THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not-Reportable

Case no: 1035/2018

In the matter between:

FRANCES OBAKENG LONDON	**FIRST APPELLANT**
MOTSAMI PETRUS RANTHO	**SECOND APPELLANT**
MALEBOGO LOUIS MOKWENA	**THIRD APPELLANT**
NTHABISENG CONSTANCE KEMANE	**FOURTH APPELLANT**

and

DEPARTMENT OF TRANSPORT, ROADS AND PUBLIC WORKS, NORTHERN CAPE	**FIRST RESPONDENT**
PREMIER OF THE NORTHERN CAPE	**SECOND RESPONDENT**
MEMBER OF THE EXECUTIVE COUNCIL OF THE NORTHERN CAPE FOR TRANSPORT, ROADS AND PUBLIC WORKS	**THIRD RESPONDENT**

Neutral citation: *London & others v Department of Transport, Roads and Public Works, Northern Cape & others* (1035/2018) [2019] ZASCA 144 (30 October 2019)

Coram: Petse DP, Cachalia, Tshiqi and Mokgohloa JJA and Tsoka AJA

Heard: 11 September 2019

Delivered: 30 October 2019

Summary: Delict – action for damages by shareholders – necessary averments – alleged breach of contractual duty owed to a company resulting in its liquidation – shareholders suing the other contracting party for damages representing loss of dividends – no allegation in particulars of claim that shareholders' loss separate and distinct from that suffered by the company and caused by breach of a legal duty independently owed to shareholders – exception that particulars of claim not disclosing a cause of action rightly allowed by high court.

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberley (Vuma AJ sitting as court of first instance):

1 The appeal is dismissed with costs.

2 The period of 20 days allowed by the high court for the amendment of the plaintiffs' particulars of claim, if so advised, will run from the date of this judgment.

JUDGMENT

Petse DP (Cachalia, Tshiqi and Mokgohloa JJA and Tsoka AJA concurring):

Introduction

[1] The four appellants, who are business persons residing in Kimberley, Northern Cape, instituted a delictual claim for damages in the order of R27 million against the three respondents in the Northern Cape Division of the High Court, Kimberley (the high court). The first respondent is the Department of Transport, Roads and Public Works of the Northern Cape (the Department). The second respondent is the Premier of the Northern Cape (the Premier) and the third respondent is the Member of the Executive Council for Transport, Roads and Public Works of the Northern Cape (the MEC). Since their interest in this litigation is identical, I shall refer to them collectively as the Department.

[2] The litigation between the parties has a long and tortuous history. This appeal is the fourth legal skirmish in which the parties have become embroiled. The first three of those skirmishes happened in the high court.

[3] The appellants' claim (described in more detail below) is said to arise from a legal duty owed to them by the Department following an alleged breach of its contractual obligations to an entity known as Canton Trading 159 (Pty) Ltd (Canton), in which the

appellants were shareholders. Canton was subsequently liquidated and the appellants' shares rendered worthless.

Factual background

[4] It is necessary to recount the facts relating to the history of this dispute in order to understand the issues in this appeal. In February 2012, the appellants instituted an action against the Department. The particulars of claim, amongst others, made the following averments:

'9 On or about 27th January 2009 at Kimberley the company and the first defendant entered into a public-private partnership fleet agreement (the agreement); a copy of the agreement is annexed hereto marked A.

. . .

10.3 Clause 32.1 of the agreement provided as follows:

Neither party shall be entitled to assign or otherwise transfer the benefits or obligations of all or any part of this agreement without the prior written consent of the other party, which consent shall not be unreasonably withheld. Notwithstanding the aforesaid, the private party may cede its rights under this agreement to its principal financing bank (principal financier) as security for performance by the private party of its obligations to such principal financier in respect of loan funding to be made available by the principal financier in respect of this agreement, provided that the private party receives prior written approval of DTRPW/User Departments and such written approval shall not be unreasonably withheld by DTRPW/User Departments.

11 The company could not fulfil its obligations in terms of the agreement unless it was able to assign or otherwise transfer the benefits or obligations of all or any part of the agreement to a financier or cede its rights under the agreement to a financier as security for the performance by the company of its obligations to such financier in respect of loan funding to be made available by the financier in respect of the agreement.

12 The company was able to obtain such finance from the financier, provided that the company entered into an agreement with the financier referred to as a Finance Direct Agreement (FDA), which would afford security to the financier.

13 In terms of clause 32.1 of the agreement the company was not entitled to enter into such a FDA without the consent of the first defendant, which consent was not to be unreasonably withheld.

14 The first defendant refused to give such consent to the FDA.

15 It was clear that the Department had no reasonable basis for withholding such consent. By letter dated 10th May 2010 Attorneys Weavind & Weavind, acting on behalf of Nissan, sent a letter to the Premier of the Northern Cape, pointing out that the Department was obliged in terms of the agreement to consent to the terms of the FDA so that the finance could be released. The aforesaid Attorneys actually threatened to take legal action against the Department if they did not comply with their obligations. I will cause a copy of such letter to be annexed hereto marked "C".

. . .

17 In view of the agreement and the availability of finance, the company at all material times operated a viable and profitable business. However the refusal of the Department to comply with its obligation to consent to the FDA prevented the company from finalising the grant of finance to it and this eventually caused the winding up of the company. However at all material times prior thereto the business of the company was in operation in a successful and effective manner and substantial profits were generated.

18 In so refusing the first defendant acted unreasonably.

. . .

19.3 The plaintiffs' shares in the company were rendered worthless.

. . .

21.3 The company would have made a profit as follows:

21.3.1 2011 – R257 761.

21.3.2 2012 – R7 917 803.

21.3.3 2013 – R5 046 323.

21.3.4 2014 – R6 921 497.

21.3.5 2015 – R8 944 108.

. . .

23 The plaintiffs would have received such profit as a dividend in accordance with their shareholding in the company.

. . .

27 In the premises the first defendant was under a duty of care to the plaintiffs not to refuse its consent to the FDA unreasonably.

28 In acting as set out in 14 and 15 above, the first defendant acted wrongfully and unlawfully and in breach of such duty of care.

29 In the premises the first defendant is liable to the plaintiffs for the damages suffered by the plaintiffs, being the dividends which the plaintiffs would have received as set out in 20 above.'

I have quoted liberally from the appellants' amended particulars of claim for reasons that will become apparent later.

[5] The Department raised two special pleas to the particulars of claim. The first was that the appellants had no *locus standi in judicio* (legal standing) to institute the action. The foundation for this special plea was that the agreement upon which the appellants relied was between the Department and Canton – not the appellants – and that only Canton's liquidators had legal standing to sue. The second was a special plea of non-joinder. The basis therefor was that since Canton had been liquidated, and in the absence of an allegation that the liquidators had refused to institute action against the Department, the liquidators were therefore necessary parties who should have been joined as either co-plaintiffs or co-defendants.

[6] In order to meet the Department's special pleas the appellants amended their particulars of claim by alleging that Canton's liquidators had refused 'after being requested to do so to institute the action against the [Department]'; and further that the liquidators would not be instituting any claims against it.

[7] In June 2014, Williams J heard argument on the special pleas. The learned Judge delivered her judgment on 6 February 2015, dismissing both special pleas. She held that the confirmation by the liquidators that they would not be pursuing any claims against the Department was dispositive of the first special plea relating to legal standing. As to the special plea of non-joinder, she held that the liquidators had unequivocally indicated that they would not be pursuing any claims against the Department. The learned Judge thus concluded that the liquidators had waived their right to be joined in the proceedings.[1] Consequently, she dismissed both special pleas with costs.

[8] The Department then brought a substantive application under rule 33(4) of the Uniform Rules of Court[2] for the trial court to determine a separated issue, which was whether the appellants' particulars of claim disclosed a cause of action. In support of this application

---

[1] See in this regard: *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

[2] Uniform Rule 33(4) reads:

'If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.'

the deponent to the founding affidavit – who was the attorney for the Department – averred that:

'9.1 The Plaintiffs' claim is a derivative action.

9.2 The claim against the Defendants should have been pursued by the company Canton Trading 159 (Pty) Ltd and not by the four shareholders.

9.3 The shareholders' claim is not against other shareholders [which] makes it impossible for the Plaintiffs to enable the company to claim from a third party, but is rather a claim directly by shareholders against a third party.

9.4 The contractual relationship was one between the company and the Defendants and not between the shareholders and the Defendants.

9.5 Insofar as the claim constitutes a delictual claim, the injury was against the company and not against the shareholders.

10 From the Plaintiffs' Particulars of Claim it is apparent that there is a second ground for Plaintiffs not making out a cause of action and for the following reasons:

10.1 The Plaintiffs rely in the Particulars of Claim on a contract between the company Canton Trading 159 (Pty) Ltd and the Defendants in paragraph 9 of the Particulars of Claim. In paragraph 27 the Plaintiffs stated that the First Defendant was under a duty of care to the Plaintiffs not to refuse its consent to the Finance Direct Agreement unreasonably.

10.2 It is impermissible and it does not disclose a cause of action where the parties are in a direct contractual relationship for a party to rely on an action based on delict and a breach of duty of care and to base its claim on the *actio legis aquiliae* instead of relying on their contractual remedies.'

[9] The appellants opposed the Department's application on several grounds. The thrust of their opposition was that the particulars of claim did disclose a cause of action and that in any event the Department ought to have raised that point by way of an exception. The appellants further asserted that the separated issue now raised by the Department had been decided by Williams J and was therefore *res judicata* (matter already adjudicated).

[10] The rule 33(4) application came before Matlapeng AJ, who lamented the fact that the Department invoked rule 33(4) when the proper course was to except to the particulars of claim under rule 23(1). Nevertheless, he found that the objects of rules 33(4) and 23(1) sometimes overlap. Thus, notwithstanding his reservations with the course adopted by the Department, the learned Judge granted the application and directed that the separated

question – whether the appellants' particulars of claim, as amended, disclosed a cause of action – be determined first.

[11] Vuma AJ later heard argument on this question and gave judgment on 22 June 2018. She answered the separated question in favour of the Department and granted the appellants leave to amend their particulars of claim within 20 days from the date of her order. With the leave of the high court, the appellants now appeal to this court against that part of the order.

[12] Before us counsel agreed that what the Department raised by utilising rule 33(4) was, in truth, an exception to the appellants' amended particulars of claim. The implication of this is that it is incumbent upon the Department to demonstrate that the pleading in question is excipiable on every interpretation that can reasonably be ascribed to it.[3] Consequently, the appellants are confined to the allegations made in the particulars of claim, apart from any further facts that the parties agree may be taken into account. In this case there are no additional agreed facts. This then explains the extensive reference (in para 4 above) to the appellants' amended particulars of claim.

[13] What this court is called upon to determine, therefore, is first, the exception and, secondly, whether the high court was precluded from considering the exception because the issues raised were *res judicata*, having been determined by Williams J on 6 February 2015. It is convenient to deal with the *res judicata* issue first.

[14] The pleas of *res judicata* or issue estoppel may be raised by a defendant in a later suit against a plaintiff who is demanding the same thing in respect of: (a) the same cause of action; (b) for the same relief; and (c) between the same parties.[4] Issue estoppel, was described as follows in *Boshoff v Union Government*.[5]

'"Where the decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or

---

[3] See in this regard: *Theunissen en Andere v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E-F.

[4] *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* [2000] ZASCA 70; 2001 (2) SA 232 (SCA) para 2 and the authorities cited therein (per Olivier JA).

[5] *Boshoff v Union Government* 1932 TPD 345 at 350-351.

rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms . . . .”’

[15] The Constitutional Court has most recently affirmed the requirements for *res judicata*. It held that *res judicata* is a legal doctrinal shield that precludes continued litigation after a final court order ‘on the same case, on the same issues and between the same parties’.[6] The Constitutional Court went on to explain that issue estoppel is an extension of *res judicata* to cases where the same issue has arisen between the same parties. The inquiry into the ‘same issue’ entails determining whether an issue of fact or law was an essential element of the previous judgment.[7]

[16] In *Smith v Porritt & others*[8] Scott JA explained issue estoppel thus:

‘Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadam res* and *eadam petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. (*Kommisaris van Binnelandse Inkomste v Absa Bank* (*supra*) at 670E-F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in *Bertram v Wood* (1893) 10

[6] *Mkhize NO v Premier of the Province of KwaZulu-Natal & others* [2018] ZACC 50; 2019 (3) BCLR 360 (CC) paras 36-37; *S v Molaudzi* [2015] ZACC 20; 2015 (2) SACR 341 (CC) para 19.
[7] *Mkhize NO*, fn 6, para 37.
[8] *Smith v Porritt & others* [2007] ZASCA 19; 2008(6) SA 303 (SCA) para 10.

SC 177 at 180, “unless carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals”.’

[17] Reverting to the facts of this case the question must then be: is it correct that the issue raised in the Department’s rule 33(4) application is in essence the same as that raised in the Department’s special pleas. It is as well to recall that in relation to the rule 33(4) application the crux of the complaint was whether the particulars of claim disclosed a cause of action. As to the special pleas, the first contested the appellants’ *locus standi* and the other raised the issue of non-joinder, the latter being a dilatory plea.

[18] I proceed to consider the first of these special pleas. *Locus standi* has been held to be both a procedural matter and a matter of substance. In essence, it is about the sufficiency and directness of interest in the litigation to determine whether the party that initiates legal proceedings can be accepted as a litigating party.[9] The sufficiency of the interest is always dependent upon the particular facts of each case and no fast and hard rules may be laid to answer that question. The general rule is that it is for the party initiating proceedings to allege and prove *locus standi*.[10] Put differently, a party that institutes proceedings must have a direct and substantial interest in the relief claimed.[11] And as it was explained in *Jacobs*, ‘a direct and substantial interest’ means a legal interest in the subject matter of the suit.

[19] As to the plea of non-joinder, it suffices to state that the law is by now well-settled. And as Corbett J put it in *United Watch & Diamond Co*[12] ‘[t]he right of a defendant to demand joinder of another party and the duty of the Court to order such joinder or to ensure that there is waiver of the right to be joined are limited to cases . . . where the other party has a direct and substantial interest in the issues involved and the order which the court might make’.

[20] With that prelude I turn to consider the contentions of the parties in relation to *res judicata* or its extended form, namely issue estoppel. In this regard the appellants’ counsel

---

[9] See: *Wessels en andere v Sinodale Kerkkantoor Kommissie van die Nederduitse Gereformeerde Kerk, OVS* 1978 (3) SA 716 (A) at 725H; *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 388B-E.
[10] See: *Jacobs en ‘n ander v Waks en ‘n andere* 1992 (1) SA 521 (A) at 534D.
[11] *United Watch & Diamond Co (Pty) Ltd & others v Disa Hotels Ltd & another* 1972 (4) SA 409 (C) at 417E.
[12] Above at 415E-H.

submitted that the judgment of Williams J made a definitive finding that the appellants' particulars of claim disclosed a cause of action. And that the claim pursued by the appellants was not a derivative action but a delictual one arising from a breach of a legal duty owed to the appellants.

[21] In response, counsel for the Department contended that Williams J was called upon to adjudicate two issues only, namely (a) the appellants' legal capacity to institute the action concerned, and (b) whether Canton's liquidators should have been joined as necessary parties, nothing more. Counsel for the Department is quite right. A reading of the learned Judge's judgment makes plain that she determined only two issues. First, she found that the appellants' claim was not a derivative action and that in the light of the liquidators' unequivocal indications that they would not be pursuing any claims against the Department, the appellants clearly had legal standing to pursue their claim.

[22] Secondly, as to the non-joinder point, she reasoned that the liquidators had waived their right to be joined as parties to the action. This was because of their stance that they would not be pursuing any claims against the Department. It is thus fallacious to argue, as the appellants' counsel do, that because Williams J found that: (a) the appellants had *locus standi*; (b) were not pursuing a derivative claim; and (c) the liquidators were not necessary parties, this meant that their particulars of claim disclosed a cause of action. The learned Judge's judgment said nothing about the appellants' cause of action. This is hardly surprising because that issue had no bearing whatsoever on what was before her. I therefore cannot agree with the contentions advanced on the appellants' behalf on that score. Consequently, it follows that the appellants' reliance on *res judicata* and issue estoppel is misconceived.

[23] I now come to the crux of this appeal, which is whether the appellants' amended particulars of claim disclose a cause of action. Arising from this is an aspect that merits emphasis. It is this. The litigation between the protagonists was precipitated by the Department's refusal to consent to the cession of Canton's rights under the agreement to its financiers. The appellants say that this refusal led to the liquidation of Canton. They assert further that that refusal was unreasonable and that Canton's liquidation rendered

their shares in Canton worthless, thus making the Department liable to them in delict for the loss of dividends they would have received from Canton but for its liquidation.

[24] There is no dispute between the parties that there was no privity of contract between the appellants, as shareholders of Canton, and the Department. Consequently they sought to frame their claim in delict for the loss they suffered. As is apparent from their particulars of claim, the appellants founded their claims upon an alleged breach of a 'duty of care' (properly, a legal duty) owed to them as shareholders of Canton by the Department not to unreasonably withhold its consent for the cession of Canton's rights under the agreement to its financier, which would give rise to a foreseeable loss to them.

[25] It is trite that an incorporated company is a legal persona which is distinct from its members.[13] As Corbett CJ put it, albeit in a different context, in *The Shipping Corporation of India Ltd v Evdomon Corporation & another*:[14]

'It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify the "piercing" or "lifting" the corporate veil.'

[26] It bears mentioning that the appellants' case is not founded on the 'permissible deviation' as identified by Corbett CJ in *Evdomon Corporation* above.

[27] The appellants' claim is for pure economic loss.[15] Although the *Lex Aquilia* was previously limited to cases of bodily injury or physical damage to corporeal things, its scope was later extended to certain instances of pure economic loss.[16] In such cases the courts will examine the alleged legal duty and the unlawful conduct relied upon in order to determine whether a remedy should be extended to a particular pure economic loss situation

[13] *Dadoo Ltd & others v Krugersdorp Municipal Council* 1920 AD 530 at 550.
[14] *The Shipping Corporation of India Ltd v Evdomon Corporation & another* 1994 (1) SA 550 (A) at 566 C-D.
[15] As to what the concept of 'pure economic loss' entails, see *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 1; J Neethling, J M Potgieter & J C Knobel Visser *Law of Delict* 6 ed (2010) at 290.
[16] See, for example, Van der Walt 'Delict' in Joubert *Law of South Africa* vol 8 paras 13 and 14.

on a case by case basis.[17] One of the critical factors to bear in mind in this regard, would be whether recognition of the remedy would result in 'indeterminate liability'.[18]

[28] It is equally important not to lose from sight of what Ponnan JA said in *Itzikowitz v Absa Bank Ltd*:[19]

'It is well-established that in contrast to cases of physical harm, conduct causing pure economic loss is not prima facie wrongful. As it was recently put by the Constitutional Court in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28; 2015 (1) SA 1 (CC) para 23:

"So our law is generally reluctant to recognise pure economic loss claims, especially where it would constitute an extension of the law of delict. Wrongfulness must be positively established. It has thus far been established in limited categories of cases, like intentional interferences in contractual relations or negligent misstatements, where the plaintiff can show a right or legally recognised interest that the defendant infringed."'

[29] In essence, the Department's response to the appellants' pleaded cause of action is the following: First, if any wrong was committed at all, that wrong was not to the appellants, whose shareholding in Canton remained unaffected by the alleged breach of legal duty, but against Canton. Secondly, the Department owed a contractual duty in terms of the agreement not to the appellants but to Canton. Thirdly, in the appellants' amended particulars of claim there is no allegation that the loss allegedly suffered by them was separate and distinct from that suffered by Canton, and arose from a breach of a legal duty independently owed to them as shareholders.

[30] I propose dealing first with the law relating to the relationship between an incorporated company and its shareholders. In *Johnson v Gore Wood & Co (a firm)*,[20] after considering the authorities on the recoverability of damages by shareholders, the relationship between a company *vis-á*-vis its shareholders in respect of wrongs committed against the company was succinctly captured by Lord Bingham in the following terms:

---

[17] For which see *Herschel v Mrupe* 1954 (3) SA 464 (A) at 478 C-G; 490 G-H; *Administrateur, Natal v Trust Bank van Afrika Bpk* 1997 (3) SA at 833 in fine.
[18] See, for example, *Union Government v Ocean Accident & Guarantee Corporation Ltd* 1956 (1) SA 577 (A) at 584 G-H and 587 A.
[19] *Itzikowitz v Absa Bank Ltd* [2016] ZASCA 43; 2016 (4) SA 432 (SCA) para 8.
[20] *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 (HL) at 503.

'(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. So much is clear from *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 esp at 266-267, [1982] Ch 204 esp at 222-223 . . . . (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.'

[31] In this court, Wallis JA, with reference to the English decision in *Foss v Harbottle*,[21] and in relation to the principles underlying company law, said:[22]

'It is a curious feature of this case that we are asked to apply a rule, or more accurately a combination of rules, of ancient origin that has been abolished in the country of its birth. The rule has two components. The first recognises that a company is a separate legal entity from its shareholders and, accordingly, in the ordinary course, any loss caused to the company must be recovered by the company, and not by its shareholders on the basis of the diminution in the value of their shares or the loss of dividends they had anticipated. The second recognises the need for exceptions to this principle in order to avoid oppression and permits a shareholder to recover loss caused to the company by way of what is termed a derivative action. In certain circumstances it also permits recovery of the shareholder's own loss.

A helpful summary of the rule and its different elements is to be found in the following passage from the leading case of *Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2)* (*Prudential Assurance*):

"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

[21] *Foss v Harbottle* (1843) 2 Hare 461.
[22] *Gihwala & others v Grancy Property Ltd & others* [2016] ZASCA 35; 2017 (2) SA 337 (SCA) paras 107-110.

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 a 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."

The parameters of the rule are apparent from this passage. It precludes shareholders from suing in their own right where the claim is one in respect of a wrong done to the company causing it to suffer loss. That is so even where the result is to diminish the value of the shareholder‘s shares or deprive them of a dividend and the company has declined or failed to take steps to recover the loss. On the other hand, where there is no wrong to the company, but only one to the shareholder, there is no reason to bar the shareholder from suing. That is so even if the measure of the shareholder‘s loss is the diminution in value of their shareholding. Those two propositions appear clearly from the speeches of Lord Bingham of Cornhill and Lord Millett in [*Johnson v Gore Wood & Co (a firm)]*.

There is a third case described by Lord Bingham in *Gore Wood* in the following terms:

"Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers loss separate and distinct from that suffered by the company caused by a 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."'

Discussion

[32] In the present case counsel for the appellants submitted that the claim sought to be advanced by the appellants, fell squarely in the third category described in *Gore Wood*[23] above. In support of this proposition, counsel strongly relied on a New Zealand decision in *Christensen v Scott*.[24] There the court was considering an exception taken to the plaintiffs'

[23] *Gore Wood*, fn 14 above, at 502.
[24] *Christensen v Scott* [1996] 1 NZLR 273 at 277.

claim on the grounds that the claim did not fall within one of the exceptions recognised in *Foss*.[25] The exception was dismissed. The court held that where there is a separate, distinct and independent duty owed to a shareholder by professional advisors who were advising both the company and the shareholders and a breach of that duty occurs, resulting in a loss to shareholders, such loss may be recovered by the shareholders. The fact that the same loss may also have been suffered by the company, the court reasoned, did not mean that it was not at the same time personal loss suffered by the shareholders.

[33] The *Christensen* case does not assist the appellants. On the contrary it is against them because there the professional advisors were advising both the company and shareholders simultaneously, and therefore owed a legal duty to both separately.

[34] Counsel for the appellants also contended that, on the allegations pleaded in the appellants' amended particulars of claim, it was clear that the Department owed a legal duty to the appellants independently of the legal duty owed to Canton. The basis for this submission was that, in negotiating the agreement between the Department and Canton, the latter was represented by the appellants who were, to the Department's knowledge, Canton's shareholders. This argument cannot be sustained for at least two reasons. First, a company is an artificial person and must perforce act through natural persons. Secondly, as already indicated above, our law has always drawn a distinction between a company, as a juristic person, and those who control and direct its affairs. The truth of the matter is that the appellants' contention entirely overlooks this distinction in order to construct a basis to sue the Department for having refused to grant the consent contemplated in clause 32.1 of the agreement.

[35] Before us, counsel for the appellants was pertinently asked to identify specific paragraphs in the amended particulars of claim containing explicit averments to the effect that the appellants were owed a separate and distinct legal duty by the Department, ie independently of the contractual obligation it owed to Canton. Counsel could make reference only to paragraph 27 (quoted in para 4 above) of the particulars of claim. However, paragraph 27 contains no allegations of any kind but merely conclusions of law.

---

[25] *Foss v Harbottle*, fn 21 above.

[36] Thus, absent any pertinent allegations in the appellants' particulars of claim that their loss was separate and distinct from that suffered by Canton, and arising from a legal duty independently owed to them, the pleadings simply do not disclose a cause of action. This must be so because, in the ordinary course, shareholders are precluded from suing to recover loss caused to a company of which they are members arising from a breach of a duty owed to the company.

[37] It therefore follows that the exception taken to the appellants' particulars of claim was rightly upheld by the high court. In the result the following order is made:

1 The appeal is dismissed with costs.

2 The period of 20 days allowed by the high court for the amendment of the plaintiffs' particulars of claim, if so advised, will run from the date of this judgment.

_____

X M Petse

Deputy President

APPEARANCES

For Appellants:	N Segal
	Instructed by: Adrian B Horwitz & Associates., Kimberley McIntyre van der Post, Bloemfontein
For Respondents:	J G Rautenbach SC
	Instructed by: Mjila and Partners, Kimberley Claude Reid Inc., Bloemfontein