to hold another person accountable for losses or damages resulting from a violation of the provisions outlined in the 2008 Act.[910] However, a claimant must demonstrate causation or at least a causal connection between the contravention and the loss incurred. Consequently, claims for a decrease in share value have not been upheld on this basis, adhering to the principle of the “no reflective loss rule”.[911]

Furthermore, when a company acts *ultra vires*, shareholders may file a claim for damages under section 20(6) against any individual, including directors, who intentionally, fraudulently, or through gross negligence causes the company to act in violation of the Act or any restrictions therein, unless such actions have been ratified by the shareholders.[912] However, it is important to note that fraud and breaches of fiduciary duties cannot be ratified. Beyond the confines of company law, other statutory provisions, such as section 332 of the Criminal Procedure Act, impose liability on directors. In most cases, however, the duties of directors are owed to a specific company or entity. Delictual law offers an alternative remedy for shareholders based on the principle that individuals are accountable for their delictual acts. Nevertheless, in addition to the requirement that the elements of a delict must be established, the

909 *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60.
910 Section 218(2) of the Companies Act 71 of 2008.
911 *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA 83; *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43; *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* [2017] ZALMPPHC 27; *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
912 Section 20(6) of the Companies Act 71 of 2008.

claimant must demonstrate that, in the absence of a contractual basis for the claim, the directors owed them a direct duty of care. Moreover, a delictual claim may lack legal certainty, as decisions are primarily made on a case-by-case basis influenced by policy considerations.

It is therefore submitted that, fundamentally, shareholders have limited recourse for the harms or losses they believe they have incurred as a result of directors' conduct. This limitation arises from the principle that the company is a separate legal entity, and directors' duties are owed solely to the company. To assert that directors also owe a fiduciary duty directly to shareholders would impose an unfair and uncertain burden on the board, potentially placing them in a position where their actions could conflict with either the interests of shareholders or those of the company. Furthermore, it is acknowledged that there is an inherent risk associated with being a shareholder and exercising a right of participation within the company; however, it should be noted that a company's separate legal existence is a construct of law that may be limited or revoked in cases of abuse.

6.4. RECOMMENDATIONS

This study has demonstrated that a company's separate legal personality presents significant legal challenges for shareholders attempting to claim damages against directors for losses incurred as shareholders due to the directors' actions. While the common law and statutory remedies for piercing the corporate veil may aid shareholders in pursuing such claims, they must establish an exception to the principle that directors owe their fiduciary duties to the company rather than to the shareholders. Additionally, shareholders must show that their losses are not merely a reflection of the company's losses. It is recommended that the following common law and statutory remedies may be available for shareholders to directly claim damages from the directors of the company (rather than from the company itself) when they have incurred losses as a result of the directors' actions:

6.4.1. AMENDING OR ESTABLISHING GUIDELINES FOR INTERPRETATION OF SECTION 218(2)

The study has highlighted the ambiguities surrounding the interpretation of section 218(2). In addition, various authors have comment on section 218(2), with some even labelling it a mistake and advocating for its removal from the 2008 Act 2008. However, I believe that removing this section is unnecessary. Section 218(2) is an essential provision in our legal framework, but it requires refinement to prevent frivolous litigation. Simple amendment or the establishment of guidelines for its interpretation could potentially alleviate the issue and reduce the number of claims brought by shareholders under section 218(2) for losses incurred due to a decline in share price. The question of when section 218(2) of the 2008 Act applies has garnered increasing attention in a growing number of High Court cases.[913] Case law regarding the interpretation of section 218(2) is evolving steadily. The most effective approach would be to adopt an interpretation that aligns with and promotes the "spirit, purposes, and objects" of 2008 Act. The general recommendation is that section 218(2) should be interpreted in a manner that is practical, predictable, and effective in its application. Mupangavanhu[914] and Cockrill[915] have argued, correctly in my view, that section 5(1) of the 2008 Act advocates for a purposive approach to interpreting its provisions.[916] Therefore, it is crucial to consider the context in which a provision is applied when assigning meaning to that provision.[917]

If section 218(2) is regarded as a general remedy, as noted by various courts and scholars, the pertinent question arising from the judgments discussed in this study is whether section 218(2) should be interpreted broadly or narrowly in different

[913] *Venator Africa (Pty) Ltd v Watts and Another* 2024 (4) SA 539 (SCA); *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43; *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ); *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others* [2020] ZASCA.
[914] Brighton Mupangavanhu, 'Diminution' In Share Value and Third-Party Claims For Pure Economic Loss: The Question Of Director Liability To Shareholders' (2019) 31 Sa Mercantile Law Journal 110.
[915] Chanté Ashley Cockrill, 'A shareholder's personal claim against directors for causing pure economic losses through diminution in share value: A South African critical analysis' (published LLM thesis, University of Western Cape, 2020).
[916] Chanté Ashley Cockrill, 'A shareholder's personal claim against directors for causing pure economic losses through diminution in share value: A South African critical analysis' (published LLM thesis, University of Western Cape, 2020); Brighton Mupangavanhu, 'Diminution' In Share Value And Third-Party Claims For Pure Economic Loss: The Question Of Director Liability To Shareholders' (2019) 31 Sa Mercantile Law Journal 110.
[917] Chanté Ashley Cockrill, 'A shareholder's personal claim against directors for causing pure economic losses through diminution in share value: A South African critical analysis' (published LLM thesis, University of Western Cape, 2020); Brighton Mupangavanhu, 'Diminution' In Share Value And Third-Party Claims For Pure Economic Loss: The Question Of Director Liability To Shareholders' (2019) 31 Sa Mercantile Law Journal 110.

contexts.[918] As emphasised in *Blue Farm Fashion Limited v Rapitrade*,[919] a narrow interpretation of section 218(2) is warranted; adopting a broader interpretation could result in a manifest absurdity that would not align with the legislature's intentions, as argued by several authorities. Justice Matame, in the *Blue Farm Fashion Limited v Rapitrade* case, clarified that a narrow approach should be taken when the language is ambiguous, which is indeed the case with section 218(2) of the 2008 Act.[920]

Section 218(2) states that any individual who contravenes any provision of this Act is liable to any other person for any loss or damage incurred as a result of that contravention.[921] However, recent case law also affirm the decision in *Blue Farm Fashion Limited v Rapitrade* case that our courts are applying this section quite narrowly, making it difficult for shareholders to succeed in claims against directors. In *De Bruyn v Steinhoff International Holdings N.V. and Others*,[922] shareholders filed a claim under section 218(2) against the directors for damages resulting from the directors' misstatements. The court noted that while the plain language of section 218(2) "has led certain courts to interpret the provision literally and in the widest terms", it should not be applied in a literal manner.[923]

The court emphasised that when applying this section, it is essential to determine what obligations arise from the contravention of the Act that lead to liability and to whom those obligations are owed.[924] The court confirmed that although this section grants a right of action for loss or damage resulting from violations of the Act, "the nature of the right, who possesses it, and against whom it may be exercised are all matters that must be resolved by reference to the substantive provisions of the 2008 Act".[925]

The court cited the case of *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkins and Others*, which strongly supported interpreting section 218(2) in accordance

[918] Chanté Ashley Cockrill, 'A shareholder's personal claim against directors for causing pure economic losses through diminution in share value: A South African critical analysis' (published LLM thesis, University of Western Cape, 2020); Brighton Mupangavanhu, 'Diminution' In Share Value And Third-Party Claims For Pure Economic Loss: The Question Of Director Liability To Shareholders' (2019) 31 Sa Mercantile Law Journal 110.
[919] *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd and Others* (WCC) para 31.
[920] *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd and Others* (WCC) para 31.
[921] Section 218(2) of the Companies Act 71 of 2008.
[922] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
[923] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ) para 188.
[924] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ) para 188.
[925] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ) para 191.

with common law and the limitations it imposes on liability.[926] Consequently, based on its previous finding that common law does not hold directors liable to shareholders for losses in share value – even if such losses were caused by breaches of the standards required of directors under section 76(3) – the court concluded that "section 218(2) cannot be interpreted as rendering directors liable to shareholders for breaches of their duties under section 76(3) when common law, incorporated by reference in section 77(2)(a), recognises no such liability".[927]

Furthermore, due to inadequate drafting, there remains a lack of clarity regarding the reasons and extent to which a director can be held liable under section 218(2) of the 2008 Act 2008. By amending this section, clarity would be provided, ultimately fulfilling the purpose of the 2008 Act as outlined in section 7(b)(iii), which aims to promote the development of the South African economy by fostering high standards of corporate governance. It is therefore recommended that section 218(2) of the 2008 Act 2008 be amended to read "in alignment with common law principles concerning delict and breaches of fiduciary duty, any individual who violates any provision of this Act is liable to any other individual for any loss or damage incurred as a consequence of that violation".

Consequences of reforming Section 218(2) is that stablishing clear guidelines for the interpretation of Section 218(2) would promote legal certainty, enabling directors to understand their responsibilities and shareholders to comprehend their rights and remedies. Such guidelines would also align with South Africa's King IV Report on Corporate Governance, supporting principles of fairness, accountability, responsibility, and transparency by ensuring directors are held accountable for breaches of duty and shareholders have appropriate recourse. Clear guidelines would balance director accountability with the necessity of allowing directors to take business risks, ensuring that they are not unduly deterred from innovation and strategic decision-making. Additionally, these guidelines would empower shareholders, particularly minority shareholders, to hold directors accountable for actions that harm their interests, strengthening shareholder rights. Consistency with international corporate

[926] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ) para 186.
[927] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ) para 189.

governance standards would enhance South Africa's reputation, and addressing interpretation challenges would make Section 218(2) more effective in practice.

6.4.2. SECTION 20(6) – A SHAREHOLDER'S CLAIM AGAINST ANY PERSON

As discussed in chapter 5, section 20(6) states that "each shareholder of the company has a claim for damages against any person who intentionally, fraudulently, or through gross negligence causes the company to act in a manner inconsistent with this Act, or any limitation, restriction, or qualification contemplated in this section, unless that action has been ratified by the shareholders in accordance with subsection 2".[928] In *Steinhoff case*,[929] shareholders attempted to invoke section 20(6) to seek damages from directors for losses incurred due to a significant decline in the value of their shares, which was attributed to misstatements made by the directors that constituted breaches of various sections of the Act when they became public.[930]

The court determined that "the correct interpretation of section 20(6) is that it imposes liability on individuals who cause loss to the company" (meaning not loss to the shareholders), and that section 20(6) 'requires those who have caused the company to act ultra vires or unlawfully to compensate the company for the loss they have caused" (again, not compensating the shareholders). Applying the common law principles discussed earlier, the court concluded that "a shareholder cannot sue for the diminution in value of his or her shares when that loss merely reflects the loss suffered by the company". It ruled that the losses experienced by shareholders were not separate from those of the company, and therefore, shareholders had no claim under section 20(6).[931]

6.4.3. PIERCING THE CORPORATE VEIL – SECTION 20(9) OF THE COMPANIES ACT 2008 AND THE COMMON LAW

Common law provides the remedy of piercing the corporate veil in cases where there has been a misuse or abuse of the separate legal personality of a company by an

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928 Section 20(6) of the Companies Act 71 of 2008.
929 *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
930 *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).
931 *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ).

individual. In such situations, personal liability is assigned to the person responsible for the abuse, effectively allowing the courts to treat the liabilities of the company as those of its shareholders or directors.[932] Section 20(9) of the 2008 Act represents the first statutory provision in company law that allows a court to disregard a company's separate legal personality in cases of "an unconscionable abuse of the juristic personality of the company as a separate entity". This section grants the court broad discretion to issue orders it deems appropriate when it decides to pierce the corporate veil. Importantly, section 20(9) does not eliminate the common law remedy, which remains accessible when the criteria outlined in section 20(9) are not satisfied.[933]

While courts view the common law remedy as an exceptional measure, section 20(9) may provide them with greater discretion to apply this remedy than is available under common law.[934] However, the Appellate Division has emphasised that courts "should not lightly disregard a company's separate personality but should strive to uphold it". Scholars suggest that when applying Section 20(9), courts should balance the preservation of a company's separate legal personality against policy considerations favouring the piercing of the veil.[935] Thus, although this remedy may be available for shareholders seeking damages from directors, it will not be applied lightly by our courts.[936]

6.4.4. COMMON LAW DELICTUAL CLAIM

A claim for a decrease in market share value constitutes a delictual claim for pure economic loss. Under South African law, it is well-established that, unlike cases involving physical harm, conduct resulting in pure economic loss is not considered prima facie wrongful.[937] A recent warning from the Constitutional Court in *Country Cloud Trading CC v MEC, Department of Infrastructure Development,*[938] *Gauteng* indicates that even intentional actions leading to economic loss are not

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[932] Farouk HI Cassim, Maleka Femida Cassim, Rehana Cassim, and Others, *Contemporary Company Law* (Juta and Company (Pty) Ltd 2022) 31.
[933] Rehana Cassim, 'Piercing the Veil Under Section 20(9) of the Companies Act 71 of 2008: A New Direction' (2014) 26 *South African Mercantile Law Journal* 307.
[934] *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) 9.
[935] *Ex Parte Gore NO and others NNO* [2013] 2 All SA 437 (WCC) 33.
[936] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) 803.
[937] *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2018 (1) SA 391 (SCA; Itzikowitz *v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43 para 8; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) para 1.
[938] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC).

inherently actionable, particularly if such actions are legally permissible.[939] For a plaintiff to successfully claim damages for pure economic loss in a delictual context, two key elements must be demonstrated. First, the plaintiff must establish the wrongfulness of the defendant's conduct by proving that it constitutes a breach of a legal duty owed to them personally.[940] Second, the court must independently assess the facts to confirm that this breach has resulted in personal loss to the plaintiff, distinct from any loss incurred by a juristic entity in which the plaintiff has a financial interest.[941]

At common law, a pertinent question arises regarding when a shareholder may personally seek delictual damages from a director due to pure economic loss stemming from a decrease in share value caused by the director's actions. Lord Bingham of Cornhill, in the English case of *Johnson v Gore Wood & Co (a firm)*,[942] identified three potential categories for such claims:

1. First Category: If a company suffers a loss due to a breach of duty owed to it, the company itself is the aggrieved party and thus the appropriate plaintiff to seek damages for its monetary loss.[943] In this scenario, shareholders should not pursue derivative actions; allowing them to claim for diminished share value could lead to double recovery for both the shareholder and the company.[944] If the company opts not to sue or is unable to do so, this does not transform that wrong into one against its shareholders.[945]
2. Second Category: If a company incurs a loss but lacks a cause of action to recover that loss, shareholders may pursue claims based on their own causes of action arising from that loss, even if it pertains to a reduction in their shareholding.[946]
3. Third Category: When a company experiences a loss due to a breach of duty owed to it while a shareholder suffers distinct and separate losses resulting from an independently owed duty breach, both parties may sue for their

939 *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) para 43.
940 *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) para 23.
941 *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) para 1.
942 *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 (HL) para 502.
943 *Foss v Harbottle* 67 ER 189.
944 *Kalinko v Nisbert & others* 2002 (5) SA 766 (W) para 778–779.
945 *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43 para 17.
946 *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 (HL) para 502.

respective losses. However, neither party can recover losses incurred by the other due to breaches of duty owed specifically to them.[947]

Proper categorisation of these claims is essential for courts to accurately determine whether the plaintiff has been independently wronged by the defendant, thereby justifying a delictual claim for pure economic loss.[948] In *Itzikowitz v Absa Bank Ltd*, Ponnan JA critiqued three High Court decisions cited by an appellant shareholder in support of their delictual claim against Absa Bank for losses inflicted on AMU, the company in which they were invested.[949] The appellant aimed to persuade the SCA based on cases where shareholder plaintiffs were allowed to claim delictual damages against directors for pure economic losses linked to breaches of duty owed to the company that resulted in diminished shareholding value.[950] Ponnan JA noted that these courts made a common error by failing to first ascertain which of Lord Bingham's three categories applied to the claims.[951] According to common law regarding category 1 claims, shareholders cannot initiate derivative actions solely because their financially interested company has suffered losses.[952] They cannot recover amounts equivalent to the reduction in their shares' market value or anticipated dividends since such losses merely reflect those suffered by the company itself.[953]

This was recently affirmed in *De Bruyn v Steinhoff International Holdings N.V. and Others case* where the shareholders attempted this approach, asserting that the directors owed them a duty of care under common law, which they allegedly breached by making misstatements. The court clarified that for such a delictual claim to be successful, it must be demonstrated that the directors engaged in wrongful conduct towards the shareholders and that a duty of care was owed to them by the directors.[954] The court determined that the duties of the directors were owed to the company rather

[947] Itzikowitz *v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43 para 11.
[948] *Walker v Stones [2000] 4* All ER 412 (CA) para 438–439.
[949] *McLelland v Hulett* 1992 (1) SA 456 (D) para 467B–H; *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43.
[950] *McLelland v Hulett* 1992 (1) SA 456 (D) at 467B–H; *Kalinko v Nisbert & others* 2002 (5) SA 766 (W) para 778–779; McCrae *v Absa Bank Ltd* (unreported case no 42229/2008 (SGHC) 7 April 2009); *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43.
[951] *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43 para 16.
[952] *Kalinko v Nisbert & others* 2002 (5) SA 766 (W) para 778–779.
[953] *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 (CA) Para 222-223.
[954] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ) para 186.

than to the shareholders, and it found no evidence of a special factual relationship between the shareholders and the directors that could establish a duty owed by the directors to the shareholders.[955] Consequently, the court concluded that there was no wrongful conduct by the directors against the shareholders, resulting in the failure of their common law delictual claim.[956]

[955] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ) para 144.
[956] *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ) para 160.

7. BIBLIOGRAPHY

Book(s)

- Beuthin RC and Luiz SM, *Beuthin's Basic Company Law* (Butterworths 2000).
- Cassim F, *Contemporary Company Law* (Juta and Company Ltd 2022).
- Cassim FH, Femida M, Cassim R, Jooste R, Shev J & Yeats J, *The Law of Business Structures* (Juta and Company (Pty) Ltd 2021).
- Cassim MF, *The new derivative action under the Companies Act* (Juta and Company Ltd 2016).
- Cilliers HS, *Corporate law* (Butterworths 2000).
- Davis D & Geach W, *Companies and other Business Structures* (Oxford University Press 2019).
- Delport P, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis South Africa 2016).
- Delport P and Vorster Q*, Henochsberg on the Companies Act 71 of 2008* (LexisNexis 2012).
- Johann N, Marthinus PJ and Visser PJ, *Law of Delict* (LexisNexis, 2015).
- Jorge A*, Corporate Governance Regulation in South Africa in Trends and Developments in Corporate Governance* (The Comparative Law Yearbook of International Business 2004).
- Loubser M, Midgley R, Mukheibir A, Niesing L, and Peruma D, *The Law of Delict in South Africa* (Oxford University Press 2018).
- Lyndon DP and Worthington S, *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell 2012).
- Stein C*, The New Companies Act Unlocked* (Siber Ink 2011).
- Williams C, *Attributes or Consequences of The Company's Corporate Personality* (LexisNexis 2012).

- Worthington S, *Sealey's Cases and Materials in Company Law* (Oxford University Press 2016).

Case Law(s)

- *ADT Security (Pty) Ltd v Botha and Others* [2010] ZAWCHC 563.
- *African Claim & Land Co Ltd v Langermann* 1905 TS 494.
- *Airport Cold Storage (Pty) Limited v Ebrahim and Others* [2007] ZAWCHC 25.
- *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) 9.
- *Allen v Hyatt* (1914) 30 TLR 444.
- *Ashbury Railway Carriage & Iron Co Ltd v Riche* 1875 LR 7 HL 653 694.
- *Atlas Maritime Co SA v Avalon Maritime Ltd (No. 1*) [1991] 4 All SA 769 (CA).
- *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173.
- *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) 490 (CC).
- *Bell v Lever Bros Ltd* [1932] AC 161.
- *Big Catch Fishing Tackle Proprietary Limited and Others v Kemp and Others* [2019] ZAWCHC.
- *Body Corporate of Greenwood Scheme v 75/2 Sandown (Pty) Ltd* 1999 (3) SA 480 (W).
- *Botha v Van Niekerk En 'n Ander* 1983 (3) SA 513 (W).
- *Brunninghausen v Glavanics* (1999) 46 NSWLR 538.
- *Broadcasting Investment Group Ltd v Adam Smith* [2020] EWHC 2501 (Ch).
- *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd* (22288/2014) [2016] ZAWCHC 35.
- *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (AD).
- *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* [1995] ZASCA 53.
- *Capital Appreciation Ltd v First National Nominees (Pty) Ltd and Others* [2022] ZASCA 85.

- *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* [2017] ZALMPPHC 27.
- *Cohen, NO v Segal* 1970 (3) SA 702 (W).
- *Coleman v Myers* [1977] 2 NZLR.225.
- *Country Cloud Trading cc v MEC: Department of Infrastructure Development* [2013] ZASCA 22.
- *Cullerne v The London & Suburban General Permanent Building Society* 1890 25 QB.
- *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA).
- *Daimler Co Ltd v Continental Tyre and Rubber Co* [1916] UKHL 845.
- *Daimler Co Ltd v Continental Tyre and Rubber Co* [1916] 2 AC 307.
- *Daniels v Anderson* (1995) 13 ACLC 614 (CA) NSW 665.
- *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530.
- *De Bruyn v Steinhoff International Holdings N.V. and Others 2022* (1) SA 442 (GJ).
- *Du Plessis NO v Phelps* 1995 (4) SA 165 (C).
- *Ebrahim and Another v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA).
- Edwards *v Halliwell* [1950] 2 All ER 1064.
- Ex Parte Donaldson (1947) (3) SA 170 (T)173.
- *Ex Parte Gore and Others Nno* [2013] ZAWCHC).
- *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency* Ltd (2009) (2) (SA 150 (SCA)).
- *Fulham Football Club Ltd v Cabra Estates plc 1994 (BCLC 363).*
- *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (All SA 201 (A)).
- *Gihwala and Others v Grancy Property Ltd and Others* 2016 (All SA 649 (SCA)).
- *Glazer v Commission* 431 So. (2d 752 (La 1983)).
- *Golf Estates (Pty) Ltd v Malherbe and Others* (1997) (1) (SA 873 (C)).
- *Gordon NO and Rennie NO v Standard Merchant Bank Ltd and Others* (1984) (2) (SA 519 (C)).
- *Hülse Reutter and Others v Gödde* (2001) (4) (SA 1336 (SCA)).
- *Heneways Freight Services (Pty) Ltd v Grogor* (2007) (2) (SA 561 (SCA)).
- *Howard v Herrigel and Another NNO* (1991) (2) (SA 660 (A)).

- *In Re: Grancy Property Limited and Another v Gihwala and Others* 2014.
- *In re City Equitable Fire Insurance Co Ltd* 1925 (Ch 407 (CA)).
- *Itzikowitz v Absa Bank Ltd* (20729/2014) 2016.
- *Jaga v Donges* (1950) (4) (SA 653 (A)).
- *Johnson v Gore Wood & Co* 2002 (AC 1 para 19).
- *Johnson v Gore Wood & Co (a firm)* 2001 (All ER 481 (HL)) 502.
- *Kalinko v Nisbet & others* (2002) (5) (SA 766 (W)).
- *Knoop NO and Others v Birkenstock Properties (Pty) Ltd and Others* 2009.

  Kolisang v Alegrand General Dealers and Auctioneers and Another 2022.
- *Lategan and Another NNO v Boyes* (1980) (4) (SA191(T)).
- *Le'Bergo Fashions CC v Lee and Another* (1998) (2) (SA608(C)).
- *Lewis Group v Woollam and Others* (2017) (AllSA192(WCC)).
- *Lipschitz and Another NNO v Wolpert and Abrahams* (1977).
- *Longford v The London & Suburban General Permanent Building Society* (1890) (25 QB).
- *Magnus Diamond Mining Syndicate v Macdonald and Hawthorne* (1909) (ORC65).
- *Mafikeng Mail (Pty) Ltd v Centner* (1995) (4)(SA603(W)).
- *Manong & Associates (Pty) Ltd v City Manager, City of Cape Town and Another* (2009) (1) (SA644 (EqC)).
- *Media24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd* (2011) (5) (SA329(SCA)).
- *Mentmore Manufacturing Co v National Merchandising Manufacturing Co* Inc (1979) (89 DLR (3d195 (FedCtApp)).
- *Motor Industry Bargaining Council v Botha and Another* (34198/2013) [2016] ZAGPPHC 615.
- *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others* (2019).
- *Novick v Comair Holdings Ltd* (1979) (2) (SA116(W))153.
- *Orkin Bros Ltd v Bell and Others (1921).*
- *Ozinsky NO v Lloyd* (1992) (3) (SA396(C)).
- *Parker v McKenna* (1974) (LR 10 Ch App 96).
- *Pavlides v Jensen* [1956] 2 All ER 518.

- *Phillips v Fieldstone Africa (Pty) Ltd* (2004) (1) (AllSA150(SCA)).
- *Piercy v SMills & Co Ltd* (1920) (1Ch77).
- *Pender v Lushington* (1876 Ch D70).
- *Quigley Meats Ltd v Hurley* [2011 IEHC192].
- *Rabinowitz van Graan and Others* (2013) (SA 315 (GSJ)).
- *Regal (Hastings) v Gulliver* (19672AC134n(HL)).
- *Re Brazilian Rubber Plantations and Estates Ltd* (19111 Ch425).
- *Re Smith & Fawcett Ltd* (1967).
- *Rees and Others v Harris and Others* (2011).
- *Robinson v Randfontein Estates Gold Mining Co Ltd* (1921AD168).
- *Rolled Steel Products (Holdings) Ltd British Steel Corporation* (1986 Ch246(CA)).
- *R v denden Berg & Another* (19552 (SA338 (A))).
- *Saincic and Others Industro Clean (Pty) Ltd & Another* (2009 1 (SA538 (SCA))).
- *Salomon v A Salomon & Co. Ltd* [1897 AC22].
- *Samuel v President Brand Gold Mining Co. Ltd* [19693(SA629(A))
- *Hogg v Cramphorn Ltd* 1967 Ch254].
- *Sasol Oil (Pty) Ltd Nationwide Poles CC* [2006 3 (SA 400 (CAC))].
- *Shipping Corporation of India Ltd Evdomon Corporation & another* [19941 (SA 550 (A)).
- *Sharp & Others Blank & Others* [2015 EWHC3220(Ch)].
- Sibex Construction (SA) *(Pty) Ltd Another Injecta seal CC* [1988 2 (SA 54 (T))].
- *Steenkamp NO Provincial Tender Board, Eastern Cape* [2006 3 (SA 151 (SCA)) 155F].
- *Symington v Pretoria-Oos Privaat Hospitaal Bedryf (Pty) Ltd [*2005 4 (All SA 403 (SCA)].
- *Telematrix (Pty) Ltd v Advertising Standards Authority SA* (459/2004) [2005] ZASCA 73.
- *Treasure Trove Diamonds Ltd v Hyman* 1928 AD 464.
- *Venter v R* 1907 TS910.
- *Viraland Inc v Ole Media Group (Pty) Ltd and Another* [2016] ZAWCHC 10.
- *Wallersteiner v Moir* (No2) [19751(All ER 849).

- *William H Sanders v Roselawn Memorial Gardens Incorporated* 159 S.E. (W. Va 1968).
- *Woolfson v Strathclyde Regional Council* [19782 EGLR19].
- *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189.

Journal Article(s)

- Blackman MS, Jooste RD and Everingham GK, 'Commentary on the Companies Act' (2002) South African Law Journal 133.
- Cassidy J, 'Models for reform: the director's duty of care in a modern commercial world' (2009) Stell LR 373.
- Cassim F, 'Company Law (Including Close Corporations)' (2003) Annual Survey of South African Law 549.
- Cassim MF, 'Judicial Discretion In Derivative Actions Under The Companies Act Of 2008' (2013) 130 SALJ 778.
- Cassim MF, 'The Statutory Derivative Action Under the Companies Act of 2008: guidelines for the Exercise of the Judicial Discretion' (published PhD thesis, University of Cape Town, 2014).
- Cassim R, 'A Critical Analysis of the Removal of Directors by the Board of Directors and the Judiciary under the Companies Act 71 of 2008' (published PhD thesis, University of South Africa, 2018) 253.
- Cassim R, 'Hiding behind the veil' (2013) De Rebus 32.
- Cassim R, 'Piercing the Veil Under Section 20(9) of the Companies Act 71 of 2008: A New Direction' (2014) 26 South African Mercantile Law Journal 307.
- Chokuda CT, '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).

- Cockrill CA, 'A Shareholder's Personal Claim Against Directors For Causing Pure Economic Losses Through Diminution In Share Value: A South African Critical Analysis' (Published LLM, University Of Western Cape, 2020) 9.
- Coetzee L, 'The fiduciary relationship between a company and its directors' (2014) 35 OBITER 305.
- De Jager J, 'Comments on the effects of section 40 of the Banks Amendment Act 19 of 2003 on section 60 of the Banks Act 94 of 1990' (2005) 17 SA Merc LJ 170 at 174.
- Delport PA, 'Henochsberg on the Companies Act 71 of 2008' (2011) THRHR 82.
- Du Plessis JC, 'A Comparative Analysis of Directors' Duty of Care, Skill and Diligence in South Africa and Australia' (2010) Acta Juridica 263.
- Duvenhage A, 'Personal Liability of Company Directors Towards Company Creditors Under The Companies Act 71 Of 2008: Much Ado About Nothing?' (Published LLM, University Of Pretoria 2020).
- Esser IM and Delport PA, 'The Protection of Stakeholders: The South African Social and Ethics Committee and The United Kingdom's Enlightened Shareholder Value Approach: Part 1' (2017) De Jure 97.
- Jan de Jong B, 'Shareholders' Claims for Reflective Loss: A Comparative Legal Analysis' (2013) European Business Organization Law Review.
- Jooste R, 'Financial assistance to directors – the Companies Act 71 of 2008' (2010) Acta Juridica.
- Kanamugire J and Chimuka TV, 'The Directors' Duty to Exercise Care and Skill in Contemporary South African Company Law and the Business Judgment Rule' (2014) Mediterr J Soc Sci.
- Kathleen VL, 'The Personal Liability of Directors for Corporate Fault – An Exploration' (2008) SA Mercantile Law Journal.
- Levenberg P,'The Mystery of the Corporate Veil: Comparing Anglo-American Jurisdictions' (2019) Penn St JLIA.

- McLennan JS, 'Directors fiduciary duties and the 2008 Companies Bill' (2009) TSAR.
- Michele H, 'Directors' Co-liability for Delicts' (2006) SA Mercantile Law Journal.
- Mupangavanhu B, 'Diminution' in Share Value and Third-Party Claims For Pure Economic Loss: The Question Of Director Liability To Shareholders' (2019) 31 Sa Mercantile Law Journal 110.
- Phungula S, 'Lessons to be Learned from Reckless and Fraudulent Trading by a Company: Section 424(1) of the Companies Act 61 of 1973 and Sections 22 and 77(3)(b) of the Companies Act 71 of 2008' (2016) SA Merc LJ.
- Quinton ST, 'Criminal Law' in Willem Adolf Joubert (ed), LAWSA Vol.6(2) (2004)
- Rehana C, 'The Launching of Delinquency Proceedings under the Companies Act 71 of 2008 by Means of the Derivative Action: Lewis Group Limited v Woolman [2017] Orbiter.
- Scott J, 'An Unsuccessful Long Shot Aimed at Effecting Liability for Causing Pure Economic Loss: Itzikowitz v ABSA Bank [2016] Journal of Contemporary Roman-Dutch Law.
- Schoeman N, 'Piercing the corporate veil under the New Companies Act [2012] June DR.
- Sparis LC, 'Can Directors Be Held Personally Liable to Shareholders in the Context of South African Law?' LLM mini dissertation University of Pretoria [year].
- Stevens R and de Beer P, 'The Duty of Care and Skill, and Reckless Trading: Remedies in Flux?' SA Merc LJ.
- Sutherland P, 'The state of company law in South Africa [2012] Stellenbosch University Law Review.
- Vaness Finch, 'Company directors: who cares about care and skill [1992] Modern Law Review.

Legislation(s)

- Companies Act 69 of 1984.
- Close Corporations Act 69 of 1984.
- Companies Act 71 of 2008.
- Consumer Protection Act 68 of 2008.
- Companies Amendment Act 3 of 2011.
- Criminal Procedure Act 51 of 1977.
- Constitution of the Republic of South Africa, 1996.

Website(s)

- Bondarenko P, 'Enron scandal' (7 May 2024) https://www.britannica.com/event/Enron-scandal accessed 4 July 2024.
- Bracher P, 'Claim by Shareholders Against Directors Under Section 218(2) of Companies Act fails' https://www.financialinstitutionslegalsnapshot.com/ accessed 15 September 2024.
- Comins L, 'The case against the Tongaat executives' (11 February 2022) https://www.businesslive.co.za/fm/features/2022-02-11-former-tongaat-executives-appear-in-court-facing-19-fraud-charges/ accessed 4 July 2024.
- Corsi A and Birney N, 'Shareholder claims and the no reflective loss rule' https://www.nortonrosefulbright.com/en/knowledge/publications/0688bcea/shareholder-claims-and-the-no-reflective-loss-rule (1 December 2018) accessed 29 June 2024.
- Cox I, 'South Africa: The Misfit- Section 218(2) of the Companies Act 71 of 2008' http://www.mondaq.com/southafrica/x/194898/Directors+Officers/THE+MISFIT+Section+218+2+Of+The+Companies+Act+71+Of+2008 accessed 15 September 2024.
- Cremen G, 'Paying the piper' https://www.hoganlovells.com/en/publications/paying-the-piper accessed 15 September 2024.
- Falato A, Kadyrzhanova D, and Ugur L, 'Distracted Directors: Does Board Busyness Hurt Shareholder Value?' (10 December 2013) SSRN https://ssrn.com/abstract=2272478 or http://dx.doi.org/10.2139/ssrn.2272478.
- Hogan L, 'Extension of delictual liability for pure economic loss: Are courts adopting the correct

approach?' https://www.hoganlovells.com/en/publications/extension-of-delictual-liability-for-pure-economic-loss-are-courts-adopting-the-correct-approach accessed 14 September 2024.

- Kleitman M, 'Director Liability' https://withoutprejudice.co.za/article/5043/view accessed 15 September 2024.
- Kleitman Y, 'Director Liability' https://withoutprejudice.co.za/article/5043/view accessed 15 September 2024.
- Loxton D, 'Criminal Liability of Companies Survey: South Africa' (2008) Bowman Gilfillan https://pdf4pro.com/view/criminal-liability-of-companies-survey-south-africa-bowman-4cd4d8.html accessed 21 September 2024.
- Myburgh E, 'Holding delinquent directors personally liable' https://www.derebus.org.za/holding-delinquent-directors-personally-liable/ accessed 15 September 2024.
- Mitchly A, 'VBS looting kingpin pleads guilty to 33 charges as part of agreement' (10 July 2024) https://www.news24.com/news24/southafrica/news/vbs-looting-kingpin-pleads-guilty-to-33-charges-as-part-of-agreement-20240710 accessed 14 July 2024.