THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 1423/2018

In the matter between:

HLUMISA INVESTMENT HOLDINGS (RF) LTD	**First Appellant**
EYOMHLABA INVESTMENT HOLDINGS (RF) LTD	**Second Appellant**
and	
LEONIDAS KIRKINIS	**First Respondent**
NITHIANANTHAN NALLIAH	**Second Respondent**
MOJANKUNYANE FLORENCE GUMBI	**Third Respondent**
MORRIS MTHOMBENI	**Fourth Respondent**
MUTLE CONSTANTINE MOGASE	**Fifth Respondent**
NOMALISO LANGA-ROYDS	**Sixth Respondent**
NICHOLOAS ADAMS	**Seventh Respondent**

SAMUEL SITHOLE **Eighth Respondent**

ANTONIO FOURIE **Ninth Respondent**

ROBERT JOHN SYMMONDS **Tenth Respondent**

DELOITTE & TOUCHE **Eleventh Respondent**

Neutral citation: *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* (Case no 1423/2018) [2020] ZASCA 83 (03 July 2020)

Coram: NAVSA, MAKGOKA and SCHIPPERS JJA and MOJAPELO and KOEN AJJA

Heard: 9 March 2020

Delivered: This judgment was handed down electronically via e-mail to the parties' legal representatives on 03 July 2020. It has been published on the Supreme Court of Appeal website.

Summary: Company Law – s 218(2) of the Companies Act 71 of 2008 – claim by shareholders of company against directors and auditors for damages related to diminution in value of shares – directors alleged to have acted in bad faith, for ulterior purposes and without the requisite degree of care, skill and diligence, in breach of provisions of the Act – company, rather than shareholders, proper plaintiff in respect of claim against directors – essentially a claim for reflective loss – claim against auditors based on alleged negligence in the manner in which they conducted an audit of the company, in breach of their legal duty – proper plaintiff the company – claim for pure economic loss – wrongfulness requirement not met – exceptions rightly upheld by court below – appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Molopa-Sethosa J sitting as court of first instance): judgment reported *sub nom Hlumisa Investment Holdings RF Limited and Another v Kirkinis and Others* [2018] ZAGPPHC 676; 2019 (4) SA 569 (GP).

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Navsa JA and Schippers JA (Makgoka JA and Mojapelo and Koen AJJA concurring):

[1] This appeal, with the leave of the Gauteng Division of the High Court, Pretoria (Molopa-Sethosa J, sitting as court of first instance), concerns principally the question whether s 218(2) of the Companies Act 71 of 2008 (the Companies Act) enables a claim by a shareholder in relation to the diminution in the value of shares due to misconduct by directors. The appeal also concerns the viability of a shareholder's claim based on a diminution in share value related to alleged misconduct by auditors in auditing the company's financial statements. It follows on the upholding of exceptions to the appellants' particulars of claim in an action for damages, brought against the respondents in the court below.

[2] The first appellant, Hlumisa Investment Holdings (RF) Ltd (the first plaintiff in the court below), and the second appellant, Eyomhlaba Investment Holdings (the second plaintiff in the court below), are shareholders in African Bank Investments Limited (ABIL), which is listed on the Johannesburg Securities Exchange. The first appellant owns 1.73%, and the second appellant 3.24%, of the issued share capital of

ABIL. African Bank Limited (African Bank or 'the Bank'), which carries on the business of a bank under the Banks Act 94 of 1990, is a wholly-owned subsidiary of ABIL. The first to tenth respondents are all either former or current directors of ABIL and African Bank (the directors). At all material times they were all directors of both. The eleventh respondent, Deloitte & Touche (Deloitte), was the auditor of both ABIL and African Bank.

[3] In the action instituted by the appellants in the court below in 2015, they sued the directors and Deloitte, jointly and severally, for damages allegedly suffered as a result of the diminution in the value of their shares in ABIL, on account of the directors' alleged misconduct in relation to the affairs of both African Bank and ABIL and on account of Deloitte failing to conduct audits in accordance with generally recognised auditing standards.

[4] In their claim against the directors (Claim A), the appellants alleged that between 2012 and 2014, and in breach of s 76(3) of the Companies Act, the directors had failed to exercise their powers in good faith and in the best interests of ABIL and African Bank, which 'resulted in the business of ABIL and African Bank being carried out recklessly or with gross negligence in contravention of the provisions of section 22(1) of the Act'. This caused the Bank and ABIL to suffer significant losses, which, in turn, caused the ABIL share price to drop from R28.15 per share as at April 2013 to R0.31 per share as at August 2014, a total diminution in the price per share of R27.84. The appellants' damages, according to the pleadings, arose from this diminution in value of the ABIL shares, multiplied by the number of shares that they held, which resulted in the first appellant allegedly suffering a loss of R721 384 512, and the second appellant, a loss of R1 341 224 294.

[5] The particulars of claim set out numerous instances of the directors' alleged misconduct. They include the publication of false financial statements in respect of both entities; the authorisation of the publication, in relation to a rights issue, of a prospectus containing false financial statements and other financial information that was misleading; the authorisation of a loan, at meetings or in terms of s 74 of the Companies Act, in contravention of s 45 in circumstances where it could be foreseen that the loan would not be repaid; the appointment of an executive director who did

not possess the necessary skills and expertise; failing to make provision for losses sustained as a result of bad business decisions; utilising flawed credit provisioning models; pursuing aggressive and reckless accounting practices; and pursuing a rights offer on behalf of ABIL on false premises. In para 24 of the particulars of claim the appellants locate the statutory basis for their claim against the directors:

'In the circumstances, and by reason of section 218(2) of the Act, the directors are liable to compensate the first and second plaintiffs for the damages they have suffered. . . .'

[6] The directors excepted to the particulars of claim on three bases, the relevant parts of which are reproduced hereunder:

'EXCEPTION 1

The plaintiffs' claim is premised on the defendants, in their capacities as directors of ABIL and African Bank, having conducted themselves in a particular manner . . . .

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

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

On the basis advanced by the plaintiffs the entities which suffered loss as a result of the directors' conduct were African Bank and ABIL . . . .

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

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

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

EXCEPTION 2

The plaintiffs rely on section 218(2) of the Companies Act . . .

Section 218(2) of the Companies Act provides:

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

The only provisions of the Companies Act identified by the plaintiffs are section 76(3) and section 22(1) . . . and sections 74 and 45.

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

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

EXCEPTION 3

In the amended particulars of claim the plaintiffs allege that the defendants authorised the publication of a prospectus containing false or misleading information . . . .

In the amended particulars of claim the plaintiffs set out certain details in respect of the false and misleading information in the prospectus . . . .

The authorisation of the prospectus is alleged to be a misrepresentation . . . .

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

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

[7] In respect of the claim against Deloitte (claim B), the appellants alleged that during the period between December 2012 and December 2014, Deloitte was tasked by ABIL to audit and report on the financial standing of ABIL and African Bank. The appellants alleged that Deloitte had, in respect of African Bank's annual financial statements for the years ending December 2012 and December 2013, reported that the financial statements fairly presented the Bank's financial position. The reports were 'false', so the appellants said, in that the financial statements did not reveal the true state of affairs at the Bank. The falsity arose, so it was alleged, as a result of:

'[T]he deliberate, *alternatively*, negligent failure on the part of the auditors to take sufficient steps to rectify and disclose to the investors and shareholders of African Bank and ABIL, including the plaintiffs (the plaintiffs constituting third parties as contemplated in section 46(3) of the [Auditing Profession Act 26 of 2005]) the true state of affairs at African Bank in the financial statements.'

The appellants went on to state that Deloitte deliberately failed to qualify the financial statements.

[8] The appellants alleged that Deloitte knew, or could reasonably have been expected to know that the audit reports would induce them to act or refrain from acting in some way, as contemplated in s 46(3) of the Auditing Profession Act 26 of 2005 (the APA).[1] Had Deloitte performed proper audits, the appellants would have convened a meeting of the shareholders of ABIL and caused the removal of the errant directors. That would have put an end to their mismanagement of African Bank and prevented further losses. As a result of Deloitte's audit reports, so it was asserted, the appellants did not take these preventive measures, the directors continued to mismanage the Bank and it continued to suffer loss. The ongoing losses suffered by the Bank caused ABIL to suffer loss in that its shares in the Bank diminished in value; and in turn, the plaintiffs suffered losses in the amounts set out at the end of para 4 above.

[9] Deloitte, like the directors, excepted to the particulars of claim. Its exceptions read as follows:

'FIRST EXCEPTION: THE ALLEGED WRONG WAS COMMITTED AGAINST AFRICAN BANK, NOT AGAINST THE PLAINTIFFS

The plaintiffs are shareholders of ABIL, the holding company of African Bank.

According to the plaintiffs, ABIL "*tasked*" Deloitte to audit and report on the financial standing of ABIL and African Bank . . . .

ABIL'S shareholders have no claim over any assets of ABIL and/or African Bank and merely have a personal right to participate in ABIL on the terms of its memorandum of incorporation.

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[1] Section 46(3) of the Auditing Profession Act provides:

'Despite subsection (2), a registered auditor incurs liability to third parties who have relied on an opinion, report or statement of that registered auditor for financial loss suffered as a result of having relied thereon, only if it is proved that the opinion was expressed, or the report or statement was made, pursuant to a negligent performance of the registered auditor's duties and the registered auditor—

(a) knew, or could in the particular circumstances reasonably have been expected to know, at the time when the negligence occurred in the performance of the duties pursuant to which the opinion was expressed or the report or statement was made-

(i) that the opinion, report or statement would be used by a client to induce the third party to act or refrain from acting in some way or to enter into the specific transaction into which the third party entered, or any other transaction of a similar nature, with the client or any other person; or

(ii) that the third party would rely on the opinion, report or statement for the purpose of acting or refraining from acting in some way or of entering into the specific transaction into which the third party entered, or any other transaction of a similar nature, with the client or any other person; or

(b) in any way represented, at any time after the opinion was expressed or the report or statement was made, to the third party that the opinion, report or statement was correct, while at that time the registered auditor knew or could in the particular circumstances reasonably have been expected to know that the third party would rely on that representation for the purpose of acting or refraining from acting in some way or of entering into the specific transaction into which the third party entered, or any other transaction of a similar nature, with the client or any other person.'

Consequently, any culpable failure by Deloitte to discharge its duties pursuant to its appointment as African Bank's statutory auditor:

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

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

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

In the premises, [the claim against Deloitte] lacks allegations necessary to sustain a cause of action.

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

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

The plaintiffs' claim is based upon negligent misstatements allegedly made by Deloitte in expressing audit opinions in respect of the financial statements of African Bank.

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

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

The plaintiffs rely on section 46(3) of [the APA] to found a legal duty to them, based on the alleged knowledge of Deloitte that the directors would use the [annual financial statements] to induce them to refrain from exercising their rights as shareholders in a specific way.

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

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

In the premises, [the claim against Deloitte] lacks allegations necessary to sustain a cause of action.'

[10] In short, the directors and Deloitte adopted the position that the claims by the appellants – which, if proven, enured only to the company – were unsustainable at common law, at the instance of shareholders in their capacity as such, and could also not be brought in terms of s 218(2) of the Companies Act. Deloitte was adamant that it owed a legal duty to the company but not to the appellants in their capacities as individual shareholders in the company.

[11] The court below, in adjudicating the exceptions in relation to Claim A, had regard to s 218(2) of the Companies Act which, although appearing in the exceptions set out above, we restate for convenience:

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

Alongside this provision, Molopa-Sethosa J considered s 76(3) of the Act, which the appellants contended the directors had contravened in conducting the affairs of the company as alleged. Section 76, which concerns the standards of conduct expected from company directors . . . is, in essence, a codification of the common law on fiduciary duties. Section 76(3) essentially provides that directors must exercise their powers and perform their functions in good faith and for a proper purpose; in the best interests of the company; and with the degree of skill, care and diligence reasonably expected of directors. Section 76(3) reads as follows in relevant part:

'(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director—

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

(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person—

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.'

[12] At para 26 of the judgment, the following appears concerning s 218(2) of the Companies Act:

'Section 218(2) is worded widely in respect of individuals who fall within its ambit; however, it is restricted in its application and applies only to "damage *suffered by that person* as a result of that contravention". This restriction requires a particular person to have suffered damage as a result of a particular contravention. What this means is that the particular person who has suffered damage must be a person who is able to invoke a claim for damages as a result of a particular contravention of the Companies Act. In para 21 of the amended particulars of claim, the plaintiffs' recourse to s 218(2) is articulated as follows:

"21 The directors' conduct as aforesaid:

21.1 constituted a breach of the provisions of section 76(3) of the Companies Act and resulted in the business of ABIL and African Bank being carried out recklessly or with gross negligence, in contravention of the provisions of section 22(1) of the Act . . . .'

Noting that s 76(3) sets the standard of conduct expected of a director, the court below stated that the subsection does not, however, 'deal with the liability of a director'. That subject, said the court below, is dealt with in s 77 of the Companies Act, which reads as follows:

'77 Liability of directors and prescribed officers—

. . .

(2) A director of a company may be held liable—

(a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75,[2] 76(2) or 76(3)*(a)* or *(b)* . . . .'

[13] Molopa-Sethosa J reached the following conclusion:

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

The court went on to state the following:

'Where a statute expressly and specifically creates liability for the breach of a section, then a general section in the same statute cannot be invoked to establish a co-ordinate liability; see *Gentiruco AG V Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 603. This is the result of the *generalia specialibus non derogant* maxim in terms of which general provisions do not derogate from special provisions.'[4]

[14] The court below stated that if s 218(2) had the breadth ascribed to it by the appellants, it 'would be a drastic departure from a core principle of company law'.[5]

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[2] Section 75 deals with the personal financial interests of directors and is of no relevance in relation to the present dispute.

[3] *Hlumisa Investment Holdings RF Limited and Another v Kirkinis and Others* [2018] ZAGPPHC 676; 2019 (4) SA 569 (GP) para 29.

[4] Ibid para 30.

[5] Ibid para 31.

Molopa-Sethosa J then embarked on an extensive examination of case law, dealing with the well-established principle of statutory interpretation that a statute should not be taken to alter the common law unless it is clear that that is what was intended; and even then, no more than what is necessary. She dealt with the qualification that statutes must be interpreted in the context of constitutional values and that the common law must be developed to promote the spirit, purport and objects of the Bill of Rights and referred to Constitutional Court authority in that regard. The court below proceeded to hold as follows:

'It cannot be said that there is anything in s 218(2) to indicate that the legislature intended to alter the common law and allow reflective-loss claims to be brought under that section.'[6]

It was emphasised that s 77(2) required claims for a breach of s 76(3) to be brought 'in accordance with the principles of the common law'.[7] Molopa-Sethosa J concluded on this score by holding that 'a reflective-loss claim cannot be brought under s 77(2), because the common law does not permit such a claim. What the plaintiffs' argument involves is a finding that the Companies Act allows a reflective-loss claim which the common law prohibits if the claim is brought under s 76(3)'.[8]

[15] In respect of the appellants' reliance on s 22 of the Companies Act the court below referred to the provisions of s 77(3)*(b)*,[9] which deal explicitly with losses suffered by a company as a consequence of a director having acquiesced in the carrying on of the company's business, despite knowing that it was being conducted in a manner prohibited by s 22. Thus, it held, as in the case of their reliance on s 76, the appellants' reliance on s 22 was misconceived.

[16] Dealing with the contention on behalf of the appellants that the words 'as a result of' in s 218(2) do not import a legal causative requirement, the court below held as follows:

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[6] Ibid para 39.
[7] Ibid para 40.
[8] Ibid para 41.
[9] Section 77(3)*(b)* reads as follows: 'A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having—
. . .
(b) acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1) . . .'

'Basically, what the plaintiffs suggest in their interpretation of s 218(2) is that all the requirements of the common law relating to fault, foreseeability, causation and the proper plaintiff should be discarded, and this cannot be so.'[10]

In arriving at that conclusion, the court below rejected the appellants' reliance on the decision of the Constitutional Court in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC). The Constitutional Court was there dealing with causation in relation to the application of the Restitution of Land Rights Act 22 of 1994 and the meaning of the phrase 'as a result of' in s 2(1) of that Act. It gave that expression an extended meaning because it was considering a remedial measure to redress past imbalances and the effects of historical dispossession of rights in land.[11] The court below held that the comparison with s 218(2) of the Companies Act was untenable.[12]

[17] Late in its judgment,[13] the court below considered the judgment of this court in *Itzikowitz v Absa Bank Ltd* [2016] ZASCA 43; 2016 (4) SA 432 (SCA) where there is a discussion of the principle against reflective loss in relation to companies and their shareholders.[14] The underlying principles that find application are, first, that a company has a distinct legal personality. Secondly, holding shares in a company merely gives shareholders the right to participate in the company on the terms of the memorandum of incorporation, which right remains unaffected by a wrong done to the company and, in the light thereof, a personal claim by a shareholder against a wrongdoer who caused loss to the company is misconceived.[15] Thus, the court below was fortified in its view that the appellants could not rely on s 218(2) of the Companies Act for their reflective-loss claim.

[18] The court below went on to consider the appellants' claim against Deloitte and the related exceptions. It considered the appellants' 'pivotal' allegation to be the following: 'In consequence of ABIL being the sole shareholder of African Bank, any

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[10] *Hlumisa Investment Holdings* above fn 3 para 44.
[11] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC) para 47.
[12] *Hlumisa Investment Holdings* above fn 3 paras 47-48.
[13] Ibid para 50.
[14] See especially paras 9-20 of Ponnan JA's judgment in *Itzikowitz v Absa Bank Ltd* [2016] ZASCA 43; 2016 (4) SA 432 (SCA).
[15] Ibid paras 9-12.

acts or omissions by third parties causing patrimonial loss to African Bank would *consequently* result in ABIL suffering patrimonial loss'.[16] It held as follows:

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

This analysis is not correct. African Bank suffered the loss and it is the proper plaintiff. In circumstances where African Bank has a claim against the third party, the shareholders of African Bank (or of its shareholder) have no claim in their own name.'[17]

[19] Consequently, the court below upheld the exceptions by the directors and Deloitte in respect of both Claims A and B with costs, and granted the plaintiffs an opportunity to amend their particulars of claim, if so advised. It is against the order based on the conclusions set out above, that the present appeal is directed.

[20] Deloitte was given leave to cross-appeal conditionally, ostensibly on the basis that if this court found that liability attached to the directors in terms of s 218(2), it did not follow that there was liability on the part of Deloitte, located either statutorily or otherwise. It must be borne in mind that in their claim against Deloitte, the appellants did not rely expressly on s 218(2).

[21] In considering whether the essential conclusions of the court below are correct it is necessary, at the outset to deal with the contention by the appellants, near the commencement of their heads of argument, that the directors' reliance on the legally recognised bar against a reflective loss claim is nowhere to be found in their exceptions and, consequently, the court below erred in having regard to submissions in that regard. This was all the more so, it was contended, if regard is had to rule 23(3) of the Uniform Rules of Court, which provides that the grounds upon which an exception is founded 'shall be clearly and concisely stated'. That contention can be disposed of briefly. The rule against claims for reflective loss will be examined in some detail later in this judgment. For present purposes it suffices to state its essentials: Where a wrong is done to a company, only the company may sue for damage caused to it. This does not mean that the shareholders of a company do not consequently

[16] *Hlumisa Investment Holdings* above fn 3 para 68. (Emphasis original.)
[17] Ibid paras 69-70.

suffer any loss, for any negative impact the wrongdoing may have on the company is likely also to affect its net asset value and thus the value of its shares. The shareholders, however, do not have a direct cause of action against the wrongdoer. The company alone has a right of action. In their exceptions, the directors contended that ABIL and/or African Bank ought to have brought an action, if one was sustainable, and not the appellants as shareholders in ABIL. The exceptions accordingly encompassed the no reflective loss principle. There is thus no merit in this point.

[22] In deciding an exception a court must take the facts alleged in the pleading as being correct. It is for the excipient to satisfy the court that the conclusion of law set out in the particulars of claim is unsustainable. The court may uphold the exception only if it is satisfied that the cause of action or conclusion of law cannot be sustained on every interpretation that can be put on those facts.[18] As Harms JA noted in *Telematrix*, exceptions are a useful tool to 'weed out' bad claims at an early stage and an unnecessarily technical approach is to be avoided.[19] The facts are what must be accepted as correct; not the conclusions of law.

[23] In the present case one must therefore accept that there was a diminution in value of the shares held by the appellants; that losses were caused to both ABIL and African Bank; and that these losses were due to the alleged misconduct on the part of the directors. What is in issue, is whether s 218(2) of the Companies Act provides a basis for a claim by the appellants, in their capacity as individual shareholders in ABIL, against the directors based on contraventions by the directors of ss 22(1), 45 and 74 and breaches of s 76(3) of the Companies Act. In respect of the auditors the issue is whether, in the circumstances pleaded, they owed the appellants, as individual shareholders in ABIL, legal duties not to have made misrepresentations in African Bank's financial statements and to have qualified the audit; and whether, in that regard, reliance could be placed on s 46(3) of the APA and s 218(2) of the Companies Act to sustain a cause of action. To that end one must accept that there were

[18] *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA) para 36, cited with approval in *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC) para 10.
[19] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) para 3, obtaining the Constitutional Court's imprimatur in *Pretorius and Another v Transport Pension Fund and Others* [2018] ZACC 10; 2019 (2) SA 37 (CC) para 15.

misrepresentations by Deloitte relating to African Bank's financial statements, as well as a failure to qualify the financial statements, and that this commission and omission caused loss to African Bank and consequently a diminution in value of the appellants' shares.

[24] A good starting point in considering whether the exceptions were correctly upheld, is a revisiting of the rule against claims by shareholders for reflective loss. In *Itzikowitz*[20] this court restated, with reference to the prevailing authorities, the following established principle:

'The notion of a company as a distinct legal personality is no mere technicality – a company is an entity separate and distinct from its members and property vested in a company is not and cannot be regarded as vested in all or any of its members. . . . A shareholder's general right of participation in the assets of the company is deferred until winding-up, and then only subject to the claims of creditors.'

[25] Ponnan JA then went on to consider the following statement in *Lawsa*[21] concerning our law on the rights of shareholders to sue personally when a wrong is perpetrated against a company:

'Since the shareholder's shares are merely the right to participate in the company on the terms of the memorandum of incorporation, which right remains unaffected by a wrong done to the company, a personal claim by a shareholder against the wrongdoer to recover a sum equal to the diminution in the market value of his or her shares, or equal to the likely diminution in dividend, is misconceived.'

[26] Ponnan JA recognised that for that proposition in *Lawsa* reliance was placed on *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*,[22] where the following was stated at 222-223:

'[W]hat [a shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not

[20] *Itzikowitz* above fn 14 para 9. (Citations omitted.)
[21] 4(1) *Lawsa* 2 ed (2012) para 67. (Citations omitted.)
[22] *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 Ch 204; [1982] 1 All ER 354 (HL).

suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has . . . shareholding.'

[27] *Itzikowtiz* also referred to the more recent judgment of the House of Lords in *Johnson v Gore Wood & Co (a firm)* [2000] UKHL 65; [2001] 1 All ER 481; [2002] 2 AC 1 (HL), where Lord Bingham observed:

'(1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. . . . (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. . . . (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other.'[23]

[28] Dealing with the first principle, Lord Millett stated that the rationale for the rule was to avoid double recovery:

'The position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. In such a case the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of

[23] *Johnson v Gore Wood & Co (a firm)* [2000] UKHL 65; [2001] 1 All ER 481; [2002] 2 AC 1 (HL) at 35E-36B.

the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder.'[24]

He went on to say the following:

'It is of course correct that the diminution in the value of the plaintiffs' shares was by definition a personal loss and not the company's loss, but that is not the point. The point is that it merely reflected the diminution of the company's assets. The test is not whether the company could have made a claim in respect of the loss in question; the question is whether, treating the company and the shareholder as one for this purpose, the shareholder's loss is franked by that of the company. If so, such reflected loss is recoverable by the company and not by the shareholders.'[25]

[29] More recently, in *Novatrust Limited v Kea Investments Limited and Others* [2014] EWHC 4061 (Ch), with reference to *Johnson v Gore Wood & Co*,[26] *Day v Cook* [2003] BCC 256 para 39 and *Gardner v Parker* [2004] EWCA Civ 781; [2004] 2 BCLC 554 para 49, the rule against a claim by a shareholder that was purely reflective of a loss suffered by the company was reaffirmed in paras 54 and 55.

[30] In 2018 the Court of Appeal considered the scope of the rule against reflective loss in *Garcia v Marex Financial Ltd* [2018] EWCA Civ 1468; [2018] 3 WLR 1412; [2019] QB 173. Flaux LJ observed that the justification for the rule is fourfold:

'The four aspects or considerations justifying the rule which emerge from the authorities, in particular Lord Millett's speech in *Johnson v Gore Wood & Co* [2002] 2 AC 1, are: (i) the need to avoid double recovery by the claimant and the company from the defendant …; (ii) causation, in the sense that if the company chooses not to claim against the wrongdoer, the loss to the claimant is caused by the company's decision not by the defendant's wrongdoing …; (iii) the public policy of avoiding conflicts of interest particularly that if the claimant had a separate right to claim it would discourage the company from making settlements …; and (iv) the need to preserve company autonomy and avoid prejudice to minority shareholders and other creditors.'[27]

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[24] Ibid at 62D-G.
[25] Ibid at 66B-D.
[26] Ibid.
[27] *Garcia v Marex Financial Ltd* [2018] EWCA Civ 1468; [2018] 3 WLR 1412; [2019] QB 173 at 188-189.

[31] Blackman, Jooste and Everingham provide a slightly different rationale for the rule against reflective loss in their *Commentary on the Companies Act*,[28] which is perhaps more convincing. On the 'double recovery' justification for the rule, and the view that allowing a personal action would subvert the rule in *Foss v Harbottle*,[29] the authors say the following:

'This explanation is misleading. When the value of shares is depreciated or destroyed as a consequence of harm done to the company, the shareholders suffer harm, albeit that the harm is "indirect". A person who suffers indirect harm, suffers harm. And there is no principle of law that denies a person a claim for damages, merely because the harm he suffered was "indirect harm", although of course the question of remoteness of damage may arise.

The principle is that where harm is wrongfully caused directly to A (eg the company) and indirectly to B (eg the company's shareholders), the law gives the right of action to claim compensation to A. It does so because if, instead, the right were given to B, A and A's creditors would be prejudiced. What is more, B's action would involve a determination of A's loss. In the case of a company, each shareholder would have an action, and consequently there would be a multiplicity of actions, many of which would be for very small sums. If, instead, the cause of action is given to A, the law will not only ensure that A suffers no loss: it will also ensure that B suffers no loss. This is not because B will, then, merely suffer "indirect" or "incidental" harm. It is because B suffers no harm at all. A's right of action is an asset which, itself, compensates A for his loss. If A (eg the company) is able to obtain full compensation from the wrongdoer, A's financial position is unaffected. And therefore B's financial position (eg the value of the company's shareholders' shares) is also unaffected.'

And, in a later paragraph:

'It is usually said that if *both* the company *and* the shareholder were given the right to recover, the wrongdoer would suffer "double jeopardy" and the shareholder might receive "double compensation". If the shareholder sued first, the wrongdoer would be placed in double jeopardy because, after paying the shareholder, he would still be liable to the company; and if, then, the company obtained recovery, the shareholder would receive double compensation. However, despite the frequency with which this argument has been advanced, it is mistaken. If the company has the right of action, the wrong done to it causes its shareholders no harm. Hence the shareholder can have no action. The problem of "double jeopardy" and "double compensation" simply does not arise. Thus, it is not merely the company's existence as a separate legal person that deprives the shareholder of an action

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[28] 'Remedies of Members' in MS Blackman, RD Jooste & GK Everingham *Commentary on the Companies Act* (RS 9 2012) at 9-67 – 9-68-1. (Citations omitted; emphasis original)

[29] *Foss v Harbottle* (1843) 67 ER 189; (1843) 2 Hare 461.

against the wrongdoer. What deprives the shareholder of a right of action is the fact that *the company has a right to recover damages for the loss it has suffered*.'

There can however be no doubt that there are sound policy and jurisprudential reasons for the rule.

[32] We pause to note that *Novatrust* also dealt with derivative claims. In a situation where wrongdoers themselves control the company, so that they can prevent the taking of the necessary steps, any one or more of its members may bring what is known as a derivative action, that is, an action by an individual shareholder, in own name, against the wrongdoers for relief to be granted to the company, the action being one on the company's behalf.[30] In England and Wales derivative actions are comprehensively regulated by Part 11 of Chapter 1 of the Companies Act 2006. In South Africa it is regulated by s 165 of the Companies Act. In both statutes there are requirements that must be met before such a claim may be brought. Derivative claims are not in issue in this appeal.

[33] In *Giles v Rhind* [2002] 4 All ER 977; [2002] EWCA Civ 1428, the Court of Appeal gave effect to the third policy consideration set out by Lord Bingham in *Johnson*, referred to in para 27 above. It held that the rule against claims for reflective loss did not operate to exclude a shareholder's personal action for reflective loss against a wrongdoer who had deprived the company of funds and who successfully obtained security for costs against the company, essentially stifling the company's claim so that its directors discontinued the company's action against him. The shareholder then moved to litigate in the company's stead. In those circumstances the Court of Appeal permitted a shareholder's personal claim, notwithstanding the shareholder's loss being, in part, a reflection of the loss suffered by the company. Waller LJ (paras 33-35) justified the exception as follows:

'In *Johnson v Gore Wood & Co* there was no difficulty about the company having a cause of action and being able to recover on the cause of action. I also think that in the light of Lord Bingham's observation that it is important for the "court to be astute to ensure that the party

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[30] See 'Derivative actions' in PA Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (SI 21 2019) 587-593 for a useful discussion on the proper plaintiff rule in *Foss v Harbottle* (above fn 29) and the progression to derivative actions. *Foss v Harbottle* was the genesis of the rule against claims for reflective loss and is referred to in subsequent cases, such as *Prudential Assurance* (above fn 22), in terms of which the principle was refined, exceptions were developed and the rule was also relaxed as against the development of the law in general.

who has in fact suffered loss is not arbitrarily denied compensation", it is clear that he had the particular facts in *Johnson v Gore Wood & Co* in mind, ie that there had been nothing to stop the company continuing with its action if it had so chosen.

One situation which is not addressed is the situation in which the wrongdoer by the breach of duty owed to the shareholder has actually disabled the company from pursuing such cause of action as the company had. It seems hardly right that the wrongdoer who is in breach of contract to a shareholder can answer the shareholder by saying "the company had a cause of action which it is true I prevented it from bringing, but that fact alone means that I the wrongdoer do not have to pay anybody".

In my view there are two aspects of the case which [Giles] seeks to bring which point to [him] being entitled to pursue his claim for the loss of his investment. First, as it seems to me, part of that loss is not reflective at all. It is a personal loss which would have been suffered at least in some measure even if the company had pursued its claim for damages. Secondly, even in relation to that part of the claim for diminution which could be said to be reflective of the company's loss, since, if the company had no cause of action to recover that loss the shareholder could bring a claim, the same should be true of a situation in which the wrongdoer has disabled the company from pursuing that cause of action. I accept that on the language of Lord Millett's speech there are difficulties with this second proposition, but I am doubtful whether he intended to go so far as his literal words would take him. Furthermore it seems to me that on Lord Bingham's speech supported by the others, it would not be right to conclude that the second proposition is unarguable.'

[34] The approach taken in *Giles v Rhind* was, of course, to mitigate the inflexible proper plaintiff rule set out more than 175 years ago in *Foss v Harbottle*.[31] *Prudential Assurance* set that case, which is the genesis of the rule against claims for reflective loss by shareholders, in historic perspective and in relation to derivative claims. In *Prudential Assurance* (at 210-212), the Court of Appeal stated the following:

'A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B for to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested. This is sometimes referred to as the rule in *Foss v Harbottle* (1843) 2 Hare 461 when applied to corporations, but it has a wider scope and is fundamental to any rational system of jurisprudence. The rule in *Foss v Harbottle* also embraces a related principle, that an individual shareholder cannot bring an action in the

[31] Above fn 29.

courts to complain of an irregularity (as distinct from an illegality) in the conduct of the company's internal affairs if the irregularity is one which can be cured by a vote of a company in general meeting.

The classic definition of the rule in *Foss v Harbottle* is stated in the judgment of Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER 1064 at 1066-7 as follows. (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation. (2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, *cadit quaestio*; or, if the majority challenges the transaction, there is no valid reason why the company should not sue. (3) There is no room for the operation of the rule if the alleged wrong is *ultra vires* the corporation, because the majority of members cannot confirm the transaction. (4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of the greater majority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue.'

[35] As indicated above, there has been statutory and judicial intervention to address concerns against injustices resulting from the rule against claims for reflective loss being applied inflexibly. Commentators, whilst also voicing concerns that an inflexible application of the rule might lead to injustice, have not suggested that it be abolished. In P Koh's contribution on 'The Shareholder's Personal Claim: Allowing Recovery for Reflective Losses'[32] she concludes as follows at 888-889:

Undoubtedly, the no reflective loss principle, as laid down in *Prudential Assurance* and as clarified in *Johnson*, is driven by sound policy reasons. However, these policy reasons are not always applicable nor are they in themselves unassailable. As the task of any court should be to achieve justice and fairness on the particular facts before it, there is much to be said for retaining discretion over whether to allow a personal suit or not. Justice is necessarily context-

[32] P Koh 'The Shareholder's Personal Claim: Allowing Recovery for Reflective Losses' (2011) 23 *Singapore Academy of Law Journal* 863-889.

driven. To apply a rigid rule regardless of context, therefore, raises the real risk of denying the wronged party appropriate remedy. …

However, to ensure that the cause brought by a shareholder is indeed *genuine*, the asserted claim must, in the first place, be one that can properly be classified as a personal one, taking account of the source and nature of the right asserted. Only then should the court entertain the shareholder's claim and proceed to consider whether the policy concerns that support the rule may be adequately dealt with in the particular case.'[33]

[36] In New Zealand, the legislature has provided for shareholders to bring an action in instances where there is a duty owed to *them*. It also set out, though not exhaustively, duties of directors that are owed to shareholders and not to the company, and conversely, those owed to the company and not to shareholders (which include the instances relied on by the appellants in the present case). It was emphatic that an action may not be brought to recover any loss in the form of a diminution in the value of shares in the company by reason of loss suffered by the company. Thus, s 169 of the Companies Act 1993 (New Zealand) provides:

'169 Personal actions by shareholders against directors

(1) A shareholder or former shareholder may bring an action against a director for breach of a duty owed to him or her as a shareholder.

(2) An action may not be brought under subsection (1) to recover any loss in the form of a reduction in the value of shares in the company or a failure of the shares to increase in value by reason only of a loss suffered, or a gain forgone, by the company.

(3) Without limiting subsection (1), the duties of directors set out in—

(a) section 90 (which relates to the duty to supervise the share register); and

(b) section 140 (which relates to the duty to disclose interests); and

(c) section 148 (which relates to the duty to disclose share dealings)—

are duties owed to shareholders, while the duties of directors set out in—

(d) section 131 (which relates to the duty of directors to act in good faith and in the best interests of the company); and

(e) section 133 (which relates to the duty to exercise powers for a proper purpose); and

(f) section 135 (which relates to reckless trading); and

(g) section 136 (which relates to the duty not to agree to a company incurring certain obligations); and

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[33] Emphasis original. See also the views of R Samuel in 'Reflective loss reconsidered (Pt 1)' (2019) *NLJ* 17-18, and 'Reflective loss reconsidered (Pt 2)' (2019) *NLJ* 17-18.

(h) section 137 (which relates to a director's duty of care); and

(i) section 145 (which relates to the use of company information)—

are duties owed to the company and not to shareholders.'

[37] There can be no doubt that when the Companies Act became operative on 1 May 2011, and thereafter, our law recognised the rule against claims for reflective loss, more particularly, in respect of claims by shareholders for compensation for a diminution in the value of their shares due to loss occasioned to the company by a wrongdoer. That much is clear from what is set out in paras 24 to 27 above. Our courts applied the law as applied by English courts over time. See, in addition to the South African judgments already referred to, *Gihwala and Others v Grancy Property Ltd and Others* [2016] ZASCA 35; (SCA) 2017 (2) 337 (SCA) paras 107-112 and *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others* [2016] ZASCA 62; 2016 (6) SA 181 (SCA) para 41 and the cases there cited.

[38] The appellants' claims against the directors are quintessentially reflective loss claims. The essentials of the particulars of claim are that:

(a) The plaintiffs are shareholders of ABIL.

(b) The directors were at all material times directors of ABIL.

(c) African Bank was a wholly owned subsidiary of ABIL.

(d) African Bank carried out the business of a bank.

(e) The directors in their capacity as directors of ABIL conducted the business of ABIL and African Bank recklessly and in contravention of ss 22(1), 74 and 45 of the Companies Act and in breach of s 76(3) of that Act.

(f) The breach of the aforesaid provisions resulted in significant losses on the part of African Bank and consequently ABIL.

(g) As a result of the loss suffered by ABIL, the appellants suffered a diminution in the value of their ABIL shares. The losses 'in turn caused the share price… to drop from R28.15 ... to ... 31 cents ... being a total diminution of R27.84 per share'.

Simply put, the wrong done to the company (ABIL) is the basis of the appellants' claim and the diminution in share value is directly correlated to the losses suffered by ABIL. The belated attempt in a submission before us, namely, that the diminution in value of the appellant's shares, although arising from a chain of events which includes the losses suffered by African Bank and ABIL, is a loss distinct from the losses suffered by African Bank and ABIL, is fallacious. Linked to that submission is one concerning the manner in which listed shares are valued, that is, the price a willing buyer is prepared to pay to a willing seller. That ignores the very basis of the rule referred to in the first principle stated by Lord Bingham in *Johnson* and captured in the passage from *Lawsa*, cited in para 25 above. In any event, that is not how the loss and its cause were pleaded by the appellants. There can be no doubt, on the appellants' version of events, that ABIL would have a claim against the directors and that at common law, the existence and viability of that claim precluded a personal claim by the shareholders. In the present case there is no hint by the appellants of a derivative claim and no assertion of oppression by the majority of shareholders, or that ABIL was in some way, hindered or obstructed in pursuing a claim against the directors.

[39] There is no independent cause of action as submitted on behalf of the appellants and no justification of any kind as to why the appellants' claim fell within any of the recognised exceptions, or why it would be unjust to deny the claim or why allowing it would not do violence to the sound policy reasons for the retention of the rule, including a multiplicity of claims by aggrieved shareholders.

[40] There is simply no basis in fact for the contention on the part of the appellants that the claim against the directors falls with the second or third principles set out by Lord Bingham in *Johnson*, cited in para 27 above. We repeat them here for convenience:

'(2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. . . . (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other.'[34]

The appellants' claim against the directors do not even begin to approximate the claims envisaged in (2) and (3).

[34] *Johnson* above fn 23 at 35G-36B.

[41] Does s 218(2) save the day for the appellants in relation to the claim against the directors? The short answer is no. The reasons are set out hereafter. It is necessary first to have regard to the purposes of the Companies Act within which s 218(2) is located. The Act came into effect on 1 May 2011.The purposes of the Act are, inter alia, to promote compliance with the Constitution; to provide for the creation and use of companies in a manner that enhances the economic welfare of South Africa as a partner within the global economy; to promote the development of the South African economy by encouraging transparency and high standards of corporate governance; and to re-affirm the concept of the company as a means of achieving economic and social benefits. It was also enacted to balance the rights and obligations of shareholders and directors within companies. The full list of the purposes of the Act are set out in s 7. Whilst the Act was structured to deal with South African conditions, the legislature was conscious of the global economy. In the interpretation of the Act regard is also to be had to foreign law, to the extent that this would be appropriate. In this regard see s 5(2) of the Act.

[42] A company is defined in s 1 of the Act as a distinct juristic person. This distinct personality is no mere technicality.[35] It is foundational to company law. As observed in *Itzikowitz,* referred to in para 24 above, property vesting in the company does not vest in any or all of its members. It is the basis of the rule against the claim for reflective loss, as referred to in *Prudential*, *Johnson*, *Itzikowitz* and captured in the statement in *Lawsa*, referred to in para 25 above.

[43] Importantly, the legislature must have been aware of the need to retain those principles of the common law that had been applied under preceding legislation that were consonant with our constitutional values and in line with international company law. The following statement in a policy paper published by the Department of Trade and Industry, entitled 'South African Company Law for the 21st Century – Guidelines for Corporate Law Reform',[36] which is quoted in the Companies Bill,[37] is elucidating:

'It is not the aim of the [Department of Trade and Industry] simply to write a new Act by unreasonably jettisoning the body of jurisprudence built up over more than a century. The

[35] *Itzikowitz* above fn 14 para 9.
[36] See GN 1183 in *GG* 26493 of 23-06-2004.
[37] See the Companies Bill B 61-2008, an explanatory summary of which was published in *GG* 31104 of 30-05-2008.

objective of the review is to ensure that the new legislation is appropriate to the legal, economic and social context of South Africa as a constitutional democracy and an open economy. Where the current law meets these objectives, it should remain as part of company law.'

[44] A further factor to bear in mind is the presumption that statutory provisions are not intended to alter or exclude the common law unless they do so expressly or by necessary implication.[38] Where possible, statutes must be read in conformity with the common law.[39] This enhances legal certainty and recognises the value of the common law, which has developed systematically over time.[40]

[45] It is in that context that s 218(2) falls to be considered. Section 218(2) reads as follows:

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

When a wrongdoer 'contravenes' the Act and causes loss to a person, the wrongdoer is liable to that person. The ordinary meaning of 'contravene' is 'to go counter to; to transgress, infringe (a law, provision, etc); to act in defiance or disregard of'.[41] The decriminalisation of company law sanctions was one of the principles of the policy underlying the Act.[42] This indicates that the contravention envisaged in s 218(2) need not be a criminal offence.[43] It suffices to say that the word 'contravenes' in s 218(2) includes a breach or an infringement of any provision of the Act, 'which is by nature prescriptive or which in some way regulates conduct'.[44] Sections 22(1), 74, 45 and 76(3), which in the present case the appellants contend trigger the operation of s 218(2), clearly fall into this category.

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[38] *Casserley v Stubbs* 1916 TPD 310 at 312; *Dhanabakium v Subramanium* 1943 AD 160 at 167; *Attorney-General, Transvaal v Botha* 1994 (1) SA 306 (A) at 330I-J.

[39] *Ngqukumba v Minister of Safety and Security and Others* [2014] ZACC 14; 2014 (5) SA 112 (CC) para 16

[40] 25(1) *Lawsa* 2 ed para 340.

[41] *Oxford English Dictionary* (2008).

[42] See para 4.7 of the policy paper, *South African Company Law for the 21st Century – Guidelines for Corporate Law Reform*, at 44.

[43] *Henochsberg* op cit fn 28 at 642.

[44] R Stevens and P De Beer *The Duty of Care and Skill, and Reckless Trading: Remedies in Flux?* (2016) 28 *SA Merc LJ* 250 at 274.

[46] Section 22(1)*(a)* provides that '[a] company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.' Section 76(3) provides:

'Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director—

(a) in good faith and for proper purpose;

(b) in the best interests of the company; and

(c) with 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.'

Section 45 is another section of the Companies Act on which the appellants relied. That section regulates loans or other financial assistance to directors or prescribed officers of the company or of a related or inter-related company, or to a related or inter-related company or corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member. In the appellants' particulars of claim it was alleged that the directors failed to vote against the granting of loans to certain corporations and that these loans were in contravention of section 45. In not resisting the granting of the loans the directors were said to have acted in contravention of s 22(1) of the Act and, consequently, the appellants were entitled to bring a claim against them in terms of s 218(2) of the Act.

[47] *Henochsberg*,[45] in the commentary on s 76(3) of the Companies Act, states the following:

'The common law position is that a director has to act *bona fide* and in the best interests of the company. This is the fundamental duty which qualifies the exercise of any powers which the directors in fact have . . . . The duties to act *bona fide* and in the best interests of the company are now entrenched in the Act . . . . With regard to the duty to act in the best interests of the company and who the beneficiary of a director's duty is, the common law position is as follows: At common law *directors owe fiduciary duties to the company* . . . . Such duties are owed even by non-executive directors . . . . Where, therefore, a director acts in breach of a

[45] 'In good faith, in the best interests of the company for a proper purpose' in *Henochsberg* op cit fn 28 at 298-9 – 298-11, 298-15 – 298-16, and 298-17.

fiduciary duty he may, depending on the circumstances, also act in breach of his duty of care, skill and diligence . . . .

. . .

The duty of good faith and the duty to act for the benefit/interests of the company are two separate duties . . . . The "interests", in this context, are only those of the company itself as a corporate entity and those of its members as such as a body (*Alexander v Automatic Telephone Co* [1900] 2 Ch 56 (CA) at 67, 72; *Coronation Syndicate Ltd v Lilienfeld* 1903 TS 489 at 497; *Parke v Daily News Ltd* [1962] Ch 927 at 963; [1962] 2 All ER 929 at 948 . . . .

. . .

The "proper purpose" duty entails in the first instance that the director must not exceed the limitations of his own authority and must not exceed the limitations of the company . . . .

In the second instance a director must exercise the duties only for the purpose for which they were conferred and not for an "improper" purpose . . . .

Directors as such owe no fiduciary duty to the members/shareholders individually (*Percival v Wright* [1902] 2 Ch 421; *Pergamon Press Ltd v Maxwell* [1970] 2 All ER 809 (Ch) at 814), not even to a member who is the majority shareholder (*Bell v Lever Brothers Ltd* [1932] AC 161 (HL) at 228); their fundamental duty is to act only in the *bona fide* interests of the company and its shareholders *as a body* (*SA Fabrics Ltd v Millman NO* 1972 (4) SA 592 (A); *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W) para 16 . . .'

(Emphasis added and some authorities omitted.)

[48] Returning to the provisions of s 218(2) of the Companies Act, the duties owed by directors in terms of s 76(3) are owed to the company, not to individual shareholders. The company, in the event of a wrong done to it in terms of any of the provisions of that subsection, can sue to recover damages. The company would be the proper plaintiff. It is no coincidence, then, that s 77(2)*(a)* provides that a director of a company may be held liable for breaches of fiduciary duties resulting in any loss or damage sustained by the company. Similarly, in respect of the particular wrongdoer and claimant, s 77(2)*(b)* of the Act provides that:

'A director of a company may be held liable—

. . .

(b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of—

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

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

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

[49] Even more significant are the provisions of s 77(3)*(b)*, which read as follows:

'A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having—

. . .

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

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

[51] There is no need to give the words 'as a result of that contravention' in s 218(2) an extended meaning, as submitted on behalf of the appellants, so as to ignore the conventional meaning of a consequence flowing from the misconduct. The provisions referred to in the preceding paragraphs abound with recovery of loss resulting from misconduct on the part of directors. There is no indication in the scheme of the Companies Act or any of its relevant provisions that the words quoted at the beginning of this paragraph should carry a different meaning. On the contrary, all indications lead to the ineluctable conclusion that it was meant to have the conventional meaning and that the person who can sue to recover loss is the one to whom harm was caused. Simply put, there must be a link between the contravention and the loss allegedly suffered. In the present case, loss was occasioned to the company and the company is the entity with the right of action.

[52] From what is set out above it is clear that the rule against claims for reflective loss has not expressly been abolished by s 218(2), nor does it follow by necessary implication. Section 218(3) does not assist the appellants. It reads as follows:

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

The provision thus provides a statutory remedy to ‘any person’ who can bring themselves within its ambit. Subsection (3) does not detract from any existing rights to sue but is, rather, an affirmation of those rights. The remedy is available to avoid injustice where that would otherwise ensue. It is not necessary in this case to make any findings in relation to the precise contours of this remedy and we deliberately eschew doing so. However, we must accept that allowing individual shareholders in their capacities as such to bring claims against miscreant company directors for a diminution in the value of their shareholding may very likely prejudice companies (and/or its creditors and/or other shareholders). Furthermore, we are constrained to accept that a company has an established right to claim damages from its directors for any losses sustained as a result of those directors’ breach of a duty owed to the company. It follows that s 218(3) entrenches also the company’s right. If one were to accede to the appellants’ claim based on a diminution in the value of their shares, it would impinge on the company’s right preserved by s 218(3). This proves the fallacy of the appellants’ claim.

[53] Finally, in relation to the directors’ third exception, it will be recalled that the appellants alleged that the directors had authorised the publication of a prospectus containing false or misleading information. In the exception the directors pointed out that the appellants did not allege that they had acted on or relied on the misrepresentations or the falsehoods and that they suffered loss in consequence of such reliance. One cannot tell from the particulars of claim whether the appellants were already shareholders at the time that the prospectus was published. It is no answer to contend, as the appellants do, that the misrepresentation was pleaded in support of their assertion that the directors had breached s 76(3) of the Companies Act. The appellants’ claim based on the breach of s 76(3) has, in any event, been demonstrated to be unsustainable.

[54] It follows that the essential findings of the court below in relation to the exceptions by the directors cannot be faulted. They were correctly upheld. It is to the claim against Deloitte and the related exceptions that we now turn.

[55] It is necessary to revisit the basis of the appellants’ claim against Deloitte. As already recorded, the appellants were shareholders in ABIL, which was African Bank’s

sole shareholder. The directors, so the appellants said, mismanaged the affairs of the Bank which caused it to sustain significant losses. Deloitte was the Bank's auditor and was obliged to perform its function with reasonable care and skill. Deloitte, in its presentation of the Bank's 2012 and 2013 annual financial statements, reported that they fairly represented the Bank's financial position. The audit reports were false in that the financial statements did not reveal the losses the bank had sustained as a result of the directors' mismanagement. The false reports were due to the failure to perform the audit with the requisite reasonable care and skill. The appellants stated that Deloitte's negligent audit caused the appellants to suffer loss as follows:

(a) If Deloitte had performed proper audits, it would have withheld or qualified the audit reports.

(b) Had Deloitte withheld or qualified the reports, the appellants would have convened a meeting of ABIL's shareholders, and caused ABIL to remove the Bank's directors from office, which would have put an end to the mismanagement of the Bank and would have prevented further losses.

(c) Because of Deloitte's false audit reports, the preventative measures were not taken, the mismanagement of the Bank continued and it continued to suffer loss,

(d) The ongoing losses suffered by the Bank caused ABIL to suffer loss in that its shares in the Bank diminished in value, which then led to ABIL's own share price diminishing in the amounts stated above and the appellants suffering a total loss as calculated above.

[56] The basis of the appellants' claim reveals that the Bank suffered the primary loss. Against that, one must accept that Deloitte wrongfully and negligently or deliberately caused the loss. In the ordinary course, the Bank would have had statutory and contractual claims against the directors and Deloitte for the recovery of the loss. As pleaded, ABIL suffered loss in the second degree. Its loss is a reflection of the Bank's loss. ABIL did not suffer any loss of its own. The appellants, as shareholders of ABIL, thus suffered loss in the third degree. They suffered loss only because of ABIL's loss.

[57] As pointed out by Deloitte's counsel, this 'cascade' of reflective losses on which the claim is based does not end with the appellants. They were minority shareholders of ABIL, holding 1.73% and 3.24% of ABIL's shares, respectively. The reflective losses

sustained by the appellants would have been suffered by everyone else who held shares in ABIL. There must have been thousands of shareholders, if not more, who suffered the same third-degree losses as the appellants. And these reflective losses would be reversed if the Bank enforced its claim against the directors and was thereby compensated for its loss.

[58] As was discussed earlier, in relation to claims against directors, a claim for reflective loss by a shareholder is generally untenable. Furthermore, what has to be borne in mind is that the claim against Deloitte is one for pure economic loss. As a general rule our law does not allow for the recovery of pure economic loss. In *Country Cloud Trading CC v MEC, Department of Infrastructure Development*,[46] the Constitutional Court said the following:

'Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is prima facie wrongful. However, in cases of pure economic loss – that is to say, where financial loss is sustained by a plaintiff with no accompanying physical harm to her person or property – the criterion of wrongfulness assumes special importance. In contrast to cases of physical harm, conduct causing pure economic loss is not prima facie wrongful. Our law of delict protects rights and, in cases of non-physical invasion, the infringement of rights may not be as clearly apparent as in direct physical infringement. There is no general right not to be caused pure economic loss.

So our law is generally reluctant to recognise pure economic loss claims, especially where it would constitute an extension of the law of delict. . . .

In addition, if claims for pure economic loss are too freely recognised, there is the risk of "liability in an indeterminate amount for an indeterminate time to an indeterminate class".'

[59] In *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality* [2017] ZASCA 77; 2018 (1) SA 391 (SCA) para 1, the following appears:

'The first principle of the law of delict, as Harms JA pointed out in *Telematrix*, is that everyone has to bear the loss that he or she suffers. And, in contrast to instances of physical harm, conduct causing pure economic loss is not prima facie wrongful. Accordingly, a plaintiff suing for the recovery of pure economic loss, is in no position to rely on an inference of wrongfulness flowing from an allegation of physical damage to property (or injury to person), because "the negligent causation of pure economic loss is prima facie not wrongful in the delictual sense

[46] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC) paras 22-24. (Citations omitted.)

and does not give rise to liability for damages *unless policy considerations require* that the plaintiff should be recompensed by the defendant for the loss suffered".' (Emphasis added and citations omitted.)

[60] Some categories of liability for pure economic loss have, as pointed out on behalf of Deloitte, crystallised. However, the categories do not in general terms include the liability of auditors. In *Axiam Holdings Ltd v Deloitte & Touche* [2005] ZASCA 61; 2006 (1) SA 237 (SCA) para 18, the following appears:

'It is universally accepted in common-law countries that auditors ought not to bear liability simply because it might be foreseen in general terms that audit reports and financial statements are frequently used in commercial transactions involving the party for whom the audit was conducted (and audit reports completed) and third parties. In general, auditors have no duty to third parties with whom there is no relationship or where the factors set out in the *Standard Chartered Bank* case are absent.'[47]

[61] In *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) this Court had regard to the context in which the alleged negligent misstatement in that case was made, the purpose for which it was sought and made, the reliance placed on it by the third party, the relationship between the parties and, finally, and significantly for present purposes, public policy and fairness. It is true that in *Axiam*, having regard to those factors, it was held that the question of wrongfulness could not be decided at exception stage. The minority in *Axiam* held that the exception ought to have been upheld. As in *Standard Chartered Bank*, this Court in *Axiam* did not find any policy factors that militated against a finding at that stage against the auditors being held liable. The facts in *Standard Chartered* and *Axiam* are far removed from the facts in this case. In *Axiam* the question was whether the auditors of one company owed legal duties to other companies, who were in the process of negotiating agreements for share purchases and business financing and for this purpose relied on the audit statements and opinion which allegedly misrepresented the company's financial position. In both cases there was no claim by shareholders based on a diminution in share value.

[47] (Citations omitted.) See also *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* [2013] ZASCA 16; 2013 (5) SA 183 (SCA) para 21.

[62] Wrongfulness is an element of delictual liability. The test for wrongfulness was set out in *Le Roux and Others v Dey*, as follows:

'[I]n the context of the law of delict: *(a)* the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and *(b)* that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms.'[48]

[63] The test for wrongfulness should not be confused with the fault requirement. The test assumes that the defendant acted negligently or wilfully and asks whether, in the light thereof, liability should follow.[49]

[64] The appellants submitted that it would not be appropriate to decide wrongfulness on exception. In this case, as in all cases in which a plaintiff claims damages for pure economic loss, it is incumbent that the facts upon which such a plaintiff relies for its contention that the loss was wrongfully caused be pleaded. The pleadings are thus the high-water mark of its case on wrongfulness. In *Telematrix (Pty) Ltd t/a Matrix Vehicle Trading v Advertising Standards Authority* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) para 2 this court noted that it has often determined wrongfulness on exception.[50]

[65] In *Telematrix*, para 3, Harms JA said that '[s]ome public policy considerations can be decided without a detailed factual matrix, which by contrast is essential for deciding negligence and causation'. In *AB Ventures Ltd v Siemens Ltd* [2011] ZASCA 58; 2011 (4) SA 614 (SCA) para 5, Nugent JA noted that in a case such as this, the issue of wrongfulness is 'quintessentially a matter that is capable of being decided on exception'. In the present case all the policy factors upon which a decision would rest are known.

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[48] *Le Roux and Others v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC) para 122. (Citations omitted.)

[49] See *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* [2005] ZASCA 109; 2006 (3) SA 138 (SCA) para 12.

[50] See *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A); *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A); and *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A). See also *Fourway Haulage SA v National Roads Agency* [2008] ZASCA 134; 2009 (2) SA 150 (SCA).

[66] The question to be addressed on the issue of wrongfulness is whether public and legal policy considerations dictate that the auditors of African Bank be held liable to the shareholders of ABIL for the reflective losses they sustained as a result of the underlying losses suffered by the Bank. As the extensive discussion on the rule against claims for reflective losses above reveals, the appellants' claims are barred by the rule. Moreover, as noted in para 60 above, in general, auditors have no duty to third parties with whom there is no relationship. In 4(3) *Lawsa* 2 ed para 4 the following appears:

'If the auditors perform their work negligently, it is the company, and not its members, that is the proper plaintiff to sue for any loss caused to it by that negligence.'

[67] Auditors are accountable to shareholders collectively, as a body, ie as the company. Put differently, when auditors make negligent misstatements concerning the company's financial statements, individual shareholders do not have claims against the auditors, because financial statements are not prepared for the benefit of shareholders' individual investment decisions. Instead, the primary purpose of auditing accounts is to report on the stewardship of the directors to the shareholders as a body, in order 'to provide shareholders with reliable intelligence for the purpose of enabling them to scrutinise the conduct of the company's affairs and to exercise their collective powers to reward or control or remove those to whom that conduct has been confided' (*Caparo Industries plc v Dickman* [1990] 2 AC 605 at 630). The purpose of audit reports is neither to protect the interests of investors nor individual shareholders.

[68] Imposing a legal duty on auditors in a case such as this raises the spectre of indeterminate liability. Policy considerations require that liability in delict be confined to reasonably predictable limits (15 *Lawsa* 3 ed para 87). Limitation of liability is therefore a key policy consideration in deciding whether pure economic loss should be actionable. This court, citing Gaudron J in *Perre v Apand (Pty) Ltd* (1999) 198 CLR 180 (HC of A) para 32, in *Fourway Haulage*,[51] said that '[t]he first policy consideration is the law's concern to avoid the imposition of liability in an indeterminate amount for an indeterminate time to an indeterminate class'; and that liability would be more

[51] Ibid paras 23-24.

readily imposed for 'a single loss of a single identifiable plaintiff occurring but once and which is unlikely to bring in its train a multiplicity of actions'.

[69] If the appellants' claims were to be recognised despite the fact that their loss is merely a reflection of the underlying loss suffered by the Bank and ABIL, there is no reason to prevent all others who suffered reflective losses from pursuing similar claims. They would include all other shareholders of both the Bank and ABIL (of whom there are likely to be many) and, in the case of corporate shareholders like the plaintiffs, their shareholders up the corporate chain who ultimately include natural persons. This would expose the auditors to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'. The courts have frequently held that this risk disqualifies the recognition of a new category of claim.[52] (). And, if an action were granted to shareholders to claim compensation directly from the wrongdoers, the Bank's creditors would demand the same facility, particularly if it is insolvent.

[70] In the latter circumstances, if only the Bank is allowed to claim from the wrongdoers for the loss sustained the amount recovered is, in the ordinary course, distributed amongst its creditors pro rata to their claims. ABIL and its shareholders do not share in the recovery unless there is a residue after all the bank's creditors have been paid in full. However, if ABIL and its shareholders are also allowed to sue the wrongdoers, the ranking of claims gets distorted. Questions of undue preferences might arise. This consideration is part of the policy reasons for the retention of the rule against claims for reflective losses as set out in *Johnson* at 14C-D. Under insolvency law, any damages recovered from the wrongdoers should in the first place go to creditors before there is any distribution to shareholders. But what if ABIL or its shareholders have already recovered the full amount of the loss: does it mean that they circumvented the order of distribution to the prejudice of other creditors? To allow the claim would have a result that cannot be countenanced.

[52] *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar and Others* [2010] ZASCA 85; 2010 (5) SA 499 (SCA) para 25; *Country Cloud* above fn 46 para 24; *Fourway Haulage* above fn 50 paras 23-24; *South African Hang and Paragliding Association and Another v Bewick* [2015] ZASCA 34; 2015 (3) SA 449 (SCA) para 32.

[71] In addition to the aforesaid factors, it is so that the plaintiffs are not vulnerable to the risk of harm, and have another remedy. In *Cape Empowerment Trust*,[53] this Court held that the extent to which a plaintiff was vulnerable to the risk of harm was an important indicator in determining whether liability should be imposed on the defendant; and considered the extent to which a plaintiff, which pursued a delictual claim against auditors, was able to recover its loss by means of a contractual claim. In the present matter the plaintiffs could protect themselves against the risk of harm by way of a derivative action under s 165 of the Companies Act. If Deloitte is indeed guilty of professional misconduct, it might be subject to sanction by the relevant regulatory body. But that is not what this appeal is about.

[72] We turn, now, to deal with the appellants' reliance on s 46(3) of the APA. In para 28 of their particulars of claim, they cite the following parts of that subsection:

'(3) Despite subsection (2), a registered auditor incurs liability to third parties who have relied on an opinion, report or statement of that registered auditor for financial loss suffered as a result of having relied thereon, *only if it is proved* that the opinion was expressed, or the report or statement was made, pursuant to a negligent performance of the registered auditor's duties and the registered auditor—

(a) knew, or could in the particular circumstances reasonably have been expected to know, at the time when the negligence occurred in the performance of the duties pursuant to which the opinion was expressed or the report or statement was made—

(i) that the opinion, report or statement would be used by a client to induce the third party to act or refrain from acting in some way or to enter into the specific transaction into which the third party entered, or any other transaction of a similar nature, with the client or any other person; or

. . .

(b) in any way represented, at any time after the opinion was expressed or the report or statement was made, to the third party that the opinion, report or statement was correct, while at that time the registered auditor knew or could in the particular circumstances reasonably have been expected to know that the third party would rely on that representation for the purpose of acting or refraining from acting in some way or of entering into the specific transaction into which the third party entered, or any other transaction of a similar nature, with the client or any other person.'(Emphasis added.)

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[53] *Cape Empowerment Trust* above fn 47 paras 28 and 30.

Nothing further is said by the appellants about the significance of these provisions, with the appellants going on to state that the omission to qualify the Bank's financial statements was deliberate and that Deloitte negligently misrepresented the Bank's financial position and 'had a duty' not to make the statements, thus incurring liability towards the appellants. A third party might be able to rely on this subsection in circumstances such as those in *Standard Chartered* or in *Axiam*. The third party would have to state facts that would bring it within the subsection's field of operation. The appellants did not say how or why their claims fell within the ambit of the subsection. s 46(4) of the APA is of significance. It reads as follows:

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

This means that ss 46(2) and 46(3) do not found a claim where none existed before. The discussion above shows why, in the circumstances of this case, a claim should not be held to exist. For the aforesaid reasons, the appellants have not established wrongfulness. The high court thus correctly upheld Deloitte's exception to the appellants' particulars of claim.

[73] In their pleaded case against Deloitte, the appellants did not rely on the provisions of s 218(2) of the Companies Act. Before us, however, they contended that they were entitled to rely on that subsection if such reliance could be inferred. For this proposition they referred to s 30(2)*(a)* of the Act, which provides that the annual financial statements of companies like ABIL and African Bank must be audited and, if read with the definition of 'audit' in s 1 of the Act, it must mean in accordance with prescribed or applicable auditing standards. It was contended on behalf of the appellants that the auditors contravened s 30(2)*(a).* Thus, so they argued, they were entitled to rely on s 218(2). This is fallacious. The duty to have its annual financial statements audited rests on the company. In relation to liability on the part of Deloitte for contraventions of the Act, the discussion earlier in this judgment applies. The duty of the auditors is owed primarily to the company. For all the stated reasons, liability by Deloitte to shareholders in the circumstances of this case is untenable.

[74] For all the aforesaid reasons, the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

M S Navsa
Judge of Appeal

A Schippers
Judge of Appeal

Appearances

For Appellants	A Subel SC with D Mahon
Instructed by	Faber, Goertz, Austen Inc Johannesburg McIntyre & Van der Post, Bloemfontein
For First to Tenth Respondents	C D A Loxton SC, I P Green SC and N K Nxumalo Instructed by Clyde and Company, Johannesburg Webber Attorneys, Bloemfontein
For Eleventh Respondent	W Trengove SC, M du P van der Nest SC, D J Smit and L Zikalala
Instructed by	Webber Wentzel, Johannesburg Honey Attorneys Bloemfontein