(IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 18374/2022

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED. **YES**

27 JUNE 2023 DATE
SIGNATURE

In the matter between:

LOMASTEP (PTY) LTD	Plaintiff/Respondent
and	
CARLOS ALBERTO PEREIRA GALEGO	First Defendant/ Excipient
MANUEL ANTONION DA FONSCECA VASCONCELOS DA MOTA	Second Defendant/ Excipient
NUNO MIGUEL DE SOUSA ALEXANDRE	Third Defendant/ Excipient
CARLOS ALBERTO GRILO PASCOAL	Fourth Defendant/ Excipient
TEMBALIKAYISE JOHN LUPEPE	Fifth Defendant/ Excipient

MHANSI MALABA	Sixth Defendant/ Excipient
CARMEN KHETIWE NONDUMISO MCCLAIN	Seventh Defendant/ Excipient
NOLOYISO LULAMA MHLONGO	Eighth Defendant/ Excipient
PEDRO MIGUEL PEREIRA GONCALVES	Ninth Defendant/ Excipient

JUDGMENT

NEUKIRCHER J:

[1] On 23 March 2022 the plaintiff issued out summons in this court against the defendants, the purpose of which was threefold:

(a) it sought a declarator in terms of s 162(5)(c)(iv)(aa) or (bb) of the Companies Act 71 of 2008 (the new Act) that the defendants be declared delinquent;

(b) it sought a declarator that the defendants are personally liable in terms of s 218(2), read with s 22(1) of the new Act, for damages resulting from the breach and subsequent cancellation of a contract which had been concluded between the plaintiff and a company known as Mota-Engil Construction South Africa (Pty) Ltd (MECSA), of which the defendants are the erstwhile directors; and

(c) it sought judgment against the defendants jointly and severally for R1 435 680 928-33, being the amount of damages resulting from the abovementioned breach and cancellation of the contract.

[2] In response, the defendant excepted to the Particulars of Claim. They allege that not only does the pleading fail to make the necessary averments to sustain a cause of action against them but additionally the pleading is vague and embarrassing.

3] The parties are referred to as they are stated in the pleadings in order to avoid confusion.

THE FACTS

4] The facts pleaded by the plaintiff are essentially the following:

(a) on 29 July 2016 the plaintiff and MECSA entered into a written agreement for the construction of a 20 floored mixed-use building in Benmore Gardens, Sandton for R930 906 559-52 (VAT incl).

(b) the plaintiff is a third party creditor of MECSA;

(c) the defendants were, at all relevant time, directors of MECSA;

(d) on 12 April 2019, MECSA notified the plaintiff that it would suspend its work and that this constituted a repudiation[1] of the contract;

(e) for the period January 2016 to April 2019 the defendants, in their capacities as directors of MECSA carried on its business recklessly alternatively grossly negligently alternatively with the intent to defraud the plaintiff and other creditors or carried on the business for a fraudulent purpose;

(f) that during the existence of the contract MECSA was trading in insolvent circumstances and the defendants were aware of this;

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[1] Which it pleads was reckless alternatively grossly negligent

(g) that of MECSA sold its shares to an entity known as CN Holdings (Pty) Ltd in 2019 for a nominal value which had the effect of the shares being worthless and, in addition, the letters of comfort provided to the plaintiff and other creditors in respect of the works had lapsed thereby depriving any creditor of MECSA of any recourse. Thus the conduct of the directors, in acting in this manner, repudiating the contract and executing their duties as directors in a grossly negligent or reckless manner, meant that they were personally liable for the plaintiff's damages under s 218(2) as read with s 22(1) of the new Act, and their conduct was such that it was actionable in terms of s 162(5)(c)(iv)(aa) or (bb).

The Exception

5] The defendants filed their exception to these facts: there are 8 grounds set out in that pleading. In brief, they are the following:

(a) Grounds 1 and 2 relate to the s 162 declarator. The exception is based on the fact that this remedy is only available to the specific classes of persons set out in the new Act, of which a creditor is not one and therefore this cause of action is bad in law;

(b) Grounds 3 and 4 relate to the plaintiff's reliance on s 218(2), as read with s 22(1) of the Act, to hold the defendants personally liable for losses allegedly suffered by it as a result of the breach and subsequent cancellation of the contract. It is defendants' argument that these sections do not found such a cause of action and that the claim is therefore bad in law;

(c) Ground 5 related to the allegation that the defendants repudiated the contract in a reckless alternatively grossly negligent manner. The exception lies therein that the plaintiff failed to make the necessary allegations which would lead to this conclusion;

(d) Ground 6 has its origins in the *"reckless trading"* allegations. The defendants allege that the plaintiff has failed to set out facts upon which one can conclude that their conduct, as it relates to the repudiation, was reckless;

(e) Ground 7 is based on the complaint that the plaintiff failed to plead or establish the causal link between the wrongful conduct and the damages suffered;

(f) Ground 8 relates to the allegations that the plaintiff was trading in insolvent circumstances and yet, at the same time pleads that MECSA was able to meet its obligations until the contract was cancelled. The defendants argue that these two sets of facts are at variance with each other and therefore the pleading is vague and embarrassing.

(g) Ground 9 relates to the alleged insufficient particularity provided in respect of the computation of each head of damage claimed.

Exceptions

6] Rule 23(1) provides as follows:

"(1) Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto

and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception: Provided that—

(a) where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice; and

(b) the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph (a) is received, or within 15 days from which such reply is due, deliver the exception."

7] Over the years, a number of basic principles relating to exceptions have been laid out by our courts[2]:

(a) the court must look at the pleadings as they stand[3] and no facts outside of those pleaded may be adduced;[4]

(b) an excipient cannot go beyond the record and no reference may be made to any other document;[5]

(c) a pleading is excipiable if, on all possible reading of the facts, no cause of action can be made out;[6]

(d) an exception that a pleadings is vague and embarrassing ought not to be allowed unless the excipient would be seriously prejudiced if the offending

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2 As set out in *inter alia* Jowell v Bromwell-Jones 1998 (1) SA 836 (W) at 299-903

3 Salzmann v Holmes 1914 AD 152

4 Viljoen v Federated Trust Ltd 1971 (1) SA 750 (O) at 754

5 Serobe v Koppies Bantu Community School Board 1958 (2) SA 265 (O) at 269A

6 H v Federated Assessment Centre 2015 (2) SA 193 (CC) at para [10]

allegations were not expunged.[7] The prejudice must ultimately lie in the inability to properly prepare to meet the opponent's case;[8]

(e) the exception on the ground that the pleading is vague and embarrassing covers cases where there is a defect or incompleteness in the manner in which the cause of action is pleaded that this has resulted in embarrassment to the defendant of such a nature that the defendant is prejudiced.[9]

Exception: Grounds 1 and 2

8] The plaintiff has conceded that these are well-taken and has abandoned its prayer for delinquency.[10]This being so, it is unnecessary to discuss the first two grounds of exception.

Exception: Grounds 3 and 4

9] S 22 and s218 state:

(a) S 22:

"Reckless trading prohibited

"(1) A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.

(2) If the Commission has reasonable grounds to believe that a company is engaging in conduct prohibited by subsection (1), or is unable to pay its debts as they become due and payable in the normal course of business, the Commission may issue a notice to the

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7 Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298A-D; Francis v Sharp 2004 (3) SA 230 (C) at 240

8 Ibid

9 Trope v South African Reserve Bank 1992 (3) SA 208 (T) at 210-211

10 Ie prayer 1 of the Particulars of Claim

company to show cause why the company should be permitted to continue carrying on its business, or to trade, as the case may be.

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

(b) S 218:

" Civil actions

(1) Subject to any provision in this Act specifically declaring void an agreement, resolution or provision of an agreement, Memorandum of Incorporation, or rules of a company, nothing in this Act renders void any other agreement, resolution or provision of an agreement, Memorandum of Incorporation or rules of a company that is prohibited, voidable or that may be declared unlawful in terms of this Act, unless a court has made a declaration to that effect regarding that agreement, resolution or provision.

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

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

10] The plaintiff argues that where s22(1) of the new Act was contravened, s218 (2) of the new Act extends liability to the directors of a company as towards the company's creditors. The plaintiff is a creditor of MECSA and, as stated, the defendants its directors. It argues that such a claim has its origins in s 424 of the Companies Act 61 of 1973 (the Old Act) which stated:

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

11] It is however common cause that s 424 was not incorporated in the new Act outside of the ambit of companies in liquidation. It remains there to hold directors of those companies personally liable for the debts of the companies in the circumstances set out in s 424. In **Cooper NO and Another v Myburgh and Others**[11] the object of s 424 was summarised as follows:

" [8] The object of s 424 was eloquently summarised by Cameron JA in Ebrahim and Another v Airport Cold Storage (Pty) Ltd [2008] ZASCA 113; 2008 (6) SA 585 (SCA). That case was concerned with s 64 of the Close Corporation Act 69 of 1984 but, as the learned judge pointed out,[1] that provision 'is for all intents and purposes identical to s 424 of the Companies Act'. In para 15 of the judgment, Cameron JA explained that '[t]he section retracts the fundamental attribute of corporate personality, namely separate legal existence, with its corollary of autonomous and independent liability for debts, when the level of mismanagement of the corporation's affairs exceeds the merely inept or incompetent and becomes heedlessly gross or dishonest. The provision in effect exacts a quid pro quo: for the benefit of immunity from liability for its debts, those running the corporation may not use its formal identity to incur obligations

[11] [2021] 3 All SA 114 (WCC) at para [8]

recklessly, gross negligently or fraudulently. If they do, they risk being made personally liable.' I would only add that the ambit of reckless or fraudulent conduct of a company's business for the purpose of the section is not limited to the incurrence of obligations by the company, it extends also, as illustrated by the facts in Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others [1997] ZASCA 92; 1998 (2) SA 138 (SCA), to the carrying on of the company's business in any way that recklessly or fraudulently prejudices the company's creditors, or 'disregards their interests'. When a company finds itself in financial difficulty, and especially if it is in a state of insolvency, those charged with the carrying-on of its business are obliged in addressing the situation to have reasonable regard for the interests of its creditors."

12] The plaintiff's argument is that outside of those circumstances, s 218(2) as read with s 22(1) of the new Act substitute the identical liability. This, argues the plaintiff would achieve the purpose of the new Act as set out in s7(j) which states:

"7 Purposes of Act

The purposes of this Act are to –

….

(j) encourage the efficient and responsible management of companies;…"

and it argues that the purpose would not be achieved by holding directors less liable for reckless conduct.

13] The argument is that it could never have been the intention of the legislature to have created a remedy for creditors who are victims of reckless or fraudulent mismanagement of a company in terms of s 424 in a winding-up, but not otherwise. The

argument is that the intent of s 218 is clear: that in good time new provisions would be enacted to replace the old s 424 remedy and to provide a similar remedy to those creditors.

14] According to the plaintiff, this argument finds support in the decision of **Natal Joint Municipal Pension Fund v Endumeni Municipality**:[12]

"[18] … The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

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[12] 2012 (4) SA 593 (SCA) at para [18]

15] According to the plaintiff, the purpose of the new Act is to enhance the responsibilities of directors, not to remove them. This is clearly from **Gihwala and Others v Grancy Property Ltd and Others**[13] where Wallis JA stated:

"[144] All of these involve serious misconduct on the part of a director. In the affidavits raising the constitutional issue there was a complaint that gross negligence could trigger a delinquency order. There is no merit in this complaint. There is a long history of courts treating gross negligence as the equivalent of recklessness, when dealing with the conduct of those responsible for the administration of companies, and recklessness is plainly serious misconduct. It was urged upon us that there might be circumstances of extenuation, or perhaps that, notwithstanding the seriousness of the conduct, the company might not have suffered any loss. But neither of those is relevant to the protective purpose of the section. Its aim is to ensure that those who invest in companies, big or small, are protected against directors who engage in serious misconduct of the type described in these sections. That is conduct that breaches the bond of trust that shareholders have in the people they appoint to the board of directors. Directors who show themselves unworthy of that trust are declared delinquent and excluded from the office of director. It protects those who deal with companies by seeking to ensure that the management of those companies is in fit hands. And it is required in the public interest that those who enjoy the benefits of incorporation and limited liability should not abuse their position. The exclusion is for a minimum period of seven years, but the court has the power to relax that after three years and instead place the person under probation in terms of the section. So there is power to relax the full effect of a declaration of delinquency once the delinquent has demonstrated that this is appropriate. In addition, the court may restrict the operation of the declaration of delinquency to one or more particular categories of company. A director declared delinquent in relation to a financial services company may be permitted to be a director of an engineering firm."

[13] 2017 (2) SA 337 (SCA)

16] But what plaintiff loses sight of is that **Gihwala** specifically pertains to the legislative purpose of s 162 – it is now common cause that the plaintiff has no claim under s 162. And whilst I agree that s 7(j) makes provision for encouraging the efficient and responsible management of companies, the plaintiff must still make out a case that its claim falls within the provisions of the new Act.

Can plaintiff rely on s 218(2) as read with s 22(1)?

17] The plaintiff's argument is that s218(2) must be interpreted in light of the **Endumeni** judgment; that the words *"any person"* and *"any provision"* in s 218(2) (it being a general provision of the new Act) do not detract from anything contained in s 22(1) and that the words *"the company"* in s 22(1) includes its directors. Therefore, if it is found that the directors are conducting the company in the manner set out in s 22(1), the mechanism available to the creditors to hold them liable is via s218(2).

18] The plaintiff's argument is based on the judgment in **Rabinowitz v Van Graan**[14] in which Du Plessis AJ found that a third party can hold a director personally liable in terms of the new Act *"for acquiescing in or knowing about conduct that falls within the ambit of s22(1)."* His reasoning was the following:

"[19] Mr Subel submitted that these authors are wrong and that a director could only be liable in terms of the Act for the losses or damages sustained by the company of which he was a director. The proper plaintiff should therefore be the company itself or, when it is in liquidation such as the case here, the liquidator/s thereof. This is so as s 77(3) thereof provides as follows:

[14] 2013 (5) SA 315 (GJ)

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

. . .

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

[20] Mr Sawma, on the other hand, pointed out that a court has no discretion but to declare a director acting in the manner contemplated in s 77(3)(b) to be a delinquent director in terms of s 162(5)(c)(iv)(bb). The consequence of an order of delinquency is that such a person is disqualified from being a director of the company. In these circumstances the Act prohibits directors from engaging in conduct as provided for in s 22 thereof.

[21] To find the converse, so it was argued, would mean that, despite the criminal liability that the Act contemplates, despite the declaration of delinquency provided for and despite the express liability created in s 77(3) thereof, the legislature did not intend to preclude a director from knowingly being a party to conduct specified in s 22 of the Act. Bearing in mind that the Act specifically contemplates that the business and affairs of a company are to be managed by or under the direction of its board, it is hard to conceive of any basis upon which the legislature intended to prevent a company from acting in the manner provided for in s 22, but did not intend to prevent the directors responsible for the management of the company from acting in that manner."

19] But the line of decisions following on **Rabinowitz** have not followed this line of reasoning. The defendants argue that, given the decision of Unterhalter J in **De Bruyn v Steinhoff International Holdings NV and Others**[15] the decision in **Rabinowitz** is clearly wrong and I should not follow it: the plaintiff's argument is premised upon the fact that s 424 of the old Act has been retained only insofar as liquidated companies is

[15] 2022 (1) SA 442 (GP)

concerned. But s 218(2) as read with s22(1) is premised upon a claim for damages. Thus the premise and cause of action for which each section provides is clearly different.

20] In **De Bruyn** Unterhlater J stated that

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

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

21] The point made is that s 218(2) cannot be interpreted as a "stand alone" provision – it must be interpreted purposefully. In this matter the plaintiff alleges that s

22(1) provides that purpose. But as stated in **Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others**[16] 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' of which s22(1) triggers the operation of s218(2) and clearly falls into this category."*[17]

22] In para [50] of **Hlumisa**, the SCA stated:

"These provision 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[18] *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."*

23] The common law principles are that

"[47] …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 potion 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 fiduciary duty be may depending on the circumstances, also act in breach of his duty of care, skill and diligence…."

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16 2020 (5) SA 419 (SCA), which upheld the decision of the court *a quo*

17 At para [45]

18 Ie s 22(1); s 45, s 74 and s 76(3)

24] The common law position being that set out supra, it provides no succour for the plaintiff – but this is, in any event, not the basis of the plaintiff's claim.

25] But what of s 22? In my view this similarly does not assist plaintiff as s 22 contains no express provision that a director[19] may be held liable for *"carrying on [the company's] business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose"*. In **Venator Africa (Pty) Ltd v Bekker and Another**[20] the court differed from the **Rabinowitz** judgment as follows:

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

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

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19 My emphasis

20 (8800/2021P) [2022] ZAKPHC 50; [2022] 4 All SA 600 (KZP) (16 September 2022)

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

The court then simply proceeded to find that 'a third party can hold a director personally liable in terms of the Act for acquiescing in or knowing about conduct that falls within the ambit of s 22(1) thereof'.

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

26] So too must the **Rabinowitz** decision suffer a similar fate dealt to it by the **De Bruyn** judgment which stated:

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

reference to fault, s 22 can be read to impose strict liability. On the contrary, fault is constitutive of the contravention."

27] Any purposeful interpretation of s 218(2) and s 22(1) would thus be only achieved with reference to s 77(3)(b) of the Act which states:

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

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

28] But in this too the plaintiff cannot succeed as that provides a remedy only to the company - ie to MECSA - as against the defendants:

"[208] Section 77(3) also answers this central question: to whom is a director liable for knowingly acquiescing in the company's reckless trading? Put differently, who enjoys a right of action against a director? The introductory language of s 77(3) provides the answer. 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's knowing acquiescence. It is the company's loss that is claimed and it is the company that is the obvious person upon whom the right is conferred to make good its loss. Such a construction is also consistent with the interpretative force of the common law that directors owe their duties to the company, and if they fail in those duties by knowingly acquiescing in the company's reckless conduct, it is the company that exacts compensation for its loss."[21]

29] I agree with the interpretation placed on s 218(2) as read with s 22(1) in **De Bruyn** and **Venator,** and I also agree that *"therefore the so-called lacuna created by the*

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[21] De Bruyn at para [208]

legislature in not providing expressly for the liability of directors to other person, such as creditors, for loss or damage suffered, is a clear indication that it was not its intention to do so, thereby continuing to recognise what has been referred to a foundation of company law."[22]

30] This view, in any event, would align itself with the plaintiff's initial argument that by limiting the application of s 424 of the old Act, the legislature had intended to enact specific provisions in the new Act which would mirror the previous ones – the fact is that it has yet to do so.

31] Given that I am of the view that Grounds 3 and 4 of the exception must succeed, and that these go to the very heart of the claim itself. This being so, I am of the view that it is unnecessary to deal with the remainder of the exception.

Order

32] The order I make is the following:

1. Grounds 3 and 4 of the exception are upheld.
2. The particulars of claim are struck out.
3. The plaintiff is given leave to amend its Particulars of Claim within 30 days of date of this judgment.
4. The plaintiff is ordered to pay the defendants' costs of the exception, including the costs of two counsel.

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[22] Venator supra at para [88]

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B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected, and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 June 2023.

Appearances:

On behalf of Excipient	:	Adv N Redman SC; with him Adv Z Cornelissen
Instructed by	:	C de Villiers Attorneys
On behalf of 2nd Respondent	:	Adv P Ellis SC; with him Adv R Ellis
Instructed by	:	Mina Raptis Inc
Heard on	:	10 May 2023
Date of judgment	:	27 June 2023