

Can directors be held personally liable to shareholders in the context of South African law?

by

LAUREN CHERYL SPARIS

Submitted in partial fulfilment of the requirements for the degree of Master of Laws

(Corporate Law)

In the Faculty of Law,

University of Pretoria

2019, November

Supervisor : Professor P Delport

Can directors be held personally liable to shareholders in the context of South African law?

TABLE OF CONTENTS

TOPIC	PAGE
CHAPTER 1: RESEARCH OUTLINE AND CONTEXT	5
1.1 Introduction	5
1.2 Aim and Objectives	6
1.3 Scope of Study and Limitations	7
1.4 Research Methodology	7
1.4.1 Primary and Secondary Sources	7
1.4.2 Case Law and Court Decisions	7
1.4.3 Comparative Research Method	7
1.4.4 Analysis of Relevant Legislation and Statutes	8
1.4.5 Historical Analysis	8
1.5 Structure of the study	8
CHAPTER 2: LEGAL PERSONALITY & PIERCING THE CORPORATE VEIL	9
2.1 Introduction	9
2.2 Acquiring Legal Personality	10
2.3 Effect of Legal Personality	12
2.4 Disregarding the Legal Personality: Piercing the Corporate Veil	14
2.4.1 The earlier cases & common law	14

2.4.2 Legal development	16
2.5 Concluding Remarks	19
CHAPTER 3: DIRECTORS' DUTIES AND LIABILITY	20
3.1 Introduction	20
3.2 Directors' Duties in terms of the Common Law	21
3.2.1 Fiduciary duties	22
3.2.1.1 Avoid conflict of interest	22
3.2.1.2 Duty not to exceed the limitation of their power	24
3.2.1.3 Unfettered discretion & proper purpose	24
3.2.1.4 The duty to act in good faith	26
3.2.2 Duty of care, skill and diligence	27
3.2.2.1 Business judgment rule	29
3.3 Directors' duties in terms of the Companies Act 71 of 2008	30
3.3.1 Standard of Directors' conduct – section 76	30
3.3.2 Section 76(1) – Meaning of director	31
3.3.3 Subsections 76(2)(a) and (b)	33
3.3.4 Subsections 76(3)(a), (b) and (c)	33
3.4 Director's Statutory Liability in terms of the Companies Act 71 of 2008	34
3.4.1 Liability in terms of s 77	34
3.4.2 Other instances of liability – ss 218(2) and 22	36
3.5 Concluding remarks	38

CHAPTER 4: DISCUSSION REGARDING DIRECTORS' LIABILITY TO SHAREHOLDERS IN TERMS OF COMPANY COMMON LAW AND STATUTORY PROVISIONS	39
4.1 Introduction	39
4.2 Directors' liability to shareholders in respect of the Common Law	40
4.2.1 The <i>Foss v Harbottle</i> rule	40
4.2.2 The principle in <i>Percival v Wright</i>	46
4.3 Directors' liability to shareholders in terms of company law statutory provisions in South Africa	49
4.3.1 S 424 of the Companies Act 61 of 1973	49
4.3.2 Liability, s 22 and s 218(2) of the Companies Act 71 of 2008	53
4.3.3 S 218(2) of Companies Act 71 of 2008 and s 1324(1) of the Australian Corporations Act of 2001	56
4.3.4 S 20(6) of the Companies Act 71 of 2008	57
4.3.5 Statutory criminal liability	58
4.4 Concluding remarks	58
CHAPTER 5: DIRECTORS' LIABILITY TO SHAREHOLDERS – OTHER STATUTORY PROVISIONS	60
5.1 Introduction	60
5.2 Criminal Procedure Act 51 of 1977	60
5.3 Prevention and Combating of Corrupt Activities Act 12 of 2004	62
5.4 Social Security Law	62
5.5 Long Term Insurance	63
5.6 The Medical Schemes Act	63
5.7 Concluding Remarks	64

CHAPTER 6: REMEDIES BEYOND COMPANY LAW	65
6.1 Introduction	65
6.2 Discussion regarding Directors' liability in Delictual Law	65
6.3 Concluding Remarks	67
CHAPTER 7: CONCLUSION	67
BIBLIOGRAPHY	70

1. RESEARCH OUTLINE AND CONTEXT

1.1. Introduction

Considering the recent corporate scandals over the past couple years – VBS Mutual Bank, McKinsey & Trillian, Steinhoff, EOH and possibly Tongaat Hulett to name but a few – many shareholders may seek to hold the directors and management of such entities personally liable for their involvement or negligence. Especially where their actions were tantamount to fraud, they benefited in some way and or as a result the company, and possibly the shareholders, suffered damages. This is especially true when a company as consequence is liquidated and cannot institute action on its behalf.

It is submitted that directors are rarely held personally liable for failing to fulfill their duties, let alone liable to the shareholders. The risk of failing to monitor internal controls or business risks, and to hold those acting on behalf of the company responsible and accountable for their actions, is dangerous due to the significant effect that such failure could have on the economy, for example the economic collapse with respect to the recent Steinhoff debacle.

Whereas the earlier Companies Act 61 of 1973 did not necessarily ‘spell out’ directors’ duties in detail, the Companies 71 of 2008 comprehensibly records their statutory and common law duties. To this extent the board is held accountable and can ensure proper governance in the company’s internal affairs.

Shareholders expect management to maximise the value of a company for the benefit of the shareholders and to act in their best interest. In achieving this, directors are required to act in the best interests of the company. However, directors may use their elevated position for their own personal gain and self-interests. Thus, in which circumstances will courts pierce the corporate veil, stepping aside from a company’s unique legal personality, to impute liability to the wrongdoers lurking behind?

The relationship between directors, a company and its shareholders is a fiduciary one which imposes certain duties upon directors. However, it is well established in law that directors' duties are owed to the company itself.

Thus, considering common and statutory law, on what legal basis would shareholders be able to bring a claim against directors for the loss or damage they suffered due to an act of the directors? Considering the above, this paper seeks to explore directors' liability to shareholders within South Africa's common and statutory law, bearing in mind entrenched legal principles, such as the argument that fiduciary duties are duties owed to the company and not to individual shareholders; and that as a result only the company can impose liability on its directors.

1.2. Aim and Objectives

The aim of this study is to critically examine the legal framework pertaining to directors' duties in South Africa and whether the law affords shareholders the right to hold directors personally liable for losses which they or the company may have experienced as a result of directors' acts or omissions. The paper shall briefly explain the nature of a company, its unique legal personality and instances in which courts will pierce the corporate veil. The discussion will progress to briefly explain directors' duties in terms of South African common law and statutory law, specifically the Companies Act 71 of 2008.¹ This will be followed by an analysis of various case law where shareholders have been successful in personal claims against directors and where the courts have not permitted same. The paper will look at statutory provisions where the directors may be held personally liable to shareholders; and as a last level address the non-company law remedy within delictual law. This will entail a critical analysis of the current legislation pertaining to the enforcement thereof, as well a comparative study of the legal approach in foreign jurisdictions, such as the United Kingdom, Canada and Australasia.

¹ Hereinafter the "2008 Act".

1.3. Scope of Study and Limitations

The research will focus on South African common law and the 2008 Act. Legislation prior to the enactment of the 2008 Act, such as the Companies Act 61 of 1973,² will only be discussed briefly for the purpose of understanding the historical background and development thereof. The paper will further be limited to the duties of directors of companies and shall therefore not consider closed corporations or other types of entities.

1.4. Research Methodology

The following research methods will be applied:

1.4.1. Primary and Secondary Sources

A literature study of relevant books, case law, journals, statutes and other relevant materials will be conducted. The research will further refer to relevant websites for information which will provide access to international legal journals and research, as well as opinions of various renowned authors.

1.4.2. Case Law and Court Decisions

Applicable case law and judicial precedents within South Africa, the United States of America, Canada, the United Kingdom and Australia will be examined.

1.4.3. Comparative Research Method

A comparative analysis between section 218(2) of the 2008 Act and s 1324(1) of the Australian Corporations Act of 2001 shall be discussed. In addition, reference shall be made to foreign law consisting of various Canadian, United Kingdom, United States and Australian case law. A brief comparison between the South African common law

² Hereinafter the "1973 Act".

regarding directors' duties and the effect of the partial codification of the Companies Act 71 of 2008 shall be discussed in chapter 3.

1.4.4. Analysis of Relevant Legislation and Statutes

This research will focus on the 2008 Act. Other relevant statutes such as the 1973 Act, Close Corporations Act 69 of 1984, Medical Schemes Act No. 131 of 1998, Criminal Procedures Act 51 of 1977 & Prevention and Combating of Corrupt Activities Act 12 of 2004 shall be reviewed albeit briefly, where relevant. For a comparative analysis against section 218(2) of the 2008 Act, s 1324(1) of the Australian Corporations Act of 2001 shall be considered and conferred.

1.4.5. Historical Analysis

This method will be utilised throughout the paper, but specifically in Chapter 3 which discusses directors' duties in common law and the impact of the partial codification thereof, which the 2008 Act brought. Chapter 4 will further illustrate the historical progression through common law in a discussion regarding director liability to shareholders.

1.5. Structure of Study

With the inclusion of this chapter, this dissertation has 7 chapters which are outlined as follows:

Chapter One provides the introductory remarks and general research context. It outlines the statement of problem, aims and objectives, scope and limitations.

Chapter Two considers the separate legal personality of a company and the essence that this entails. It further explores instances where the courts will depart and "pierce" or "lift" the corporate veil in order to impose liability.

Chapter Three discusses the common law duties of directors and how such have been applied. It progresses to the partial codification of such duties with the enactment

of the 2008 Act and briefly highlights liability in the instance of a breach of same. Specific reference shall be made to sections 76, 77, 218 and 22.

Chapter Four expands on the scope and nature of directors' duties considering common law legal principles and cases where shareholders have attempted or succeeded in claims against directors personally.

Chapter Five draws from chapter 4 and continues to explore the imposition of personal liability on directors for loss or damages caused to a shareholder while acting on behalf of the company, within the context of other statutory legislation outside the ambit of company law.

Chapter Six considers alternate remedies available to shareholders, beyond the context of company law, within the law of delict.

Chapter Seven concludes the paper by highlighting findings, providing guidelines, conclusions and recommendations.

2. LEGAL PERSONALITY

2.1. Introduction

It is generally accepted in most common law and civil law countries that a company has a separate legal (juristic) personality. This was established, beyond doubt, in the English case of *Salomon v Salomon & Co Ltd*³ wherein it was accepted that a company exists separate from its incorporators, shareholders and or directors with rights and liabilities of its own. Companies may therefore enjoy similar rights to those of natural persons, and in some instances the courts have gone as far as to confirm that juristic personality is the same as natural personality, for example in cases regarding the *dignitas*⁴ of a company. Similarly, a wrong committed against a company would give rise to a claim on behalf of the company against the wrongdoer.

³ [1897] AC 22.

⁴ See *Huey Extreme Club v McDonald t/a Sport Helicopters* 2005 (1) SA 485 (C).

The principle of separate personality is not absolute however, and there are instances where the courts will depart from it and “pierce” or “lift” the corporate veil, and in doing so the legal *persona* of a company is disregarded. This usually results in liability being imposed to an individual, or perhaps in addition to the company.⁵

Courts have however, been hesitant to depart from the concept of a company as a separate entity and in terms of common law have only done so in the absence of alternative remedies, as a last resort.⁶ However when the 2008 Act came into effect, s 20(9) codified the doctrine of piercing the corporate veil, and gave the courts express discretion to do so, which consequently detracted from the notion that it was merely an exceptional remedy.

This chapter seeks to, albeit briefly, highlight the acquisition and nature of legal personality within South Africa and to reiterate its importance as a precursor for the chapters to come. The chapter will further discuss instances where the separate legal personality of a company may be disregarded in terms of common law and legislation.

Although there are certain circumstances where the separate legal personality of a company may be disregarded by application of the 1973 Act, this chapter will be limited to a discussion with respect to South Africa’s common law and will briefly touch on the effect and application of s 20(9) of the 2008 Act.

2.2. Acquiring Legal Personality

Recognising the separate legal personality of a company affords it a separate legal identity from its members (the shareholders) and its officers (management and directors), individually or as a body.⁷ This was confirmed in the case of *Salomon v*

⁵ Tan CH, Wang J and Hofmann C “Piercing the Corporate Veil: Historical, Theoretical & Comparative Perspectives” (2019) 16 *Berkeley Business Law Journal* 141.

⁶ Lewis A “Piercing the corporate veil has been extended” (17 March 2013) *The South African Institute of Tax Professionals* Available at: <https://www.thesait.org.za/news/119587/Piercing-the-corporate-veil-has-been-extended.htm> [accessed 18 July 2019].

⁷ Delpont PA and Vorster Q *et al Henochsberg on the Companies Act 71 of 2008* (2011) 82.

Salomon & Co Ltd,⁸ and in *Dadoo Ltd and Others v Krugersdorp Municipal Council*⁹ wherein Innes CJ held that:

“...[a] registered company is a legal persona distinct from the members who compose it... This conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; property vested in the company is not, and cannot be, regarded as vested in all or any of its members.”¹⁰

Generally speaking, a company may acquire legal personality through its conduct, through incorporation in terms of section 13(1) of the 2008 Act or by way of legislation through a general incorporating Act (for example governmental institutions or entities).

However, in terms of *Mitchell’s Plain Town Centre v McLeod*¹¹ mere registration may not be enough. The question is whether the entity was formed for a ‘critical purpose’.¹² ‘Purpose’ is to be understood as the functions and activities of the association as per its founding documents.¹³ For most companies, the ultimate purpose is to ensure financial gain for its members, not merely a financial gain for itself as an entity.¹⁴ Therefore the question is one of ‘financial gain’. However, Nienaber JA further stated that if the entity is not formed for ‘the critical purpose’ or to maximise financial profits for its members, it may enjoy legal personality if it possesses the characteristics of *universitas*, namely, to operate as an unincorporated voluntary association.¹⁵

Where the “critical purpose” is not one of financial gain, but rather a “communal purpose”, for example entities incorporated in terms of section 21 of the 1973 Act, *Cunninghame and Another v First Ready Development 249*¹⁶ held that section 21(1)(b) excludes purely commercial enterprises, and that the ‘communal interest’ or purpose

⁸ [1897] AC 22 (HL).

⁹ 1920 AD 530.

¹⁰ *Ibid* at 550-551.

¹¹ 1996 (4) SA 159 (A).

¹² *Ibid* 10.

¹³ *Ibid* 11.

¹⁴ *Ibid* 15.

¹⁵ *Ibid* 10-11.

¹⁶ [2010] 1 All SA 473 (SCA).

must be linked to either religion, art, science, education, charity or recreation.¹⁷ However, in terms of s 1 of the 2008 Act, a non-profit company is required to set out at least one object of the company, which may be a public benefit object, one relating to one or more cultural or social activities; or a communal interest. Thus, there is more flexibility offered by the 2008 Act.

2.3. Effect of Legal Personality

In common law a juristic person is the same as a natural person except for the actions which a juristic person cannot do, for example enter into a marriage, or be the guardian of a minor.¹⁸ S 19(1) of the Companies Act 2008 states that a company is a juristic person from the date and time that the incorporation of the company is registered.¹⁹

A company has *fama* and *dignitas* or personality rights, such as the right to privacy and a right to identity. This was confirmed in *Financial Mail (Pty) Ltd v Sage Holdings Ltd*²⁰ where it was held that a legal entity has the right to privacy regarding secret information which is not public knowledge, and which further may be defamatory material. A company may also sue for damages in respect of defamatory statements, which may damage its reputation.²¹

In *Media 24 v SA Taxi Securitisation*²² the notion of personality rights was further extended. It was held that a juristic person has rights regarding its goodwill, which would be afforded protection. A trading juristic person could further claim for special damages based on defamation if the elements of the *Aquilian* action could be proven, for example that there was a direct loss of profit resulting from the defamation, or that it was known by the publisher that the information was false; with fault being either

¹⁷ *Ibid* para 17.

¹⁸ *Ex parte Donaldson* 1947(3) SA 170 (T) 173.

¹⁹ S 19(1): From the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company- (a) is a juristic person, which exists continuously until its name is removed from the companies register in accordance with this Act; (b) has all of the legal powers and capacity of an individual, except to the extent that- (i) a juristic person is incapable of exercising any such power, or having any such capacity; or (ii) the company's Memorandum of Incorporation provides otherwise.

²⁰ 1993 (2) SA 451 (A) 461-463.

²¹ *Dhlomo NO v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A) at 948-953; *Caxton Ltd and Others v Reeve Forman (Pty) Ltd and Another* 1990 (3) SA 547 (AD) at 560.

²² 2011 (5) SA 329 (SCA).

dolus or *culpa*.²³ A company may further claim in terms of *action iniuriarum* for general damages for defamation.²⁴ In *Manong & Associates (Pty) Ltd v City Manager, City of Cape Town and Another*²⁵ it was held that a company may ‘enjoy the right to equality’ and can therefore be ‘discriminated against’ on racial grounds. These are only to name a few examples.

As a legal *persona* is distinct from its members, it is therefore important to note that the incorporator, shareholders or directors are not liable in their own capacity for the liabilities or obligations of the company.²⁶ Similarly, directors do not act personally when fulfilling their directorial responsibilities. Such is the benefit of the incorporated form with limited liability. As stated by Calhoun J in the United States case of *William H Sanders v Roselawn Memorial Gardens Incorporated*:²⁷

*“The doctrine that a corporation is a legal entity existing separate and apart from the persons composing it is a legal theory introduced for purposes of convenience and to subserve the ends of justice. It is clear that a corporation is in fact a collection of individuals, and that the idea of a corporation as a legal entity or person apart from its members is a mere fiction of the law introduced for convenience in conducting the business in this privileged way.”*²⁸

This being said, in principle a person should answer for their own ‘tortious acts’.²⁹ There are therefore instances where the courts will disregard the legal personality of a company by way of ‘piercing’ through it or ‘lifting’ it. In this way, the court acts to strip away the protective covering of the limited liability presented by the company structure,³⁰ in order to note the persons behind the company to whom liability may be attached.

²³ Delpont PA and Vorster Q *et al Henochsberg* (2011) 82.

²⁴ *Ibid* at para 82-83. The requirement for *solatium* is absent in the calculation for general damages, as it is accepted that a company does not have ‘feelings’.

²⁵ 2009 (1) SA 644 (EqC).

²⁶ *Ibid*.

²⁷ 159 S.E.2d 784 (W. Va.1968).

²⁸ *Supra* note 28 at 800.

²⁹ *Mentmore Manufacturing Co v National Merchandise Manufacturing Co* (1978) 89 DLR (3d) 195 para 23.

³⁰ Schoeman N “Piercing the corporate veil under the New Companies Act” (2012) June *DR* 10; Tan CH, Wang J and Hofmann C (2019) 16 *Berkeley Business Law Journal* 141 at 152.

2.4. Disregarding the Legal Personality: Piercing the Corporate Veil

2.4.1. *The earlier cases & Common Law*

In *Atlas Maritime Co SA v Avalon Maritime Ltd (No.1)*³¹ Straughton LJ made the following distinction between ‘piercing’ the veil’ and ‘lifting’ the veil:

*“To ‘pierce’ the corporate veil is an expression that I would reserve for treating the rights or liabilities of activities of a company as the rights or liabilities or activities of its shareholders. To ‘lift’ the corporate veil or ‘look behind it’, on the other hand, should mean to have regard to the shareholding in a company [in other words to its controllers] for some legal purpose”.*³²

In *Pioneer Concrete Services Ltd v Yelnah Pty Ltd*³³ Young J described ‘lifting the corporate veil’ as meaning “[t]hat although whenever each individual company is formed a separate legal personality is created, courts will on occasions, look behind the legal personality to the real controllers.”³⁴ Binns-Ward J in *Ex Parte Gore and Others NNO*³⁵ stated though, that “...nothing really turns on the labels despite the documented debate therein about nuances in the terminology.”³⁶ Rather that it is a facts-based determination made by courts to disregard all or some of the characteristics of separate legal personality.³⁷

Courts in England and South Africa have been far more willing to ‘lift’ the veil than to ‘pierce’ it.³⁸ Our common law has further not followed any consistent principles in disregarding the separate legal personality of juristic persons.³⁹ In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*⁴⁰ the appeal court recognised that in some

³¹ [1991] 4 All SA 769.

³² *Ibid* at 779.

³³ (1986) 5 NSWLR 254.

³⁴ *Ibid* at para 264.

³⁵ 2013 (3) SA 382 (WCC).

³⁶ *Ibid* at para 4.

³⁷ *Ibid*.

³⁸ *Woolfson v Strathclyde Regional Council* [1978] 2 EGLR 19, *Ebrahim and Another v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA) at 594, *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) at 396.

³⁹ Cassim F *et al Contemporary Company Law* 2 ed (2012) para 2.4.3.

⁴⁰ 1995 (4) SA 790 (A).

circumstances it would be justified to ignore the separate legal personality of an entity, however Smalberger JA stated that “The law is far from settled with regard to the circumstances in which it would be permissible to pierce the corporate veil”.⁴¹

The decision of *Daimler Co Ltd v Continental Tyre and Rubber Co*⁴² is of importance, as it was the first case in which the House of Lords set aside or ‘pierced’ the corporate veil. It further supported the general principle that where a company is being used to circumvent the law or to merely act as a façade, it is appropriate to pierce or set aside the veil.⁴³ The case came before the Privy Council during World War I, wherein the court was required to determine whether a company, which was incorporated in England, was an ‘enemy company’. The court pierced the veil by looking beyond its juristic nature, to the nationalism of the shareholders. It held that as the majority were German nationals, the entity was indeed an ‘enemy alien’ and the company could therefore not sue for payment of a debt owed to it, as the defendant was not permitted to pay a sum of money to or for the benefit of an ‘enemy’.⁴⁴ In hindsight though, the reasoning for the court to pierce the veil was largely influenced by politics and public policy.

In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*⁴⁵ the court accepted that fraud, dishonesty or improper conduct could provide adequate grounds for piercing the corporate veil and referenced the judgment of *The Shipping Corporation of India Ltd v Evdomon Corporation*⁴⁶ where the court held:

*“Suffice to say that they [the circumstances under which a court should pierce the corporate veil] would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs.”*⁴⁷

⁴¹ *Ibid* para 802.

⁴² [1916] 2 AC 307.

⁴³ Levenberg PN “The Mystery of the Corporate Veil: Comparing Anglo-American Jurisdictions (2019) 7 *Penn St JLIA* 115 at 127.

⁴⁴ *Daimler Co Ltd v Continental Tyre and Rubber Co* [1916] 2 AC 307.

⁴⁵ 1995 (4) SA 790 (A) at 803.

⁴⁶ 1994 (1) SA 550 (A).

⁴⁷ At 566F.

In *Botha v Van Niekerk*⁴⁸ it was held that the veil could be pierced if there was an ‘unconscionable’ injustice. The test for ‘unconscionable abuse’ was set out by Flemming J as follows:

“Ek meen dat daar in hierdie geval ook net tot ‘n konklusie van persoonlike aanspreeklikheid sou kon kom as daar ten minste ‘n oortuiging was dat applikant ‘n onduidbare onreg aangedoen word en wel teen gevolg van iets wat vir die regdenkende duidelik onbehoorlike optrede aan die kant van eerste respondent is”.⁴⁹

Smalberger JA in the *Cape Pacific* case criticised the strict approach followed in *Botha v Van Niekerk* and stated that a more flexible approach should be followed where the facts of the case permit that the corporate veil should be lifted.⁵⁰ However, in *Hülse-Reutter and Others v Gödde*⁵¹ the court held that the test is that there must at least be “...some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantages being afforded to the latter.”⁵² In this instance the court rejected the notion that the existence of an alternative remedy would not preclude an action to pierce the corporate veil, and a stricter approach was adopted.⁵³

2.4.2. Legal Development

The development of the law and instances where courts will permit ‘veil piercing’, such as to render shareholders liable for a debt owed to a company creditor, has been somewhat inhibited due to alternative remedies being available. One such remedy is s 424 of the 1973 Act, which remains applicable after the enactment of the 2008 Act.⁵⁴ This will be discussed in further detail in Chapter 4 of this paper.⁵⁵

⁴⁸ 1983 (3) SA 513 (W).

⁴⁹ *Ibid* at 525.

⁵⁰ 1995 (4) SA 790 (A) at 805

⁵¹ 2001 (4) SA 1336 (SCA).

⁵² *Ibid* 1346.

⁵³ Delpont PA and Vorster Q *et al Henochsberg* (2011) 82.

⁵⁴ Levenberg PN (2019) 7 *Penn St JLIA* 115 at 160.

⁵⁵ S 64(1) of the Close Corporations Act 69 of 1984 provides personal liability where the business of a close corporation was carried on “recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose...”.

The Companies Act 2008 has however, introduced a statutory basis for piercing the corporate veil in s 20(9). It provides:

"If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may:

(a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and

(b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a)."

The Act appears to follow a narrow approach and the test applied in *Botha v Van Niekerk*.⁵⁶ Interested parties may approach the court for an order that the incorporation, use or act by or on behalf of the company constitutes an unconscionable abuse of juristic personality and on that basis, request that the corporate veil be lifted.⁵⁷ However, the application is restricted in that it does not provide for instances where directors or natural persons may have been negligent, reckless and/or fraudulent in their dealings with, or on behalf of, the company.⁵⁸

There further remain uncertainties, for instance regarding the definition and interpretation of the term 'unconscionable abuse', and whether piercing the veil is to be regarded as an exceptional remedy used as a last resort. In *Ex parte Gore and Others NNO*⁵⁹ the applicants were liquidators of 41 companies that formed part of a

⁵⁶ Delpont PA and Vorster Q *et al Henochsberg* (2011) 85.

⁵⁷ Schoeman N (2012) "Piercing the corporate veil under the New Companies Act" (2012) June *DR* 10.

⁵⁸ Anonymous "Piercing the corporate veil: when directors can be held responsible for losses" C & A Friedlander Attorneys Available at: <https://caf.co.za/2018/06/05/piercing-the-corporate-veil-when-directors-can-be-held-responsible-for-losses/> [accessed 4 September 2019].

⁵⁹ 2013 (3) SA 382 (WCC).

group of companies, referred to as the King Group. The applicants sought that certain assets of subsidiaries be dealt with as though they were the property of the holding company. This required that the individual personalities of a few of the companies within the group be overlooked, and that the net assets of each be considered as the property of the holding company, in order to settle 'investors' claims. The argument made was that the business of the group had essentially been conducted by the holding company, with little regard to the subsidiaries. The application had been brought under the common law; alternatively, in terms of s 20(9) of 2008 Act.

Binns-Ward J provided the following principles with respect to s 20(9) in his judgment: (i) by expressly establishing that 'piercing the veil' as a remedy may be applicable when the facts of a case justify it and that the remedy should not be regarded as 'exceptional'; (ii) the use of the term 'unconscionable abuse' instead of 'gross abuse' further extends the availability of the remedy as the former term implies a less rigorous test than the latter; (iii) the reference to the phrase "...unconscionable abuse of the juristic personality..." includes common law terms such as 'sham', 'device' and 'stratagem', previously associated with 'veil piercing' cases, however may extend further. The remedy is further available "...whenever the illegitimate use of the concept of juristic personality adversely affects a third party in a way that reasonably should not be countenanced.";⁶⁰ (iv) the statute is "supplemental" to the common law and does not substitute it; and (v) the remedy is available even when there may be alternative remedies available.⁶¹

Thus, the effect of s 20(9) is that even though a company may have been formed for a legitimate purpose, should it be misused, the corporate veil may be pierced. It is submitted that this is in accordance with the common law position.⁶² Therefore, s 20(9) and the extension of liability, in terms of s 218(2) of the Companies Act 2008, ensure that where third parties have suffered damages resulting from contravention of the said Act, there is a greater onus to pierce the corporate veil and assign liability. S 218(2) will be discussed in further detail in Chapter 4.

⁶⁰ *Ibid* at 399 para 34.

⁶¹ *Ibid*.

⁶² Cassim R "Piercing the corporate veil 'Unconscionable abuse' under the Companies Act 71 of 2008" (2012) August *DR* 22 at 23.

2.5. Concluding remarks

One of the well-established principles of company law is that a company has a separate legal personality from its directors and shareholders. Therefore, directors and shareholders cannot be liable, all things being equal, for a company's liabilities and vice versa.⁶³ Similarly, a wrong committed against a company would entitle the company a claim against the wrongdoer. This is the essence of limited liability, which encourages investor confidence.

However, as the company is a legal fiction there are instances, such as where the company operates as a sham or when the company is incorporated for an illegal, fraudulent or improper purpose, where courts will 'lift' or 'pierce' the corporate veil, setting aside the juristic personality of the company, and at times, to impose liability on directors or shareholders behind it.

In terms of our common law, it is clear that any approach to piercing the veil is seen as an extreme remedy, exceptional in nature and used as a last resort. S 20(9) of the 2008 Act has however codified the doctrine of piercing the veil and is supplemental to the common law. It detracts from the notion that the remedy is regarded as one to be used in exceptional instances alone. However, a court will not apply s 20(9) and intervene where the 'unconscionable abuse' is not in respect of any right, liability or obligation.⁶⁴

Thus, in litigation brought against a director(s) by shareholders who wish to impose liability upon the director(s) for damages suffered, they may request that the courts pierce the corporate veil of the company, in terms of common law or s 20(9), in order to review the actions (or omissions) of those shielded behind it. The courts will be cautious in doing so and only when the circumstances of each case permit it, after weighing up the infringed right, the unconscionable abuse and policy considerations.

⁶³ Maple T "Liability of directors or shareholders – Can you pierce the veil?" (6 July 2016) *Field Seymour Parkes Attorneys* Available at: <https://www.fsp-law.com/liability-of-directors-or-shareholders-can-you-pierce-the-veil/> [Accessed 11 October 2019].

⁶⁴ Cassim R (2012) August *DR* 22 at 23.

CHAPTER 3: DIRECTORS' DUTIES AND LIABILITY

3.1 Introduction

The discussion in this chapter will focus on the fiduciary duties and legal responsibilities imposed on directors in terms of the common law, and the extent to which some of these have been codified in the 2008 Act.⁶⁵ The chapter will briefly highlight instances where directors may be held liable for breach of these duties in terms of s 77 and other sections of the 2008 Act. The intention is not that this chapter discuss directors' duties and liabilities extensively, as the scope is too wide and there are several controversial aspects;⁶⁶ rather the chapter shall focus on the main underlying principles and those which bear relevance to this paper.

The discussion is of significance, as although fiduciary duties and the duty to act with care and skill are owed to the company,⁶⁷ argument has been made that directors' duties extend further to the company's shareholders, who in the end share in the company's profits. Thus, understanding to 'whom' directors' duties are owed is important, as it *inter alia* determines who has *locus standi* to bring an application for the enforcement of directors' duties and hold directors liable in the event of a breach of same. Chapter 4 hereafter will examine instances in common law and statutory law where liability to shareholders may be imposed on directors; and where shareholders have been successful or unsuccessful in their claims.

⁶⁵ The focus shall be upon s 76 of the 2008 Act, although there are other sections within the Act which address directors' duties, such as s 75 (addressing conflict of interest), s 78 (indemnification of insurance of directors) and s 46(1)(b) (pertaining to distributions and ensuring that the company will satisfy the solvency and liquidity test immediately after the distribution). S 77 on civil liability will be discussed later in the chapter. A breach of fiduciary duties can also result in an order of delinquency in terms of s 162.

⁶⁶ Delpont PA, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 297. See also *Ghersi v Tiber Developments (Pty) Ltd* 2007 (4) SA 536 (SCA) at para 9 where it was held that the ambit of directors' duties may change from time to time. As held in *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) at 477H the existence of a fiduciary duty and its nature are questions of fact which are to be determined from a "thorough consideration" of the substance of the relationship and relevant circumstances which affect the operation of that relationship.

⁶⁷ See *Percival v Wright* [1902] 2 Ch 421; *Pergamon Press Ltd v Maxwell* [1970] 2 All ER 809 at 814 and chapter 4 of this paper for further discussion.

3.2 Directors' Duties in terms of the Common Law

Directors are given wide powers to effectively manage a company for the benefit of the shareholders and other stakeholders.⁶⁸ However, these powers are not absolute and they are compelled to act within the powers granted by the company and their fiduciary duties. The duties imposed upon directors are categorised into fiduciary duties and the duty to act with the necessary care, skill and diligence. The latter is not *sui generis* in nature and is based on delictual or *Aquilian* liability in instances of negligence.⁶⁹

The basis of a fiduciary relationship is a relationship founded on trust between parties. A fiduciary is someone who acts on behalf of and in the interest of another person.⁷⁰ In *Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd*⁷¹ it was confirmed that a director stands in the fiduciary relationship to the company of which they are a director. Directors do not however owe subsidiaries of the company a fiduciary duty.⁷² The common law also recognises that both executive and non-executive directors have the same fiduciary duties. Goldstone JA held in *Howard v Herrigel and Another NNO*:⁷³

“In my opinion it is unhelpful and even misleading to classify company directors as ‘executive’ or ‘non-executive’ for purposes of ascertaining their duties to the company or when any specific or affirmative action is required of them. No such distinction is to be found in any statute. At common law, once a person accepts an appointment as a director, he becomes a fiduciary in relation to the company

⁶⁸ Recently there have been discussions to extend the scope of directors' duties by ensuring that they consider other stakeholders and the impact that their decisions may have on societies and the environments in which they operate. This is referred to as the 'inclusive shareholder value approach' or 'stakeholder value approach'. This will not be discussed in greater detail in this paper. For more information refer to Chapter 8 of The King Report on Corporate Governance for South Africa (The Institute of Directors in Southern Africa) September 2009 (hereinafter King III). See also Esser I-M and Delport P "The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1" (2017) *De Jure* 97 at 98-99.

⁶⁹ *Ex parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T); *Du Plessis NO v Phelps* 1995 (4) SA 165 (C).

⁷⁰ *In re Equitable Fire Insurance Co Ltd* [1925] 1 Ch 407 (CA) at 427-429; Cassim F *et al Contemporary Company Law* 2 ed (2012) 465.

⁷¹ 2000 (3) SA 806 (C).

⁷² Cilliers HS, Benade ML *et al Corporate Law* 3 ed (2000) 140.

⁷³ 1991 (2) SA 660 (A).

and is obliged to display the utmost good faith towards the company and in his dealings on its behalf. That is the general rule and its application to any particular incumbent of the office of director must necessarily depend on the facts and circumstances of each case.”⁷⁴

3.2.1 Fiduciary duties

Directors are to act honestly, in good faith (*bona fide*), in the best interests of the company.⁷⁵ The duty of good faith and the duty to act in the best interests of the company are two separate duties, however this is not applied by the courts consistently.⁷⁶ Directors’ fiduciary duties include, but are not limited to, the duty to avoid a conflict of interests, not to exceed the limitation of their power, to act with unfettered discretion, to exercise their powers for the purpose for which they were conferred and to act in good faith.⁷⁷

3.2.1.1 Avoid conflict of interest

Directors are not to place themselves in a position where their interests are in conflict with those of the company.⁷⁸ Rather, they are to act *bona fide* in the best interests of the company.⁷⁹ This is strictly enforced; even in instances where the conflict of interest is merely hypothetical, directors may be forced to surrender personal gains arising from it.⁸⁰ In *Treasure Trove Diamond v Hyman*⁸¹ it was held that where shares were

⁷⁴ *Ibid* at 678B-C.

⁷⁵ Cilliers HS, Benade ML *et al Corporate Law* 3 ed (2000) 141.

⁷⁶ *Ibid* at 111; *Fabrics Ltd v Millman* NO 1972 (4) SA 592 (A) at 596; *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) para 18; Delport PA, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 298.

⁷⁷ *Ibid*.

⁷⁸ *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173, *Phillips v Fieldstone Africa (Pty) Ltd* (2004) 1 All SA 150 (SCA). Havenga M “Directors’ exploitation of corporate opportunities and the Companies Act 71 of 2008” (2013) TSAR 25.

⁷⁹ *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) at 627 where Scott JA stated “[i]t is a well-established rule of company law that directors have a fiduciary duty to exercise their powers in good faith and in the best interests of the company”.

⁸⁰ See *Robinson v Randfontein Estates Gold Mining Co. Ltd* 1921 AD 168, where a director of the plaintiff had purchased property in circumstances under which it was their duty to acquire the property for the company. He had then re-sold the property to the company and made a profit. It was held that the action arose as the director breached his fiduciary duty to the company, and as such he was not permitted to make a secret profit at the expense of the company or place himself in a position where his personal interests conflict with his duty.

⁸¹ 1928 AD 464.

issued with the intention of gaining control of the company, and not for the purpose of acquiring capital, the directors were not acting *bona fide* in the best interest of the company. Usually within the law, conflicts of interest can be categorised as an interference with a company's economic or corporate opportunities, or actions (omissions) which are contrary to the 'secret profit rule'.⁸²

Directors have a duty to seek out and attain economic opportunities for the company. The 'corporate opportunity rule' prohibits directors from misappropriating for themselves, or for another person or company, economic opportunities which belong to the company or to which the company has a valid claim.⁸³ The rule applies even after a director's resignation.⁸⁴ Any profit made in such an instance is treated as an acquisition made on behalf of the company, and the company may claim same from the director,⁸⁵ unless the majority of shareholders consent to the benefit which the director derived.⁸⁶

The 'non-profit rule' holds that a director may not derive a profit (which is not restricted to 'money' but includes any financial gain or advantage) as a result of the position they hold, unless acquired or retained with the knowledge and consent of the company.⁸⁷ Directors have a duty to account to the company for all profits which they acquire during their tenure as directors and during the exercise of their duties.⁸⁸ They also

⁸² Cassim MF "Da Silva v C H Chemicals (Pty) Ltd: Fiduciary Duties of Resigning Directors" (2009) SALJ 126 (1) 61-70.

⁸³ See Beuthin RC and Luiz SM *Beuthin's Basic Company Law* 3 ed (2000) 198-199 which states that a company would have a claim where the opportunity falls within the line of the business of the company, and the company was relying on the director to acquire the opportunity for it.

⁸⁴ See *Magnus Diamond Mining Syndicate v Macdonald and Hawthorne* 1909 ORC 65 at 81-82 and *Big Catch Fishing Tackle Proprietary Limited and Others v Kemp and Others* (17281/18) [2019] ZAWCHC 20 (5 March 2019) para 32.

⁸⁵ See *African Claim & Land Co Ltd v Langermann* 1905 TS 494 at 505; *Robinson v Randfontein Estates Gold Mining Co. Ltd* 1921 AD 168 at 179-180, 200-202 and *Kruger Investments Group Limited and Another v Nuberry Holdings Limited and Others* (14184/15) [2015] ZAWCHC 159 (30 October 2015) paras 37-40. In *Magnus Diamond Mining Syndicate v Macdonald and Hawthorne* 1909 ORC 65 the directors and managers of a company acquired information regarding a diamondiferous property which they thereafter purchased without disclosing the information to the company. The purchase was in competition to the company and the court held that they were to transfer the property to the company together with any profits which they had already derived therefrom.

⁸⁶ Havenga M (2013) TSAR 258; see *Robinson v Randfontein Estates Gold Mining Co. Ltd* 1921 AD 168 at 268.

⁸⁷ See *Robinson v Randfontein Estates Gold Mining Co. Ltd* 1921 AD 168 per Innes CJ at 177-178, 192 and per Solomon JA at 241-242; Delpont PA, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 298.

⁸⁸ See *Parker v McKenna* (1974) LR 10 Ch App 96 at 118 where it was held that an agent must not, without the informed consent of the principal, acquire any profit or benefit from his or her agency. See

cannot act as directors for competing companies, as their duties to each company would be in conflict.⁸⁹ In *Regal (Hastings) v Gulliver*⁹⁰ Lord Macmillan held that what had to be established was:

“(i) That what the directors did was so related to the affairs of the company that it can properly be said to have been done in the course of their management and in utilisation of their opportunities and special knowledge as directors; and (ii) that what they did resulted in profit to themselves.”⁹¹

Lord Macmillan submitted that the conditions were present and as a result, this precluded the directors, who made a personal profit from the transaction, from retaining same.

3.2.1.2 Duty not to exceed the limitation of their power

A director is not to act illegally, *ultra vires* or dishonestly. Directors must fulfil their duties within the limits of the company’s Memorandum of Incorporation, company law, common law, other legislation and directions given through shareholders’ special resolutions.⁹² A director, when exercising his powers, should ensure that he does not act or enter into transactions that fall beyond the capacity of the company.⁹³

3.2.1.3 Unfettered discretion & proper purpose

Directors have a fiduciary duty to exercise independent judgment and objectively apply their minds to the business of the company.⁹⁴ In other words, a director should not act

also *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 at 33–34; *Transvaal Cold Storage Co Ltd v Palmer* 1921 AD 168 and *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at 153.

⁸⁹ See *Sibex Construction (SA) (Pty) Ltd and Another v Injectaseal CC* 1988 (2) SA 54 (T) where directors formed a closed corporation which was in competition to the company for which they held office as directors. The court held that the unauthorised use of confidential information was a breach of the directors’ fiduciary duties. In addition, the court held that the directors’ fiduciary duties remained in force even after their resignation. See also *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 198-199.

⁹⁰ [1967] 2 AC 134 n (HL).

⁹¹ *Ibid.*

⁹² Cilliers HS, Benade ML *et al Corporate Law* 3 ed (2000) 141-144.

⁹³ *Ibid* at 144.

⁹⁴ Jorge A “Corporate Governance Regulation in South Africa” in Campbell D and Woodley S (ed) *Trends and Developments in Corporate Governance: The Comparative Law Yearbook of International Business* (2004) 17-18.

as a ‘puppet’ for another.⁹⁵ Directors further may not contract or agree with each other to act in a certain way, for example as to how they will vote at future board meetings.⁹⁶ Where a director is appointed to represent certain shareholders, for example a nominee director, they would still be obliged to serve in the best interests of the company, even if by doing so would be to the exclusion of those whom nominated them.⁹⁷

A director must further ensure that they only exercise their powers for the purpose for which they were conferred, namely for ‘proper purpose’.⁹⁸ Directors should therefore use their powers for the company’s benefit and not for their own personal interests. In *Piercy v S Mills & Co Ltd*⁹⁹ Peterson J held the below view:

“[D]irectors are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders. That is, however, exactly what has happened in the present case. With the merits of the dispute as between the directors and the plaintiff I have no concern whatever. The plaintiff and his friends held a majority of the shares of the company, and they were entitled, so long as that majority remained, to have their views prevail in accordance with the regulations of the company; and it was not, in my opinion, open to the directors, for the purpose of converting a minority into a majority, and solely for the purpose of defeating the wishes of the existing majority, to issue the shares which are in dispute in the present action.”

However, in most instances, courts are hesitant to interfere with the internal dealings of companies and would rather not “...act as a kind of supervisory board over decisions within the powers of the management honestly arrived at.”¹⁰⁰ However where directors have been dishonest the courts may intervene. In *Extrasure Travel Insurance*

⁹⁵ *Fulham Football Club Ltd v Cabra Estates plc* [1994] 1 BCLC 363; *Howard v Herrigel and Another* NNO 1991 (2) SA 660 (A); *S v Shaban* 1965 (4) SA 646 (W).

⁹⁶ Cassim F *et al Contemporary Company Law* 2 ed (2012) 480.

⁹⁷ See *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 (4) SA 156 (W) at 163.

⁹⁸ Cilliers HS, Benade ML *et al Corporate Law* 3 ed (2000) 141-142.

⁹⁹ 1920 1 Ch 77.

¹⁰⁰ *Howard Smith Ltd v Ampol Petroleum Ltd* 1974 AC 821 at 832E-F.

*Ltd v Scattergood*¹⁰¹ it was held that it is not a requirement that evidence be shown that a director was indeed dishonest, or that he was aware he was pursuing an unauthorised, collateral purpose. Rather, (i) the power being challenged should be identified; (ii) the proper purpose for which the power was conferred to the director should be identified; (iii) the substantial purpose for which the power was exercised should be investigated; and (iv) a decision should be made as to whether the purpose was indeed proper.¹⁰²

3.2.1.4 *The duty to act in good faith*

The duty to act in good faith requires that directors have reasonable grounds and exercise honest belief in their judgment as to what is in the best interest of the company.¹⁰³ However, courts will usually not require that directors provide the reasons for their actions, or explain the commercial or financial grounds upon which they make decisions.¹⁰⁴ When determining whether the duty of good faith has been exercised by a director the courts may consider whether a reasonable man, in such circumstances, could have believed that the director was acting in the interests of the company.¹⁰⁵ This is a subjective assessment. Alternatively, in the exercise of public power the director's actions may be evaluated in terms of the rationality principle, which is an objective assessment.¹⁰⁶ In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co. Ltd*¹⁰⁷ it was held that directors of the company could not, in this instance, resign in order to avoid their duties to the company, as such was not acting in good faith.¹⁰⁸

¹⁰¹ [2003] 1 BCLC 598.

¹⁰² *Ibid.*

¹⁰³ *In re Smith & Fawcett Ltd* [1942] Ch 304 (CA) at 306; [1942] 1 All ER 542 at 543; see also the Canadian case *Teck Corporation Ltd v Millar* (1972) 33 DLR (3D) 288.

¹⁰⁴ *Levin v Felt & Tweeds Ltd* 1951 (2) SA 401 (A) at 414–415; *Howard Smith Ltd v Ampol Petroleum Ltd* 1974 AC 821 at 832–834; *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) para 74.

¹⁰⁵ *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd supra* at para 74; *Howard Smith Ltd v Ampol Petroleum Ltd supra* at 834.

¹⁰⁶ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 85; *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd supra* at para 74 and *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) para 69; Delport PA, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 298.

¹⁰⁷ 2006 (5) SA 333 (W) at para 16.6.

¹⁰⁸ *Stilfontein Gold Mining Co. Ltd* was involved in gold mining which resulted in the pollution of underground water. The Minister of Water Affairs and Forestry obtained a court order against the company, whereafter the whole board of directors resigned simultaneously. It was held that the directors

3.2.2 Duty of Care, Skill and Diligence

In exercising their functions and duties, directors are required to do so with a certain level of skill and diligence. South African common law adopted a relatively conservative attitude towards the duty of care and skill,¹⁰⁹ and directors are expected to exercise the necessary care and diligence in the same way which a reasonable person would exercise care and manage their own affairs.¹¹⁰ One must note that ‘care’ and ‘skill’ have different meanings. ‘Skill’ may refer to the knowledge, technical competence or experience a director has.¹¹¹ This differs person to person and is therefore a subjective assessment. Whereas ‘care’ refers to the manner in which the ‘skill’ is applied and is therefore assessed more objectively.¹¹²

In the judgment of *In re City Equitable Fire Insurance Co Ltd*¹¹³ the court applied three principles, which were thereafter referred to in the latter case of *Fisheries Development Corporation of SA Ltd v Jorgensen*.¹¹⁴ The principles explained by Margo J are summarised as follows:

- The extent of a directors’ duty of care and diligence will largely depend on the nature of the company’s business and other obligations assumed or assigned to them. The degree of care required will therefore differ between non-executive directors and executive directors. It may not be required of non-executive directors that they give continuous attention to the affairs of the company or attend every meeting. However, it would be expected of executive directors that they devote their attention to the day-to-day management of the company and thus a higher level of care would be expected.

had breached their fiduciary duty to act *bona fide* in the best interests of the company and in good faith by resigning simultaneously. See Luiz and Taljaard “Mass resignation of the board and social responsibility of the company: *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co. Ltd*” 2009 SA Merc LJ 420-425 for further information.

¹⁰⁹ Du Plessis JJ “A Comparative Analysis of Directors’ Duty of Care, Skill and Diligence in South Africa and Australia” (2010) *Acta Juridica* 263.

¹¹⁰ See *Re Brazilian Rubber Plantations and Estates Ltd* (1911) 1 Ch 425 at 437 where it was held that when exercising their duties, directors must attend carefully to the affairs of the company and must display the “reasonable care” which any ordinary person may be expected to exhibit in the same circumstances.

¹¹¹ *Daniels v Anderson* (1995) 13 ACLC 614 (CA) NSW 665.

¹¹² Cilliers HS, Benade ML *et al Corporate Law* 3 ed (2000) (2012) 142.

¹¹³ [1925] Ch 407 (CA) at 429.

¹¹⁴ 1980 (4) SA 156 (W). See also *Re Brazilian Rubber Plantations and Estates Ltd* (1911) 1 Ch 425.

- A director is not expected to have specific business acumen, knowledge, expertise or experience in the business of the company. Directors are expected to exercise the degree of care and skill which an ordinary person may exhibit in the same circumstances. However they need not exhibit, in the performance of their duties, a greater degree of care and skill than may be reasonably expected from a person of their knowledge and skill.¹¹⁵
- Where a director entrusts an official to perform certain duties, they are justified in trusting that official to perform such duties honestly. Therefore, in the absence of reasons not to - a director is entitled to rely on the judgment, advice and information provided by management.¹¹⁶ However they are required to apply reasonable consideration in each instance.

Neville J explained the approach of the courts regarding the duty of care and skill in *Re Brazilian Rubber Plantations and Estates Ltd*¹¹⁷ as follows:

“So long as they act honestly, they cannot be made responsible in damages unless guilty of gross negligence. There is admittedly a want of precision in this statement of a director’s liability. In truth, one cannot say whether a man has been guilty of negligence, gross or otherwise, unless one can determine what is the extent of the duty which he is alleged have neglected. A director’s duty has been laid down as requiring him to act with such care as is reasonable to be expected from him, having regard to his knowledge and experience. He is, I think, not bound to bring any special qualification to his office. He may undertake the management of a rubber company in complete ignorance of everything connected with rubber without incurring responsibility for the mistakes which may result from such ignorance, while if he is acquainted with the rubber business, he must give the company the advantage of his knowledge when transacting the company’s business. He is not, I think bound to take any

¹¹⁵ Cilliers HS, Benade ML *et al Corporate Law* 3 ed (2000) 149.

¹¹⁶ *Ibid.*

¹¹⁷ (1911) 1 Ch 425.

definite part in the conduct of the company's business, but as far as he does undertake it, he must use reasonable care to its dispatch."¹¹⁸

Thus, in terms of the common law, mere negligence or an error in judgment is not enough to impose liability.¹¹⁹ South African courts have further followed a relatively lenient approach in holding directors accountable for the duty of care and skill.¹²⁰

Directors' who fail to observe their duty of care and skill may be held delictually liable to the company for any damages which it suffered as a result.¹²¹ Unlike fiduciary duties which do not necessarily include fault as a basis for liability,¹²² liability lies within the principle of *Lex Aquilia*. In *Du Plessis NO v Phelps*¹²³ Friedman J explained that:

*"Apart from their statutory duties, directors owe fiduciary duties to the company as well as a common law duty to take reasonable care in the management of the company's affairs. Liability in the event of a director failing to take reasonable care in the management of the company affairs is based on the principles of the Lex Aquilia. The basic requisite for liability under the Lex Aquilia is fault, ie dolus or culpa, which results in loss to the plaintiff."*¹²⁴

3.2.2.1 Business Judgment Rule

In the assessment of directors' duty of care and skill, liability may be limited due to the application of the business judgment rule. The rule was developed in the United States

¹¹⁸*Ibid* at 436-437.

¹¹⁹ *Ibid*; *Overend & Gurney Co v Gibb* (1872) LR 5 HL 480 at 487.

¹²⁰ Kanamugire J C and Chimuka T V "The Directors' Duty to Exercise Care and Skill in Contemporary South African Company Law and the Business Judgment Rule" (2014) 5 *Mediterr J Soc Sci* 70 at 72.

¹²¹ *In re City Equitable Fire Insurance Co Ltd* [1925] 1 Ch 407 (CA) at 427-429; Havenga M "Breach of Directors Fiduciary Duties: Liability on What Basis?" (1996) 8 *SA Merc LJ* 366.

¹²² Liability for the breach of fiduciary duties is also determined based on the loss or damage suffered by the company, or benefit to the director, see *Symington v Pretoria-Oos Privaat Hospitaal Bedryf (Pty) Ltd* [2005] 4 All SA 403 (SCA).

¹²³ 1995 (4) SA 165 (C).

¹²⁴ *Ibid* at 170. See also *Lagunas Nitrate Co v Lagunas Nitrate Syndicate Ltd* [1899] 2 Ch 392 at 435 where it was held that gross or culpable negligence is required before a director would be held to be in breach of their duties. Extreme misconduct however, is not classified as gross negligence – refer to *Re Brazilian Rubber Plantations and Estates Ltd* (1911) 1 Ch 425 where directors contracted on behalf of the company to purchase a plantation on the basis of a fraudulent report. Despite the directors being aware of the discrepancies in the report, their failure to make proper inquiries and to correct the discrepancies, did not amount to gross negligence.

of America and is a judicially created protection which balances directors' duties with their right to make decisions for the company.¹²⁵ The rule was developed due to a desire to "...protect honest directors and officers from the risks inherent in hindsight reviews of their unsuccessful decisions, and because of a desire to refrain from stifling innovation and venturesome business activity."¹²⁶ For the rule to apply, a decision must have been made,¹²⁷ in good faith on an informed basis, without conflicting financial interest.¹²⁸ If the requirements are met, the decision maker may be exempted from liability, irrespective of the outcome of their decision.¹²⁹

3.3 Directors' duties in terms of the Companies Act 71 of 2008

3.3.1 *Standard of Directors' conduct – section 76*

S 76 of the 2008 Act sets out directors' fiduciary duties as well as the duty to exercise reasonable care and skill as follows:

"76. Standards of directors' conduct –

(1) In this section, "director" includes an alternate director, and –

(a) a prescribed officer; or

(b) a person who is a member of a committee of a board of a company, or of the audit committee of a company, irrespective of whether or not the person is also a member of the company's board.

(2) A director of a company must –

¹²⁵ See *Arson v Lewis* 437 A.2d 805 (Del. 1984); Restrepo C A "The Need for Increased Possibility of Director Liability: Refusal to Dismiss In re Wells Fargo & Co. Shareholder Derivative Litigation, a Step in the right direction" (2019) 60 *Boston College Law Review* 1689 at 1700.

¹²⁶ American Law Institute *Principles of Corporate Governance and Structure: Restatement and Recommendations* (1982), quoted by Lipton P and Herzberg A *Understanding Company Law* 19 ed (2018) at 393.

¹²⁷ Otherwise the rule will not apply.

¹²⁸ Havenga M "The business judgment rule – Should we follow the Australian example?" (2000) 12 *SA Merc LJ* 25 at 28.

¹²⁹ The rule has been incorporated into the Companies Act 71 of 2008 in ss 76(4)(a)(i)-(iii). A director will be protected from liability for breach of his statutory duties if the director took reasonable, diligent steps to become informed about the matter; he/she, or a person related to them had no material personal financial interest; or where such an interest existed, the director disclosed the interest as per s 75 of the Act.

(a) not use the position of director, or any information obtained while acting in the capacity of a director –

(i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or

(ii) to knowingly cause harm to the company or a subsidiary of the company;
and

(b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director –

(i) reasonably believes that the information is –

(aa) immaterial to the company; or

(bb) generally available to the public, or known to the other directors; or

(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.

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

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

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

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

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

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

3.3.2 Section 76(1) – Meaning of director

In terms of s 76(1) it is worth noting that it is not only a director who will be held liable in terms of the section, but also a prescribed officer, the audit committee of the company, or a person who is a member of a committee of a board of a company.¹³⁰

The person therefore need not sit on the board of directors of the company.

¹³⁰ Section 1 of the 2008 Act defines a director as “...a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated”.

Regulation 38 of the Companies Regulations 2011 defines a ‘prescribed officer’ as:

“Despite not being a director of a particular company, a person is a “prescribed officer” of the company for all purposes of the Act if that person —

(a) exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or

(b) regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.

(2) This regulation applies to a person contemplated in sub-regulation (1) irrespective of any particular title given by the company to –

(a) an office held by the person in the company; or

(b) a function performed by the person for the company.”

The definition of ‘director’ in terms of the 2008 Act is broad enough to include both executive and non-executive directors,¹³¹ *de jure* and *de facto* directors, alternate directors, nominee directors and *ex officio*¹³² directors.¹³³ A ‘shadow director’ in most instances is understood to be a retired director who continues to assist the board, however they are not formally appointed as a director. South Africa’s common law with respect to the fiduciary duties of shadow directors is relatively vague.¹³⁴ However, there have been instances where our courts have imposed fiduciary duties on non-directors who have exercised ‘near-absolute’ control of a company.¹³⁵ It is submitted that the definition of a ‘prescribed officer’ would therefore include shadow directors.

¹³¹ *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A).

¹³² An *ex officio* director is someone who holds office as director as a result of holding some other office, designation, similar status or title specified in the company’s Memorandum of Incorporation. Refer to s 66(4)(a)(ii) read with s 66(5)(b)(ii).

¹³³ Fiduciary duties are therefore extended to managers or senior employees of a company. See *Phillips v Fieldstone Africa (Pty) Ltd* (2004) 1 All SA 150 (SCA); *Canadian Aero Service Limited v O’Malley* (1973) 40 DLR (3d) 371 (SCC) 381.

¹³⁴ Idensohn K “The Regulation of Shadow director’s” (2011) 22 SA Merc LJ 326.

¹³⁵ *Robinson v Randfontein Estates Gold Mining Co. Ltd* 1921 AD 168.

3.3.3 Subsections 76(2)(a) and (b)

At the centre of s 76(2)(a) is the directors' duty of loyalty and fidelity to the company, and the duty not to make a profit for themselves as a result of their position as directors.¹³⁶ The scope of the statutory duty within s 76(2)(a) is wider than the common law as it includes wholly-owned subsidiaries and a subsidiary. As a result, directors have fiduciary duties to subsidiary companies of the holding company, which was not the common law position.¹³⁷

S 76(2)(b) imposes a duty upon directors to disclose to the board information which is material to the company. This upholds the common law position, specifically with respect to the 'fair dealing rule'.¹³⁸ The rule requires that a director is to disclose any material information which he has, and which others acting for the company do not possess, if such information is likely to influence the company's decision in a matter.¹³⁹ In essence, s 76(2), if widely interpreted, is akin to the common law fiduciary duty to avoid a conflict of interest. This provision thus would include the common law duties to avoid a secret profit, not misappropriate corporate opportunities and not to compete with the company.¹⁴⁰

3.3.4 Subsections 76(3)(a), (b) and (c)

As set out above, ss 76(3)(a) and (b) reaffirm the common law fiduciary duty to act *bona fide* in the best interests of the company. S 76(3)(a) intertwines the duty to act in good faith with the duty to act for a proper purpose and is a declaratory of the common law in that it does not alter the common law in any respect.¹⁴¹ Similarly s 76(3)(b) does

¹³⁶ Cassim F *et al Contemporary Company Law* 2 ed (2012) at 514-515.

¹³⁷ In terms of common law, a director only owes fiduciary duties to the holding company, and not the subsidiary, unless they sit on the subsidiary's board of directors as well. See *R v Milne and Erleigh* (7) 1951 (1) SA 791 (A) at 828; *Adams v Cape Industries plc* 1990 Ch 433 (CA); Delpont PA, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 298.

¹³⁸ Cassim F *et al Contemporary Company Law* 2 ed (2012) at 554.

¹³⁹ *Novick v Comair Holdings Ltd* 1979 (2) SA 116 (W) 153.

¹⁴⁰ See Delpont PA, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 297-298 for further discussion. See also s 75(5) pertaining to the duty a director has to disclose a personal financial interest which the director or related person to them may have.

¹⁴¹ Cassim F *et al Contemporary Company Law* 2 ed (2012) at 525. This assists with legal certainty pertaining to the duty to act for proper purpose.

not appear to deviate away from the common law duty to act in the best interests of the company.¹⁴²

S 76(3)(c) establishes a statutory duty of care, skill and diligence. The first leg of the subsection is an objective test to determine what the reasonable director would have done in the same situation;¹⁴³ whereas the second leg appears to be subjective in assessing the general knowledge, skill and experience of the director.¹⁴⁴ Cassim explains that the minimum standard of care imposed by s 76(3)(c) is the objective standard of the reasonable man.¹⁴⁵ The subjective standard may vary; the more skilled and knowledgeable a director is, the higher the level of care and skill that will be expected of them. Conversely, the less skilled or experienced the director, the lower the level of care and skill expected, provided that it is exercised reasonably.¹⁴⁶

3.4 Directors' Statutory Liability in terms of the Companies Act 71 of 2008

3.4.1 Liability in terms of s 77

S 77 of the 2008 Act sets out directors and prescribed officers' statutory liability. The section also applies to the company's audit committee, a member of a committee of the board of the company as well as alternate directors.¹⁴⁷ S 77(2) states that a director may be held liable in accordance with the principles of common law relating to a breach of a fiduciary duty, for any loss, damages or costs sustained by the company as consequence of any breach by the director to disclose a personal financial interest (s 75); to avoid a conflict of interest (ss 76(2)); to act in good faith and for a proper purpose or in the best interest of the company (s 76(3)(a) and (b)).¹⁴⁸

¹⁴² It was held in *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) that the test with respect to 'proper purpose' (ie s 76(3)(a)) is objective, whereas the duty imposed by s 76(3)(b), to act in the best interest of the company is subjective.

¹⁴³ S 76(3)(c)(i).

¹⁴⁴ S 76(3)(c)(ii).

¹⁴⁵ Cassim F *et al Contemporary Company Law* 2 ed (2012) at 509-510.

¹⁴⁶ *Ibid.*

¹⁴⁷ S 77(1)(b).

¹⁴⁸ S 77(2)(a) deals with the breach of fiduciary duties. It appears to exclude the common law liability for the acquisition of a benefit irrespective of whether the company suffered damages; see *Regal (Hastings) v Gulliver* [1967] 2 AC 134; *Symington v Pretoria-Oos Hospitaal Bedryfs (Edms) Bpk* [2005] 4 All SA 403 (SCA); *Dorbyl Ltd v Vorster* 2011 (5) SA 575 (GSJ); Delpont PA, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 301.

S 77(2)(b) holds directors liable in accordance with the common law principles of delict for any loss, damages or costs sustained by the company as a consequence of any breach by a director of the duty of care and skill, as per s 76(3)(c); any provision of the 2008 Act;¹⁴⁹ or any provision of the company's Memorandum of Incorporation.¹⁵⁰

S 77(3) lists a few specific instances where directors may be found liable for any loss, damages or costs sustained by the company as a direct or indirect result of their actions. These include, but are not limited to, acting on behalf of the company despite knowing they lack authority to do so;¹⁵¹ acquiescing to the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by s 22;¹⁵² and being a party to an act or omission despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company.¹⁵³ The word 'knowing' in s 77(3) requires that 'knowledge' on the part of the director is a prerequisite for liability.¹⁵⁴ Liability in terms of s 77 is joint and several with any other person who is or may be held liable.¹⁵⁵

It should be emphasised that should directors breach their statutory fiduciary duties and the duty of care and skill, it is the company itself who would be the proper plaintiff to take proceedings to enforce liability in terms of s 77(2)(a) and (b)(i). This is as the duties mentioned therein are owed to the company and not to the shareholders or other third parties. Similarly, directors' duties in terms of s 77(3) are owed to the company, as the liability imposed on the directors is to the company and not to any other person.¹⁵⁶ This upholds the position in common law – that directors (and non-

¹⁴⁹ Not otherwise mentioned in this section.

¹⁵⁰ S 77 (2)(b)(i), (ii) and (iii).

¹⁵¹ S 77(3)(a).

¹⁵² S 77(3)(b). S 22 pertains to reckless trading and will be discussed later in this chapter and in chapter 4 of this paper.

¹⁵³ S 77(3)(c).

¹⁵⁴ In terms of s 1 of the 2008 Act the term 'knowing', 'knowingly' or 'knows', when used with respect to a person, and in relation to a particular matter, means that the person either had actual knowledge of the matter or was in a position in which the person reasonably ought to have had actual knowledge, investigated the matter to an extent that would have provided the person with actual knowledge' or taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter.

¹⁵⁵ S 77(6). However, in circumstances as per s 77(3)(e), the director can apply to court for an order to set aside the transaction, and the court may make an order as per s 77(5)(b).

¹⁵⁶ Phungula S "Lessons to be learned from reckless and fraudulent trading by a company: Section 424(1) of the Companies Act 61 of 1973 and sections 22 and 77(3)(b) of the Companies Act 71 of 2008" (2016) 2 SA Merc LJ 238; Stevens R and De Beer P "The duty of care and skill, and reckless trading: Remedies in flux" (2016) 28 SA Merc LJ 273.

executive directors) owe fiduciary duties to the company, and only the company may take proceedings against wrongdoers that cause it to suffer harm or prejudice.¹⁵⁷

3.4.2 Other instances of liability – ss 218(2) and 22

The 2008 Act has various other provisions in terms of which directors can be held liable by the company. One such section is s 218(2). It provides that:

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

The provision has wide implications due to the use of the word “any”. It may be used together with s 22(1) of the 2008 Act pertaining to the prohibition of reckless trading, which states as follows:

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

The above section read together with s 77(3)(b) of the 2008 Act penalises and holds directors personally liable to the company for any damages suffered through knowingly carrying on the business of the company recklessly, with gross negligence and with the intent to defraud any person or for any fraudulent purpose. The two sections read together replace s 424 of the 1973 Act, which introduced the term ‘reckless trading’ and applied to “winding-up, judicial management or otherwise”.¹⁵⁸ The 2008 Act provides that Chapter 14 of the 1973 Act will continue to apply in respect of the liquidation of insolvent companies and thus s 424 may be invoked in such instances.¹⁵⁹

¹⁵⁷ *Foss v Harbottle* (1843) 2 Hare 461 (67 ER 189); *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) at 678. See also *Cohen v Segal* 1970 (3) SA 702 (W) at 706; Delport PA, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 298. This section, specifically s 77(3)(b) regarding reckless trading contemplated in s 22, together with s 218(2) and s 22 of the Act will be discussed in more detail in chapter 4.

¹⁵⁸ S 424(1).

¹⁵⁹ See schedule 5 item 9.

S 424 states as follows:

- (1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.*
- (2) (a) Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to the declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him or any company or person on his behalf or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may from time to time make such further orders as may be necessary for the purpose of enforcing any charge imposed under this subsection.*

(b) For the purposes of this subsection, the expression 'assignee' includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the matters on the ground of which the declaration is made.
- (3) Without prejudice to any other criminal liability incurred, where any business of a company is carried on recklessly or with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence.*
- (4) The provisions of this section shall have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is made.*

These sections will be critically discussed in the following chapter, which will consider their interpretation and application – specifically with reference to whether directors can be held personally liable to shareholders.

3.5 Concluding remarks

Directors are given extensive powers to effectively manage a company for the benefit of the shareholders and other stakeholders. However, these powers are not absolute but rather limited by a company's memorandum of incorporation, common law and statutory fiduciary duties.

In common law, fiduciary duties are *sui generis* in nature and impose strict liability. They require that directors act in good faith and in the best interests of the company. The duty of care and skill is however delictual and therefore 'fault' in the form of *dolus* or *culpa* is a requisite for liability. To determine whether the duty of care and skill has been breached, a subjective assessment is used to assess the skills, knowledge or experience a director has; whereas an objective assessment is used to determine the level of care the director applied in his actions. In common law directors owe fiduciary duties and the duty of care and skill to the company. These duties would not extend to subsidiaries. Nor are they owed to shareholders or third parties, as held in *Percival v Wright*¹⁶⁰, *Pergamon Press Ltd v Maxwell*¹⁶¹ and *Cohen v Segal*¹⁶² amongst others.

This position has mostly been maintained in the partial codification of directors' duties in the 2008 Act, as the wording used by the legislature in ss 76 and 77 denotes that directors' duties are owed to the company and thus the company is the correct plaintiff to take proceedings against wrongdoers that cause it harm or prejudice.

The partial codification of directors' duties aims *inter alia* to promote accountability and encourage efficient, responsible management. Being a partial codification, to the extent that the 2008 Act does not expressly deal with a duty or consequence arising thereof, the common law will still apply or supplement such a duty. The Act contains various provisions wherein directors may be held liable to the company or others in instances where such parties have suffered damages as a direct result of the directors' conduct. It further extends liability for breach of fiduciary duties and the duty of care

¹⁶⁰ [1902] 2 Ch 421.

¹⁶¹ [1970] 2 All ER 809 at 814.

¹⁶² 1970 (3) SA 702 (W) at 706.

and skill, to prescribed officers and members of committee/s of the board. Directors further now owe such duties to subsidiaries and wholly-owned subsidiaries.

However, even with the enactment of the 2008 Act, it is submitted that considering South Africa's company law, shareholders may face difficulty in imposing personal liability on directors for losses they may have suffered due to the directors' mismanagement of the company.¹⁶³ Much rests upon the cause of action and their choice of legislation upon which they bring their claim or common law principles such as the 'no reflective loss' principle. This will be discussed further in the next chapter.

CHAPTER 4: DISCUSSION REGARDING DIRECTORS' LIABILITY TO SHAREHOLDERS IN TERMS OF COMPANY COMMON LAW AND STATUTORY PROVISIONS

4.1 Introduction

The previous chapter examined the scope and nature of directors' duties. It reflected on the nature of fiduciary duties, for instance that they are *sui generis* and impose a strict liability, and further discussed the duty of care and skill within South Africa's common law. The chapter progressed to review the partial codification of such duties within the 2008 Companies Act and the effect that this has on such duties. It was noted that shareholders may face difficulty in imposing personal liability on directors for losses they may have suffered as directors' duties are owed to the company and thus the company is the correct plaintiff to institute proceedings in such instances. This chapter will expand on this, considering common law legal principles and cases where shareholders have attempted or succeeded in claims against directors personally. The chapter will also review statutory provisions which may impose duties on directors to shareholders, in order to ascertain if and when shareholders may hold directors' personally liable.

¹⁶³ Or other actions or omissions.

4.2 Directors' liability to shareholders in respect of the Common Law

4.2.1 *The Foss v Harbottle rule*

In 1843 the infamous United Kingdom case of *Foss v Harbottle*¹⁶⁴ set out the legal principle that only the company, not its members, can sue for wrongs done to the company. The rule was explained further in *Edwards v Halliwell*¹⁶⁵ 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 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

¹⁶⁴ (1843) 2 Hare 461. Two shareholders commenced legal action against the promoters and directors of the company alleging that they had misapplied the company assets and had unduly mortgaged company property. The Court rejected the shareholders' claim and held that a breach of duty by the directors of the company was a wrong done to the company, for which it alone could sue. This rule is derived from two general legal principles, that a company is a legal entity separate from its shareholders, and secondly that the court is reluctant to interfere with the internal management of companies acting within their powers. Where a majority can ratify an act of the directors, courts will not intervene.

¹⁶⁵ [1950] 2 All ER 1064. The case concerned a trade union, however the law regarding this is the similar in both instances.

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."¹⁶⁶

*Wallersteiner v Moir (No 2)*¹⁶⁷ further agreed with *Foss* and the judgment held that:

"The rule [Foss v Harbottle] is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs - by directors who hold a majority of shares - who can then sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress."¹⁶⁸

The case highlighted the need for remedies available to minority shareholders *where the company* suffered damages¹⁶⁹. In *Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2)*¹⁷⁰ the principle that was established was that a shareholder could not institute legal action to recover damages for themselves in respect of wrongs done to the company. Rather the proper course, if the interests of justice required that a minority action should be permitted, would be to bring a

¹⁶⁶*Ibid* at 1066-1067. Point 5 refers to minority shareholder's derivative actions.

¹⁶⁷ [1975] 1 All ER 849.

¹⁶⁸ *Ibid* at para 857D-F.

¹⁶⁹ Own emphasis added.

¹⁷⁰ [1982] 1 All ER 354 (CA). Prudential Assurance Co Ltd ('Prudential') held a minority shareholding in Newman Industries Ltd ('Newman'). Prudential pursued a derivative action on behalf of Newman against two of the directors of Newman, on allegations of fraud. However, Prudential also pursued a personal action (and a representative action on behalf of all the other shareholders) based on the claim that the directors' fraud reduced Newman's net profits and thus caused a diminution in the value of its shares. It was held that a shareholder cannot recover damages merely due to the company in which he or she has an interest has suffered damage.

derivative action on behalf of the company.¹⁷¹ In addition, held in *orbiter*, it was found that a shareholder could not bring a personal claim based on a reflective loss.¹⁷² The reasons being explained as per *LAWSA*:

*“[s]ince 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.”*¹⁷³

This was explained in *Prudential* as follows:

*“Such a “loss” is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only “loss” is through the company, in the diminution in the value of the nett assets of the company . . . The plaintiff’s shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrong doing. The plaintiff still holds all the shares as his own absolutely unencumbered property.”*¹⁷⁴

However, the judgment held an exception to the *Foss* rule that where a company has suffered a loss and has no cause of action to recover the loss, for example where the company has since been liquidated, the shareholder in the company may sue in respect of it, if the shareholder has a cause of action to do so. This included instances where the shareholder had suffered a loss due to the diminution in the value of the shareholding. In addition, where the company suffers a loss due to a breach of duty to it, and a shareholder suffers a distinctly separate loss resulting from a breach of duty

¹⁷¹ *Ibid.*

¹⁷² In instances where a company is harmed by a third party, shareholders may suffer the economic consequences in the form of the diminution in the value of their shares. The ‘no reflective loss’ rule is that a direct claim made by the shareholder who has suffered such loss is not permitted as the company should claim in respect of the damages. See De Jong B “Shareholders Claims for Reflective Loss: A Comparative Legal Analysis” 14 (2013) *EBOR* 97.

¹⁷³ Williams RC “Attributes or Consequences of The Company’s Corporate Personality” in Joubert WA (ed) *LAWSA* Vol 4(1) (2012) 67.

¹⁷⁴ [1982] 1 All ER 354 (CA) at 366-367.

owed independently owed to the shareholder, then both the company and the shareholder may sue to recover their losses.¹⁷⁵

The rule set out in *Foss* is not an absolute rule, and in the Irish case of *Fanning v Murtagh*¹⁷⁶ Irvine J identified that there are four exceptions to the rule where derivative actions would be permitted, these she summarised in the following categories, namely:

1. *ultra vires* acts;
2. where a special majority is needed;
3. the personal rights exception; or
4. fraud by those in control of the company.

In brief, the directors of a company would not be permitted to use their control of the company to condone actions which would be *ultra vires* or illegal. Shareholders are still able to prevent a company from acting *ultra vires* before a transaction is concluded.¹⁷⁷ With respect to the second exception, if a company's founding documents stipulate that a special majority is required for a course of conduct and the directors ignore this, a single shareholder may bring an action as an exception to *Foss*.¹⁷⁸ The 'personal rights' exception holds that if the company denies a shareholder rights that are afforded to him or her in the company's constitution or founding documents, the shareholder can bring an action on behalf of themselves and all other shareholders to whom the right is denied.¹⁷⁹ One reason for the restriction of derivative claims was to prevent a multiplicity of claims which could have simply been ratified by the majority shareholders on behalf of the company. The last exception 'fraud by those in control' is an exception as fraud cannot be ratified.¹⁸⁰ This exception though does not extend to negligence.¹⁸¹

¹⁷⁵ *Ibid* at 222-223.

¹⁷⁶ [2009] 1 IR 551.

¹⁷⁷ See *Parke v The Daily News Ltd* [1962] Ch 927 and *Smith v Croft (No 2)* [1988] Ch 114.

¹⁷⁸ *Edwards v Halliwell* [1950] 2 All ER 1064.

¹⁷⁹ *Pender v Lushington* (1877) 6 Ch D 70.

¹⁸⁰ *Cooks v Deeks* [1916] 1 AC 554.

¹⁸¹ *Pavlides v Jensen* [1956] 2 All ER 518

The cases of *McLelland v Hulett and Others*¹⁸² and *Kalinko v Nisbet and Others*¹⁸³ accepted the exception to the rule that where double jeopardy did not exist and the shareholder was left with diminished value in shares, the continued application of *Foss* would be an "...unwarranted technical obstruction to the course of justice", and the rule was therefore not adhered to.¹⁸⁴ These judgments were relied on by the applicant in *Letseng Diamonds Ltd v JCI Ltd and Others*.¹⁸⁵ The applicant was a shareholder in JCI Ltd, which faced several lawsuits and as a result found itself in financial difficulty. It took up a loan from Investec Bank Ltd however subject to a raising fee of 30 percent of the aggregate increase in the value of the assets furnished as surety and subject further to the board of directors being replaced. The applicant sought to have the agreements between JCI Ltd and Investec Bank Ltd declared invalid. In Blieden J's judgment the rule of *Foss* was referred to and "put in another way"; that a third party could not interfere in terms of the conditions contained in an agreement between two other parties.¹⁸⁶

In referring to the judgments in *Hulett* and *Kalinko*, Blieden J stated that the learned Judges failed to consider the consequence of allowing individual minority shareholders to pursue such claims against directors; that it was only in exceptional cases such as *Hulett* where there was no remedy available to the plaintiff that such relief could be granted to the individual shareholder. However, in the present case, there were thousands of individuals owning shares and such claims would result in "...anarchy in the affairs of the company."¹⁸⁷

¹⁸² 1992 (1) SA 456 (D); the plaintiff instituted action against two directors of a company in liquidation, in which he had been both a director and shareholder, for damages which he claimed he had suffered as a result of their negligent conduct in the management of the company's affairs. Booysen J held that the plaintiff was entitled to bring his action. He stated that the real reason why the *Foss* rule existed was due to the separate nature of the company and that to allow a shareholder to bring a claim against the wrongdoer would amount to double jeopardy. However, in the matter at hand the risk did not exist as the company had been liquidated. See also para 54 of *Letseng Diamonds Ltd v JCI Ltd; Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd* 2007 (5) SA 564 (W).

¹⁸³ 2002 (5) SA 766 (W); a company had been wound up. Thereafter a shareholder sued certain directors of the company in terms of s 424 of the 1973 Companies Act. The matter before the court on exception and Claassens J followed the *dictum* of Booysen J in *Hulett* (see note above) and held that at the exception stage it was inappropriate to decide whether the plaintiff had a cause of action or not, and thus the exception was dismissed.

¹⁸⁴ See *McLelland v Hulett* 1992 (1) SA 456 (D) at 467B – H.

¹⁸⁵ 2007 (5) SA 564 (W).

¹⁸⁶ *Ibid* para 19; see also *Hillock and Another v Hilsage Investments (Pty) Ltd* 1975 (1) SA 508 (A) at 515AC; *ABSA Bank Bpk v CL von Abo Farms BK* 1999 (3) SA 262 (O) at 274EG.

¹⁸⁷ *Letseng Diamonds Ltd v JCI Ltd; Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd* 2007 (5) SA 564 (W) at 61.

The *Foss* rule and principle set out in *Prudential* have been followed in numerous South African cases though and are usually brought before the court as a ground for exception, such as the 1997 case of *Golf Estates (Pty) Ltd v Malherbe and Others*.¹⁸⁸ The plaintiff, the sole shareholder in Fancourt Properties (Pty) Ltd (in liquidation), sued the first and second defendants, being the joint curators, for damages it suffered when the value of its shareholding reduced due to acts and omissions by the defendants. The defendants took exception to the plaintiff's claim on the basis that the plaintiff lacked a cause of action;¹⁸⁹ that the court order which authorised the curators to enter into the disputed agreement still stood, and until such time as it was set aside, the claims brought against the curators were not actionable. With respect to the first ground of exception, the court upheld the rule in *Foss* as the plaintiff had not argued that the wrong was one against the company by insiders who controlled its affairs and who prevented an action being brought by the company.¹⁹⁰ In addition, the plaintiff lacked a cause of action, as the loss suffered was a "reflection of the loss suffered by the company".¹⁹¹ Thus the court upheld the defendants' first exception and applied the rule in *Foss*.

Recently in *Itzikowitz v ABSA Bank Ltd*¹⁹² Gary Itzikowitz sought to recover from ABSA the value in the diminution of his shareholding in Compass Projects (Pty) Ltd, a company which held shares in Quantum Properties Group, that in turn owned A Million Up (Pty) Ltd (AMU). Itzikowitz alleged that the reduction in the value of the shareholding resulted from the alleged reckless, intentional or negligent conduct of ABSA. The claim was a delictual claim for pure economic loss. The Supreme Court of Appeal however referred to a constitutional court case¹⁹³ in its judgment, which held

¹⁸⁸ 1997 (1) SA 873 (C). See also *Roestorf and Another NNO and Another v Johns* 2013 (2) SA 459 (KZD); *Grancy Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) at paras 107-111; *Johnson v Gore Wood & Co* [2001] 1 All ER 481 where similar decisions were taken and the rule in *Foss v Harbottle* followed.

¹⁸⁹ At 878, Fancourt Properties (Pty) Ltd (in liquidation), being a company with a separate legal personality, the plaintiff as the shareholder had no right of action against the curators with respect to the losses the company had suffered.

¹⁹⁰ *Ibid* at 879.

¹⁹¹ *Ibid* at 881; see also *Prudential Insurance Co Ltd v Newman Industries Ltd and Others (No 2)* [1982] 1 Ch 204 (CA) at 223A.

¹⁹² 2016 (4) SA 432 (SCA).

¹⁹³ See *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) at para 23.

that the law is reluctant to recognise claims for pure economic loss, especially where it would extend the law of delict. Rather the element of wrongfulness was a requisite to be proven.¹⁹⁴ The court referred to the ruling in *Dadoo*,¹⁹⁵ that a company is an entity separate from its members and property vested in a company is not and cannot be regarded as vested in all its members.¹⁹⁶

The court further referred to the rule of *Foss* and upheld the principle in *Prudential*, that the shareholder could not recover damages merely as the company within which he has invested has suffered damages.¹⁹⁷ What is noteworthy in the judgment is that it was held that both Booyesen J and Claassen J in their judgments¹⁹⁸ overlooked the *dictum* of Innes CJ in *Dadoo*, that the notion of the existence of a company as a separate entity distinct from its shareholders is a matter of substance.¹⁹⁹ Rather their focus had been the likelihood of double recovery, and the absence thereof being an exception to the rule in *Foss*. The court referred to the case of *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*²⁰⁰ where it was held that the "...absence of indeterminate liability itself will not automatically give rise to the imposition of liability."²⁰¹ Similarly, the mere absence of the risk of double jeopardy did not provide the shareholder with an entitlement which they did not have in the first place. Thus, considering the above, the appeal was dismissed.

4.2.2 The principle in *Percival v Wright*

Another common law principle well established is that directors' duties are owed to the company and not to the shareholders or other third parties.²⁰² Directors'

¹⁹⁴ *Ibid.*

¹⁹⁵ *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 550.

¹⁹⁶ *Itzikowitz v ABSA Bank Ltd* 2016 (4) SA 432 (SCA) para 9.

¹⁹⁷ *Ibid* para 11-12.

¹⁹⁸ *McLelland v Hulett* 1992 (1) SA 456 (D) and *Kalinko v Nisbet and Others* 2002 (5) SA 766 (W) respectively.

¹⁹⁹ *Itzikowitz v ABSA Bank Ltd* 2016 (4) SA 432 (SCA) para 16.

²⁰⁰ 2009 (2) SA 150 (SCA).

²⁰¹ *Ibid* para 25.

²⁰² *Percival v Wright* [1902] 2 Ch 421; *Pergamon Press Ltd v Maxwell* [1970] 2 All ER 809 at 814; *Cohen v Segal* 1970 (3) SA 702 (W) at 706.

fundamental duties are to act only in the *bona fide* interests of the company and its shareholders as a body.²⁰³

This was held in the controversial United Kingdom case of *Percival v Wright*²⁰⁴ where shareholders of a company wished to sell their shares and requested that the company secretary find suitable purchasers. However, after their sale, the shareholders discovered that the board of directors had in the interim been negotiating the sale of the company, with the result that should they have retained their shares, the shares would have been more valuable. The plaintiff instituted action based on the breach of the directors' fiduciary duties, in that the shareholders should have been informed of the sale negotiations. Swinfen Eady J however held that the directors did not owe the shareholders such a duty individually, even though their actions may not be considered fair.²⁰⁵

Gower confirmed that the British common law position held that directors' duties were owed to the company and the company alone; that the common law had been reluctant to recognise directors' duties as being owed to individual shareholders.²⁰⁶ However, he steered away from the principle held in *Percival* by acknowledging that where directors have also been constituted to act as the shareholders' agent concurrently to directors' agency to the company, then such a duty does indeed arise to the shareholders individually.²⁰⁷

The principle held in *Percival* was adopted in South African common law in *Cohen v Segal*²⁰⁸ where Boshoff J held that directors were creatures of statute; "[t]hey occupy

²⁰³ *SA Fabrics Ltd v Millman* NO 1972 (4) SA 592 (A); however, refer to *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co. Ltd* 2006 (5) SA 333 (W) regarding the enlightened shareholder approach.

²⁰⁴ [1902] 2 Ch 421.

²⁰⁵ *Ibid.*

²⁰⁶ Davies PL *et al Gower and Davies' Principles of Modern Company Law* 9 ed (2012) 506-507. (A 10th edition was printed in 2016, however this edition was not available to the writer). Gower held this view prior to the judgment of *Peskin v Anderson* [2001] 1 BCLC 372 at 379, which agreed in principle and clearly distinguished between director's fiduciary duties owed to a company as a result of the relationship between the director and company, and fiduciary duties owed to shareholders due to "a special factual relationship between the directors and the shareholders in the particular case".

²⁰⁷ *Ibid.*

²⁰⁸ *Cohen, NO v Segal* 1970 (3) SA 702 (W).

a fiduciary position towards the company and must exercise their powers bona fide solely for the benefit of the company as a whole and not for an ulterior motive.”²⁰⁹

In the New Zealand case of *Coleman v Myers*²¹⁰ the decision of *Percival* was however rejected by Mahon J of the Supreme Court. The plaintiffs had brought an action related to the non-disclosure of material information where the offer to buy shares was made by the company’s managing director (Myers). This was pursuant to a takeover offer by Myers for the entire equity capital. However, when Myers became the sole shareholder, he liquidated certain of the company’s assets and declared a capital dividend, which far out-weighed his expenses for the acquisition of the shares. The plaintiffs argued that their shares had thus been bought at a gross undervaluation and they sought that the contract be set aside, or damages be awarded on the basis of actionable non-disclosure.²¹¹ The plaintiffs’ allegations did not succeed, however in his judgment Mahon J for the Supreme Court stated, *orbiter*, that the judgment in *Percival* was wrongly arrived at and should not have been followed.²¹²

Similarly, in *Brunninghausen v Glavanics*²¹³ the appeal court unanimously declined to follow *Percival*. The court agreed with the rule set out in *Foss*, that only the company, not its members, can sue for wrongs done to the company. However, where a transaction does not concern the company but only another shareholder, a director may owe a fiduciary duty to that shareholder. In *Peskin v Anderson*²¹⁴ it was confirmed that directors will only have a fiduciary duty to shareholders if there exists a special, factual relationship between the directors and shareholders, which gives rise to fiduciary obligations.²¹⁵

Although such judgments do not deviate away from the general principle that directors’ fiduciary duties are normally owed to the company alone, the decisions in cases such

²⁰⁹ *Ibid* para 706.

²¹⁰ [1977] 2 NZLR. 225.

²¹¹ *Ibid*.

²¹² Rider BAK “Percival v Wright Per Incuriam” *The Modern Law Review* 40 (1977) at 473. See also *Allen v Hyatt* (1914) 30 TLR 444 (directors making representations to secure options to purchase shares of shareholders and undertaking to sell shares of shareholders in agency capacity) and *Briess v Woolley* [1954] 2 WLR 832.

²¹³ (1999) 46 NSWLR 538.

²¹⁴ [2001] 1 BCLC 372.

²¹⁵ *Ibid*.

Coleman, Brunninghausen and Peskin show an increasing willingness of courts to impose fiduciary obligations upon directors which are owed to shareholders personally.

4.3 Directors' liability to shareholders in terms of Company Law statutory provisions in South Africa

4.3.1 S 424 of the Companies Act 61 of 1973

Before the partial codification of directors' duties in the 2008 Act, directors' duties were not codified. However, s 424 of the 1973 Act²¹⁶ imposed a statutory liability upon directors and others, without limitation, in relation to fraudulent or reckless trading, unlawful distributions to shareholders, investor protection, and loans to directors or controlling companies. Reckless trading is understood to mean carrying on any business in a manner which lacks a genuine concern; a failure to consider the consequences of one's actions and a disregard for consequences.²¹⁷ The section may be invoked where the business of a company is being carried on recklessly, or with the intention to defraud the company's creditors. However, the conduct need not relate to the financial affairs of the company.²¹⁸ In most instances, civil liability results in criminal liability for the same conduct.²¹⁹

As mentioned in the previous chapter, the 2008 Act provides that Chapter 14 of the 1973 Act will continue to apply in respect of the winding up of insolvent companies and thus s 424 may be invoked in such instances.²²⁰ The scope of the section is wide, however can only be applied when a company is not solvent and is being wound up.²²¹

²¹⁶ Refer to the para 3.4.2 in chapter 3 of this paper where the section is set out.

²¹⁷ See *Cronje NO v Stone* 1985 (3) SA 597 (T); *Engelbrecht NO and Others v Zuma and Others* [2015] 3 All SA 590 (GP) paras 19 and 43; *Anderson and Others v Dickson Another NNO* 1985 (1) at 110; *S v Dhlamini* 1988 (2) SA 302 (A) at 308.

²¹⁸ *Gordon NO and Rennie NO v Standard Merchant Bank Ltd and Others* 1984 (2) SA 519(C) at 527B.

²¹⁹ See paras 3.1 and 3.3-3.5 of s 424.

²²⁰ See Schedule 5 item 9.

²²¹ *Engelbrecht NO and Others v Zuma and Others* [2015] 3 All SA 590 (GP) para 61 where it was said that "...a creditor need not prove a claim at a meeting of creditors at all in order to invoke the provisions of section 424 of Act 61 of 1973, indeed, it is not even necessary to liquidate a company before errant directors and managers can be held accountable for reckless or fraudulent conduct it is not even necessary to liquidate a company before errant directors and managers can be held accountable for reckless or fraudulent conduct"; Delpont P, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 290.

This is contrary to the judgment held in *Engelbrecht NO and Others v Zuma and Others*,²²² which relied on the case of *Mafikeng Mail (Pty) Ltd v Centner (No1)*²²³ where it was stated that the word ‘creditor’ does not mean a creditor with a proven claim in liquidation proceedings.²²⁴ Alternatively, in all other instances, s 424 can only be invoked if the action was instituted before the 2008 Act came into operation on 1 May 2011.²²⁵

Liability in terms of s 424 may be imputed on anyone who is found to have been knowingly a party to the carrying on of the business recklessly, and not limited to directors. This includes juristic persons.²²⁶ The test for negligence with respect to reckless trading is objective, as held in *Howard v Herrigel and Another NNO*.²²⁷ However, the judgment of *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others*²²⁸ considered same and held that it connotated more than mere negligence, at the very least gross negligence.²²⁹ The court brought the test for negligence closer to the subjective-objective dichotomy as per the standard prescribed by the duty of care and skill.²³⁰ Where the cause of action arises out of negligence, the test is therefore objective with respect to the behaviour of a reasonable person; however it is subjective where considerations are made with respect to skills and knowledge.²³¹

²²² [2015] 3 All SA 590 (GP) para 61 where it was said that “...a creditor need not prove a claim at a meeting of creditors at all in order to invoke the provisions of section 424 of Act 61 of 1973, indeed, it is not even necessary to liquidate a company before errant directors and managers can be held accountable for reckless or fraudulent conduct it is not even necessary to liquidate a company before errant directors and managers can be held accountable for reckless or fraudulent conduct”; see also Delpont P, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 290.

²²³ 1995 (4) SA 603 (W).

²²⁴ See Delpont P, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 291.

²²⁵ In *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) it was held that the wording “or otherwise” in s 424(1) very unlikely meant that the section would be available to a claimant otherwise than were the company is unable to pay its debts. However, this was *obiter*. There has also been a view that the section may apply during business rescue proceedings, see *Collard v Jatara Connect (Pty) Ltd and Others* [2017] JOL 38032 (WCC). However, Schedule 5, item 9(1) states that the Chapter 14 of the 1973 Act is only applicable in winding up.

²²⁶ *Cooper NNO v SA Mutual Life Assurance Society* 2001 (1) SA 967 (SCA).

²²⁷ 1991 (2) SA 660 (A) para 674H. This was further confirmed in *Ozinsky NO v Lloyd* 1992 (3) SA 396 (C) and *Ex parte Lebowa Development Corp Ltd* 1989 (3) SA 71 (T).

²²⁸ 1998 (2) SA 138 (SCA) at 144.

²²⁹ See also *S v Goertz* 1980 (1) SA 269 (C) at 272; *S v Parsons* 1980 (2) SA 397 (D) at 400; *S v Harper* 1981 (2) SA 638 (D) at 681 and *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 (4) SA 156 (W).

²³⁰ Stevens R and De Beer P “(2016) 28 SA Merc LJ 273 at 267.

²³¹ *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) at 143.

In imputing liability, *Philotex* held that a causal link between the alleged conduct and those liabilities was not a requirement.²³² However the Supreme Court of Appeal in *L & P Plant Hire BK en Andere v Bosch en Andere*²³³ considered a similar provision in the Close Corporations Act²³⁴ and in *orbiter* stated that the purpose of the measure was the protection of creditors, and that with respect to a creditor's claim a restrictive interpretation is to apply in that only the conduct which had a negative effect on the creditor's claim is to be considered.²³⁵ The court held that there had to be a causal link between the reckless conduct and close corporation's inability to pay.²³⁶

Harms JA in *Saincic and Others v Industro-Clean (Pty) Ltd & Another*²³⁷ referred to the *dicta* in *L & P Plant Hire* and held that a causal link is required with respect to creditors' claims. However, it has been submitted that the imputation of liability need not turn on this, and that it should not be construed to be a general requirement.²³⁸ In *Saincic* it was concluded that there were not relevant provisions in s 424 which suggested that there was any difference between it and the requirements in cases of fraud or other wrongdoings.²³⁹ In both cases, the court restricted its findings with respect to creditors, and held that if the company was able to pay its debts then they would not have a cause of action.²⁴⁰ Thus to conclude, causation is an element to be considered, however it should be of no consequence be it present or absent, unless the company is seemingly able to pay its debts.²⁴¹

S 424 supplements and is not substitutive to the remedies available in common law.²⁴² The section can further be applied in conjunction with s 423 which provides creditors a right against the directors of companies whose conduct has caused loss to creditors.

²³² *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) at 142; *Nel and Others NNO v McArthur and Others* 2003 (4) SA 142 (T) at 155-156 and *Kalinko v Nisbet* [2002] 3 All SA 294 (W) at 303.

²³³ 2002 (2) SA 662 (SCA).

²³⁴ S 64 of the Close Corporations Act 69 of 1984.

²³⁵ 2002 (2) SA 662 (SCA) at 39 and 40.

²³⁶ *Ibid*; see also Stevens R and De Beer P (2016) 28 SA Merc LJ 273 at 269.

²³⁷ 2009 (1) SA 538 (SCA).

²³⁸ See Delpont P, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 292.

²³⁹ *Ibid* at 30.

²⁴⁰ See also *Fourie v FirstRand Bank Ltd* 2013 (1) SA 204 (SCA) at paras 28-31.

²⁴¹ Stevens R and De Beer P (2016) 28 SA Merc LJ 273 at 270.

²⁴² See *Ex parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T) at 109; and *Burley Appliances v Grobbelaar NO and Others* [2003] 3 All SA 505 (C) at 514.

The onus of proof in s 424 is that the claimant must establish their case on a balance of probabilities.²⁴³ However s 424 only applies to persons who are “knowingly a party” to the carrying on of the business of the company recklessly or fraudulently.²⁴⁴ To be party to the company’s business means joining with the company in a common pursuit of the company’s business. For example, the company’s auditor cannot be ‘party to’ the carrying on of the company’s business, even if his actions were fraudulent or reckless²⁴⁵. Goldstone JA held in *Howard v Herrigel and Another*²⁴⁶ that a director has a duty to safeguard and protect the affairs of the company, and in his opinion may thus be ‘party’ to the recklessness or fraudulent conduct, without having taken positive steps in carrying on the company’s business.²⁴⁷

The terminology “with intent to defraud...for any fraudulent purpose” refers generally to a misrepresentation which leads to a belief that the company will be able to settle its debts,²⁴⁸ or as per *Engelbrecht NO* the court referred to the term “intentional deceit”.²⁴⁹ Where a company incurs debts in the course of its business, however to the knowledge of its directors there is no reasonable prospect that it will be able to settle same, the business of the company is said to be carried out with the intent to defraud those creditors.²⁵⁰ Nevertheless, this terminology does not include instances where the directors knew there existed such a risk that the company would be unable to repay its debts, but honestly believed that it would somehow be able to.²⁵¹

²⁴³ See *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) at 142, *Engelbrecht NO and Others v Zuma and Others* [2015] 3 All SA 590 (GP) para 16.

²⁴⁴ Delpont P, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 298.

²⁴⁵ *Powertech Industries Ltd v Mayberry* 1996 (2) SA 742 (W) at 749-751; *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) at 674B-D.

²⁴⁶ 1991 (2) SA 660 (A) at 674.

²⁴⁷ *Ibid.*

²⁴⁸ *S v Ostilly (1)* 1977 (4) SA 699 (D) at 724, 727-728; Delpont P, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 298.

²⁴⁹ [2015] 3 All SA 590 (GP) at para 19.

²⁵⁰ *In re William C Leitch Brothers Ltd* [1932] 2 Ch 71 at 77. See also *Heneways Freight Services (Pty) Ltd v Grogor* 2007 (2) SA 561 (SCA) at para 4; *R v Wax* 1957 (4) SA 399 (C) at 404405; *Dorklerk Investments (Pty) Ltd v Bhyat* 1980 (1) SA 443 (W) at 444; *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 (4) SA 156 (W) at 169; *S v Harper supra* at 681; and see *Orkin Bros Ltd v Bell and Others* 1921 TPD 92; *Ex parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T) at 101106; *Simon NO and Others v Mitsui and Co. Ltd* 1997 (2) SA 475 (W) at 525; *Bellini v Paulsen and Another* [2013] 2 All SA 26 (WCC) para 7; *Noordman NO and Another v De Bruin (3635/2013)* [2016] ZAFSHC 9 (29 January 2016) at para 28.

²⁵¹ *Ozinsky NO v Lloyd* 1992 (3) SA 396 (C) at 415-418, confirmed on appeal: 1995 (2) SA 915 (AD).

Where guilty of an offence in terms of s 424, the penalty is a fine or imprisonment for a period not exceeding 24 months or both, in terms of s 216(b) of the 2008 Act. In terms of s 242(4), the delinquent director (or other guilty party) may be found to be criminally liable.

Ss 22 and S 77(3)(b) have however replaced s 424 in the 2008 Act and will be discussed in paragraph 4.3.2 below.

4.3.2 *Liability, s 22 and s 218(2) of the Companies Act 71 of 2008*

It was explained earlier in this paper,²⁵² that it is noteworthy that should directors breach their statutory fiduciary duties in terms of ss 77(2)(a) and (b), and s 77(3), it is the company who would have a claim, as the duties mentioned therein are owed to the company alone. This confirms the position in common law, as discussed in paragraph 4.2 above.

S 22 of the 2008 Act prohibits the company from acting recklessly and fraudulently. The section goes hand in hand with ss 77(3)(b) and (4)(a)(i); and where guilty, a director will be liable *to the company*²⁵³ for any loss, damage or costs arising as a direct or indirect consequence of trading as prohibited in s 22. Liability here is statutory in nature, as with s 424 of the 1973 Act. However, with respect to s 77(3)(b), it must be proved that a director “acquiesced²⁵⁴ in the carrying on of the company’s business despite knowing that it was conducted in a manner prohibited by s 22(1)”. Whereas s 424 requires that a director be a ‘party to’ reckless trading. As explained earlier, it was held in *Philotex* that ‘being a party to’ the company business does not involve the ‘taking of positive steps’ and that the mere agreement in the carrying on of the business may be enough.²⁵⁵

²⁵² See chapter 3, para 3.4.1.

²⁵³ Emphasis added.

²⁵⁴ “acquiesce” meaning to agree or tacitly agree, to accept something, typically with some reluctance, to agree to do what someone wants, see *Stevens R and De Beer* (2016) 28 *SA Merc LJ* 273 at 265.

²⁵⁵ *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) at para 143. See also *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) para 674H.

S 22 is however, vastly different from s 424 but for the interpretation of ‘fraudulent purpose’, ‘recklessly’ and ‘intent to defraud’.²⁵⁶ Unlike s 424, s 22 does not require that the conduct in question be objectively unreasonable²⁵⁷, nor does it review the casual effects²⁵⁸ of the wrongful conduct.²⁵⁹ Therefore as s 22 does not require that certain elements of a delict be proved, it would therefore appear strange that a claimant, such as a shareholder, would try to enforce the duty of care and skill in s 77(3)(b) to impute liability, which in any event only gives rise to a claim to the company.²⁶⁰

S 22 is however restricted to “a company”; it does not have a provision similar to “person who is willingly a party” as in s 242. It was held in *Rabinowitz v Van Graan and Others*²⁶¹ that “a company” in this context should mean the board of directors.²⁶² However, in the recent judgment *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others*²⁶³ the court held that s 22 “...imposes duties upon the company and not on its directors”.²⁶⁴ It is submitted though that how a company may act without the directors is rather ambiguous.²⁶⁵

A further difference between s 424 and s 22 is that creditors could institute action against directors, or any person, in terms of s 424. However, a creditor would not be able to do so under s 22 and s 77(3)(b). A creditor, or shareholder who wishes not to rely on s 77(3)(b), would in such instances be able to institute a claim under

²⁵⁶ See *Motor Industry Bargaining Council v Botha and Another* (34198/2013) [2016] ZAGPPHC 615 (10 June 2016) paras 62-63.

²⁵⁷ I.e the delictual element of wrongfulness.

²⁵⁸ I.e the delictual element of causation.

²⁵⁹ Stevens R and De Beer P (2016) 28 *SA Merc LJ* 273 at 271.

²⁶⁰ *Ibid.*

²⁶¹ [2014] 3 All SA 454 (GJ).

²⁶² *Ibid* at para 22. See also *Chemfit Fin Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* (5772/2016) [2017] ZALMPPHC 27 (1 September 2017) at para 24.

²⁶³ 2019 (4) SA 569 (GP). The case regarded shareholders of African Bank Investments Limited who had instituted a claim for over R720 million against the directors and auditors of African Bank. The plaintiffs had relied on s 218(2) of the Companies Act 71 of 2008 and alleged that the defendants’ actions resulted in a loss to the shareholders, due to the diminution in the value of their shares. The claim was unsuccessful.

²⁶⁴ *Ibid* at para 20.

²⁶⁵ See Delpont P, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 106.

s 218(2).²⁶⁶ However they would have to prove causation; namely, that the contravention of the provision resulted in the loss or damage suffered.²⁶⁷

S 218(2) establishes a *sui generis* liability²⁶⁸ and provides a remedy to any person to hold any person, who contravenes any provision of the Act, liable for any loss or damages suffered as a result of the contravention. It was held in *Maake and Others v Chemfit Finechemical (Proprietary) Ltd*²⁶⁹ on appeal that as s 218(2) does not mention a provision which was contravened, the claimant needs to specify, with sufficient particulars, which contravention was attributed to the director(s) conduct and the exact damages or loss.²⁷⁰ Multiple rulings have held that third parties, such as shareholders, would in terms of s 218(2) be able to have a claim against the director(s) for breach of their fiduciary and other duties to the company, irrespective of the principle that fiduciary duties are owed to the company.²⁷¹ The Supreme Court of Appeal acknowledged in *Gihwala and Others v Grancy Property Ltd and Others*²⁷² that the relationship between shareholders and the directors which they had elected and put in office, involved a “bond of trust”.²⁷³

However *Hlumisa*,²⁷⁴ where the court referred to the judgment in *Gentiruco AG v Firestone SA (Pty) Ltd*,²⁷⁵ held that where a statute specifically creates liability for the breach of a section, for example as s 77(3)(b) does for a breach of s 22, then a general section in the same statute, such as s 218(2) cannot be relied on to establish a co-liability.²⁷⁶ In addition, if there was no claim in common law, such as with respect to the

²⁶⁶ Refer to paragraph 3.4.2 of chapter 3 of this paper. S 218(2) reads “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.”

²⁶⁷ Due to the wording “as a result of”.

²⁶⁸ *Chemfit Fin Chemicals (Pty) Ltd v Maake* 2017 JDR 1473 (LP) at para 30.

²⁶⁹ (5772/2016/HCAA04/2018) [2018] ZALMPPHC (22 November 2018).

²⁷⁰ *Ibid* at paras 27-28; see also *Rabinowitz v Van Graan and Others* 2013 (5) SA 315 (GSJ).

²⁷¹ See *Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd and Others* [2014] 3 All SA 454 (GJ) para 41; *Grancy Property Limited and Another v Gihwala and Others; In Re: Grancy Property Limited and Another v Gihwala and Others* (1961/10; 12193/11) [2014] ZAWCHC 97 (26 June 2014) para 103; confirmed in part on appeal in *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) and *Viraland Inc v Ole Media Group (Pty) Ltd and Another* (9699/2015) [2016] ZAWCHC 10 (18 February 2016) para 62; *Motor Industry Bargaining Council v Botha and Another* (34198/2013) [2016] ZAGPPHC 615 (10 June 2016) para 60; *Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others* (5772/2016) [2017] ZALMPPHC 27 (1 September 2017) para 30.

²⁷² [2016] 2 All SA 649 (SCA).

²⁷³ *Ibid* at para 144.

²⁷⁴ *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* 2019 (4) SA 569 (GP).

²⁷⁵ [1972] 1 All SA 201 (A) at 603.

²⁷⁶ 2019 (4) SA 569 (GP). at paras 30, 51, 63 and 70.

'no reflective loss' rule, then section 218(2) could not be used to establish a basis for such liability.²⁷⁷

In the case of *Lewis Group v Woollam and Others*²⁷⁸ the court made a rather arbitrary finding when it held that the duty of company directors to act honestly and in accordance with their fiduciary duties to the company was "...owned not only to the company but also to the shareholders personally..."²⁷⁹. The court's basis for its finding was founded on s 218(2).²⁸⁰ This view however does not represent the general legal view, as set out in this chapter, that directors owe fiduciary duties and other duties to the company. Further, the breach of a directors' fiduciary duty will in most instances not result in a direct personal loss or damages to the shareholder.²⁸¹ It was therefore submitted that s 218(2) is not an indication that directors owe their fiduciary duties to shareholders personally.²⁸²

4.3.3 S 218(2) of Companies Act 71 of 2008 and s 1324(10) of the Australian Corporations Act of 2001

When considering s 218(2), cognisance must be given to s 1324(10) of the *Australian Corporations Act of 2001* which is similar in nature. S 1324 provides an injunctive relief in the event of a contravention of the Act. In such instances, ASIC²⁸³ or a person whose interests have been, are or would be affected by the alleged conduct would be able to rely on this section. S 1324(10) further permits the court to not only grant the relief, but to order that the wrongdoer pay damages "to any other person". It was submitted that this section may enable a creditor to bring an action against directors, or those who exercise control and are in breach of their statutory duties.²⁸⁴ Thus such provisions

²⁷⁷ *Ibid.*

²⁷⁸ [2017] 1 All SA 192 (WCC).

²⁷⁹ *Ibid* at para 49; As a result, the court held that the fact that directors owed duties to shareholders personally, was an indication that it was not within the scope of the Companies Act that a shareholder should seek to proceed with derivative action to obtain a remedy available in terms of s 162.

²⁸⁰ Cassim R "The Launching of Delinquency Proceedings under the Companies Act 71 of 2008 by Means of the Derivative Action: *Lewis Group Limited v Woolman* 2017 (2) SA 547 (WCC)" (2017) *Orbiter* 673 at 678.

²⁸¹ *Ibid* at 680.

²⁸² *Ibid.*

²⁸³ The Australian Securities and Investments Commission.

²⁸⁴ Lombard S and Joubert T "The Legislative Response to the Shareholders v Stakeholders debate: A Comparative Overview" (2014) 14 *Journal of Corporate Law Studies* 211.

afford an external party, for example a shareholder, who would not be able to bring a derivative action or oppression remedy, the right to take action against a director for breach of a contravention in the Act if they are able to show causation, in that the breach of duties caused them a personal and direct loss or damages.²⁸⁵

4.3.4 S 20(6) of the Companies Act 71 of 2008

Concerning s 20 of the 2008 Act, pertaining to the validity of company actions, s 20(6) states:

“(6) Each shareholder of a company has a claim for damages against any person who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with—

(a) this Act; or

(b) a limitation, restriction or qualification contemplated in this section, unless that action has been ratified by the shareholders in terms of subsection (2).”

Unlike s 77 which imputes director liability in respect of the company; s 20(6) empowers any shareholder to bring a claim for damages against “any person”, including directors who intentionally, fraudulently or due to gross negligence, cause the company to do anything inconsistent with the 2008 Act or a limitation, restriction or qualification in the company’s Memorandum of incorporation. Unless, as mentioned in provision s 20(6)(b), the company has ratified it in terms of s 20(2). This negated away from the common law principle held in *Ashbury Railway Carriage and Iron Co Ltd v Richie*²⁸⁶ that *ultra vires* actions done on behalf of the company were void *ab initio* and therefore could not be ratified. However, this being said, s 20(3) prohibits the ratification of an action if it is in contravention to the 2008 Act. Therefore, shareholders cannot ratify actions of directors that are in breach of their statutory duties.²⁸⁷ The

²⁸⁵ *Ibid.*

²⁸⁶ (1875) LR 7 HL 653.

²⁸⁷ This is in agreement with what was stated in *Edwards v Halliwell* [1950] 2 All ER 1064 at 1066-1067, that there “is not room for the operation of the [Foss] rule if the alleged wrong is *ultra vires* the corporations, because the majority of members cannot confirm the transaction.”

ratification of a fraudulent act should further not be permitted under common law, and thus the section creates uncertainty as to whether this position has been altered.²⁸⁸

4.3.5 Statutory Criminal liability

In addition to civil liability which the 2008 Act gives rise to, s 214 of the Act provides certain instances where criminal liability may be imposed. A person will be guilty of an offence if the person:

- a) *is a party to the falsification of any accounting records of a company;*
- b) *with a fraudulent purpose, knowingly provided false or misleading information in any circumstances in which this Act requires the person to provide information or give notice to another person;*
- c) *was knowingly a party to an act or omission by a company calculated to defraud a creditor or employee of the company, or a holder of the company's securities, or with another fraudulent purpose; or*
- d) *is a party to the preparation, approval, dissemination or publication of a prospectus or a written statement contemplated in section 101, that contains an "untrue statement" as defined and described in section 95.*

S 216 states that a person convicted of an offence in terms of s 213(1) or 214(1) will be liable to a fine or imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or in any other case, to a fine or imprisonment for a period not exceeding 12 months or to both a fine or imprisonment.

4.4 Concluding remarks:

One of the essential principles in company law is that a company has a distinct legal personality separate from its members.²⁸⁹ As a result, the shareholders' right is a right of participation in the company in accordance with the company's memorandum of

²⁸⁸ See Delpont P, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 290.

²⁸⁹ *Salomon v Salomon & Co Ltd* [1987] AC 22 (HL); *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 550-551.

incorporation and founding documents;²⁹⁰ thus the company's property belongs to the company and not to the shareholders. In instances where a wrong is done against the company, the correct plaintiff to claim against the wrongdoer would be the company, as held in *Foss v Harbottle*. In addition, *Percival v Wright* held that directors do not owe shareholders fiduciary duties. It is only in instances where there exists a special, factual relationship between the directors and shareholders, which gives rise to fiduciary obligation, as held in *Peskin v Anderson*. Before the 2008 Act, directors' fiduciary duties were not codified, however s 424 of the 1973 Act imposed a statutory liability upon directors and others, in relation to fraudulent or reckless trading. In proving such claims, causation need not be proven. The burden of proof rests upon a balance of probabilities.

A similar provision relating to reckless trading to that of s 424 was codified within the 2008 Act, however there are considerable differences. To impute liability on a director with respect to a breach of the duty of care and skill, as per s 77(3)(b) for conduct referred to in s 22, the sections are to be read together. However, s 77(3)(b) denotes liability to the company, and thus a shareholder would not in this instance be able to hold directors liable personally. S 218(2) establishes a *sui generis* liability and provides a remedy to any person to hold any person who contravenes a provision in the 2008 Act liable for loss or damages. However, s 22 refers to the 'company' conducting its business recklessly and thus it would seem that it cannot be used in respect of the directors' actions. It is submitted though, that shareholders would be able to bring a personal action against directors for a loss or damages they suffered, due to a contravention of the Act on the directors' part. However, this would not be without difficulty, as they would have to prove causation, namely that the loss they suffered was a result of the contravention. Thus, claims for the diminution in the value of shares have not been upheld on this basis, and upon the principle of the 'no reflective loss rule'.

²⁹⁰ *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) para 9. As such, a company's property belongs to the company and not its shareholders. The rights which shareholders have in the assets of the company are deferred until the company is wound up, and then only subject to the claims of creditors; see *S v De Jager and Another* 1965 (2) SA 616 (A) at 625.

In addition, where the company acts *ultra vires* shareholders may bring a claim for damages in terms of s 20(6) against any person, including directors, who intentionally, fraudulently or due to gross negligence cause the company to act inconsistently with the Act or a restriction therein, unless the action has been ratified by the shareholders. However, fraud and a breach of fiduciary duties cannot be ratified.

The following chapter will albeit briefly, explore other statutory provisions which may impute liability on directors, in favour of shareholders.

CHAPTER 5: DIRECTORS' LIABILITY TO SHAREHOLDERS – OTHER STATUTORY PROVISIONS

5.1 Introduction

This brief chapter draws from chapter 4 and continues to explore the imposition of personal liability on directors for loss or damages caused to a shareholder while acting on behalf of the company, within the context of other statutory legislation outside the ambit of company law. The chapter is not exhaustive in its approach but highlights a few specific instances of both criminal and civil liability.

5.2 Criminal Procedures Act 51 of 1977

Directors could be held criminally liable in terms of express statutory liability within the 2008 Companies Act and other legislation. In addition to this, directors could be held criminally liable in terms of s 332 of the Criminal Procedure Act 51 of 1977.²⁹¹ Before 1997, criminal liability could be imputed to any director, for any offence, including common-law crimes and statutory offences.²⁹² S 332 provides provisions which facilitate the procedural and evidentiary aspects of the criminal prosecution of juristic persons.²⁹³ It further provides for vicarious criminal liability on companies and directors.²⁹⁴

²⁹¹ Hereinafter the CPA.

²⁹² Van der Linde "The Personal Liability of Directors for Corporate Fault – An Exploration" (2008) 20 *SA Merc LJ* 451.

²⁹³ *Ibid* at 452; s 332(2)-(4) of the Criminal Procedure Act.

²⁹⁴ S 322(1) of the CPA.

S 332(1) provides for acts or omissions by a director while executing their duties on behalf of the company. The act or omission is believed to be conducted by the company, and thus intent is not required. Only in instances where *mens rea* is a requirement for the offence, will the actual intent of the director be considered.²⁹⁵

Previously, s 332(5) would automatically impute liability on directors for offences committed by the company even without their intent, unless they could prove that they did not participate in the offence and could not have prevented it.²⁹⁶ However, in 1977 the case of *S v Coetzee and Others*²⁹⁷ went before the Constitutional Court with respect to, *inter alia*, the constitutionality of s 332(5). The majority of the court held that the section infringed the right to be presumed innocent, as entrenched in s 25(c) of the interim Constitution.²⁹⁸ The court held further that the infringement could not be justified under the limitation clause, and that with effective sanctions and increased duties, the same result could be achieved.²⁹⁹ Langa J however submitted that the provision had a legitimate aim, to protect the public from the risks generated by the actions and activities of corporates.³⁰⁰ The majority ruled that the whole provision was to be struck down, with the effect that directors can only be held liable for the company's conduct if there is another legal basis, such as common-law accessory criminal liability.³⁰¹

In common law, directors may be held liable for crimes committed by the company, as a *socius criminis*.³⁰² This is founded on the principle that should one know about a commission of the offence, and could have prevented same, but fails to do so, they

²⁹⁵ Loxton D "Criminal Liability of Companies Survey: South Africa" (2008) *Bowman Gilfillan* Available at: https://www.lexmundi.com/images/lexmundi/PDF/Business_Crimes/Crim_Liability_South%20Africa.pdf [Accessed 23 September 2019].

²⁹⁶ It was held though that to be held liable, a director would at least have had to know about the commission of the offence *R v Van den Berg & Another* 1955 (2) SA 338 (A); *S v Klopper* 1975 (4) SA 773 (A).

²⁹⁷ 1997 (3) SA 527(CC).

²⁹⁸ Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution 1993). This was as the offence occurred before the final Constitution came into force and effect.

²⁹⁹ *S v Coetzee and Others* 1997 (3) SA 527 (CC) at 548G.

³⁰⁰ *Ibid* at 563G-H, and also per Mokgoro J at 587B-D.

³⁰¹ Van der Linde (2008) 20 SA *Merc LJ* at 453-454.

³⁰² The term refers to someone who has taken part in a crime but was not the main criminal involved.

are liable as a joint wrongdoer. The scope is wide and includes various types of participation, such as 'accomplice' or 'joint wrongdoer'.³⁰³

5.3 Prevention and Combating of Corrupt Activities Act 12 of 2004

Section 34 of the Prevention and Combating of Corrupt Activities Act³⁰⁴ stipulates that any person who holds a position of authority (such as a director) and who knows or ought reasonably to have known or suspected that any other person has committed fraud involving an amount of R100 000.00 (one hundred thousand rand only) or more must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official. Any failure to do so is a criminal offence.

5.4 Social Security Law

The Unemployment Insurance Contributions Act³⁰⁵ requires that employers are to monthly deduct or withhold the amount of the employee's contribution contemplated in s 6(1)(a) from their remuneration paid or payable during that month.³⁰⁶ S 4 states that where an employer fails to deduct the contribution as contemplated in subsections (1) or (2), they are liable for such contributions. Ss 4(A) further stipulates that if an employer has deducted the employee's contribution, but does not pay it over to the Commissioner or Unemployment Insurance Commissioner, the representative employer, director and shareholder of that company who exercise control or are involved in the management of the company's overall financial affairs will be personally liable for the payment to the Commissioner or Unemployment Insurance Commissioner for a penalty as listed in s 13(2). The act does not provide a defense for liability in this instance. It is further submitted that shareholders may encounter difficulty in imputing liability to the directors with respect to loss they suffered, due to the 'no reflective loss principle'.

³⁰³ Skeen St Q 'Criminal Law' in WA Joubert (ed) *LAWSA* Vol 6(2) (2004) 129.

³⁰⁴ Act 12 of 2004.

³⁰⁵ Act 4 of 2002.

³⁰⁶ S 7.

5.5 Long Term Insurance

Some statutory provisions require that directors act in the best interests of stakeholders, for example with respect to long and short-term insurance.³⁰⁷ Duties were imposed on directors of an insurer, both long-term and short-term, in respect of a Board Notice issued by the Registrar of Long-Term Insurance³⁰⁸ with respect to s 12(1)(bD) of the Long-term Insurance Act.³⁰⁹ The Notice required that in addition to the requirements stipulated in the 2008 Act, directors would be required to act in the best interest of the insurer and policyholders, putting the interests of the insurer and policyholders ahead of his or her own interests.³¹⁰ The Insurance Act³¹¹ regulates the duties of Insurers³¹² and policyholders.³¹³ It stipulates that the controlling company, or insurer, must adopt, implement and document an effective governance framework in order to ensure that the management and oversight of the company is above board, which ultimately protects the interest of the policyholders. It is noteworthy that this provision, as well as the Notice, in effect extend directors fiduciary duties to those who hold management positions, or positions of trust and authority, and consequently this would appear to uphold the pluralist approach.³¹⁴ However the extension and liability which may arise therefrom has not been determined.³¹⁵

5.6 The Medical Schemes Act

Similarly, the Medical Schemes Act³¹⁶ in s 57(6) imposes fiduciary duties on trustees. S 57(6) reads as follows:

³⁰⁷ Delpont P, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 298.

³⁰⁸ Board Notice 158 of 2014 in *Government Gazette* 38357 of 19 December 2014. Hereinafter referred to as the "Notice".

³⁰⁹ Act 52 of 1998, the notice also applied to a similar section within the Short-term Insurance Act, Act 53 of 1998.

³¹⁰ See s 5(b) of the Notice.

³¹¹ Act 18 of 2017.

³¹² S 22 of the Insurance Act 18 of 2017.

³¹³ S 30(1)(a) of the Insurance Act 18 of 2017.

³¹⁴ See Esser I-M and Delpont P (2017) *De Jure* 97 for a detailed discussion pertaining to the enlightened shareholder value approach; *South African Company Law for the 21st century Guidelines for Corporate Law Reform Government Gazette* 26493 of 23 June 2004.

³¹⁵ Delpont P, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 298.

³¹⁶ Act 131 of 1998.

“(1) Every medical scheme shall have a board of trustees consisting of persons who are fit

and proper to manage the business contemplated by the medical scheme in accordance with the applicable laws and the rules of such medical scheme.

(2) The board of trustees shall—

(a) take all reasonable steps to ensure that the interests of beneficiaries in terms of the rules of the medical scheme and the provisions of this Act are protected at all times;

(b) act with due care, diligence, skill and good faith;

(c) take all reasonable steps to avoid conflicts of interest; and

(d) act with impartiality in respect of all beneficiaries.

In *Afrisure CC and Another v Watson NO and Another*³¹⁷ Brand JA held that the trustees of a medical scheme have fiduciary duties similar to those of directors of a company, although a medical scheme is not incorporated in terms of the Companies Act.³¹⁸ The duties arise due to the relationship between directors and their companies³¹⁹ and he could therefore not think that the second respondent would have a ‘lesser’ fiduciary duty than that which a director would owe to his or her company.³²⁰

5.7 Concluding remarks

Thus, it has been seen that directors face potential personal liability in both civil and criminal law, on several different grounds. However, shareholders may still face challenges in successfully imputing personal liability on directors for loss or damages they have suffered. This is as directors are protected through the principle of separate legal personality of the company or entity.³²¹ In addition, shareholders cannot claim for reflective loss, for example if they were to litigate in terms of the Unemployment Insurance Contributions Act, which imposes liability on directors to the Commissioner

³¹⁷ [2009] 1 All SA 1 (SCA).

³¹⁸ See *Afrisure CC and Another v Watson NO and Another* [2009] 1 All SA 1 (SCA) para 54; Delpont P, Vorster Q, Burdette D *et al Henochsberg on the Companies Act 71 of 2008* (2012) at 298.

³¹⁹ See *Robinson v Randfontein Estates Gold Mining Co. Ltd* 1921 AD 168 at 242; *Cohen NO v Segal* 1970 (3) SA 702 (W) at 706B-F; *Du Plessis v Phelps* 1995 (4) SA 165 (C) at 171.

³²⁰ *Afrisure CC and Another v Watson NO and Another* Para 54.

³²¹ Van der Linde (2008) 20 SA Merc LJ 460.

or Unemployment Insurance Commissioner; they may face difficulties in imposing further liability in respect of a loss they may have suffered.³²² However shareholders may have alternate remedies to that of company law, such as within the law of delict. This shall briefly be discussed in chapter 6.

CHAPTER 6: DIRECTORS' LIABILITY TO SHAREHOLDERS – OTHER STATUTORY PROVISIONS

6.1 Introduction

One of the benefits a company enjoys as a result of its separate juristic personality, is limited liability. Directors are somewhat protected and can 'hide' behind the company, acting as its alter ego', as their actions are seen as those of the company.³²³ However, the principle that everyone should answer for his delictual acts is recognised in South African law.³²⁴ If a third party, such as a shareholder, is injured or suffers a loss as a result of a director's wrongful acts or omissions, or a director injures a third party by fraud or negligence, the director may be held personally liable to the shareholder in terms of the common law remedies deriving from the *actio doli* and *actio legis Aquiliae* for patrimonial loss resulting from the fraud or negligence.³²⁵ Thus, though the action for a breach of directors' fiduciary duties is usually *sui generis*, the claimant may in appropriate times elect to institute a claim in delict, rather than upon company common or statutory law.³²⁶ This chapter discusses the delictual remedy available to shareholders and third parties who have suffered a loss or damages.

6.2 Discussion regarding directors' liability in delictual law

The agency approach, mentioned earlier in this paper, views directors as agents of the company, and thus their liability should be assessed taking into consideration that there is a special relationship established between the company and directors.³²⁷

³²² For example, where shareholders are also employees of the company.

³²³ *Lennard's Carrying Company Ltd v Asiatic Petroleum Company Ltd* [1915] AC 705 at 713.

³²⁴ Havenga M "Directors' Co-liability for Delicts" (2006) 18 SA Merc LJ 229 at 229.

³²⁵ Neethling J, Potgieter JM and Visser PJ 7 ed (2015) *Law of Delict* 3-6.

³²⁶ *Ibid* at 234. The claimant in *Cohen NO v Segal* 1970 (3) SA 702 (W) chose to claim delictually.

³²⁷ *Ibid* at 230.

However liability in such instances is not automatic and the facts of each case need to be assessed, in light of appropriate policy decisions.³²⁸ It is submitted that this has the result that there is very little legal certainty as to the circumstances in which liability may be imputed to directors. In the Canadian case of *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc*,³²⁹ which concerned an action for a patent infringement, it was held that the conduct which would give rise to liability was the degree and kind of personal involvement by which the director made the delictual act his or her own.³³⁰ Thus though the outcome differs on a case by case basis, the claimant or shareholder in this instance, at the very least must show that the directors' conduct showed a deliberate, knowing and willful aspect to the participation which is required in order to impose liability.³³¹ This was confirmed in *White Horse Distillers Ltd & Others v Gregson Associates Ltd & Others*³³² where it was held that a court would have to be satisfied that not only had the director committed the delictual act, but that they had done so deliberately or recklessly and in such a way as to make it their own conduct, distinct from that of the company.³³³

Imputing personal liability within the law of delict can easily be imposed, provided all the elements of a delict are proven, including causality, as well as fault in the form of *dolus* or *culpa*.³³⁴ The opinion is that the *Aquilian* action is the correct basis upon which to bring a delictual claim for liability for a breach of fiduciary duties.³³⁵ However, in *Body Corporate of Greenwood Scheme v 75/2 Sandown (Pty) Ltd*³³⁶ the court found that a delictual claim was not the correct basis upon which to bring a claim for a director's wrongful conduct in terms of s424 of the 1973 Act.³³⁷ The decisive question in delict has been held to be not whether the director committed the wrongful act but whether the director owed the injured party a duty of care. In the absence of a contractual basis for liability, such would depend on the existence of a duty of care.³³⁸

³²⁸ *Ibid.*

³²⁹ (1979) 89 DLR (3d) 195 (Fed Ct App).

³³⁰ *Ibid* at 203.

³³¹ *Ibid*, see also Havenga M (2006) 18 SA Merc LJ 229 at 230.

³³² [1975] QB 180.

³³³ *Ibid.*

³³⁴ Van der Linde (2008) 20 SA Merc LJ 450.

³³⁵ Havenga M (1996) 8 SA Merc LJ 366 at 367. See also Du Plessis JJ "Direkteure se Vertrouenspligte en die Grondslag van Aanspreeklikheid vir die Verbreking Daarvan" (1993) 56 THRHR 11 at 31-34.

³³⁶ 1999 (3) SA 480 (W).

³³⁷ *Ibid* at 488I.

³³⁸ Van der Linde (2008) 20 SA Merc LJ 451.

Lifting the corporate veil may also lead to delictual liability in certain circumstances, however the rules in which piercing the corporate veil are contained are not clear within company law, and policy considerations determine whether the veil will be disregarded in the particular circumstances.³³⁹

6.3 Concluding remarks

Directors' who have breached their fiduciary duties are held liable without fault, unless otherwise stated in statutes, as fiduciary duties impose a strict liability.³⁴⁰ This form of liability has been recognised as necessary within South Africa company law.³⁴¹ However if too restrictive than the enforcement of directors' fiduciary duties may become ineffective. Thus, legal certainty however within reasonable limits to liability should be the desired outcome.³⁴² A shareholder who wishes to bring a claim in delict would have to show that a duty of care was owed to them directly, as well as prove intent or gross negligence on the part of the director. A delictual claim will also lack legal certainty as decisions are predominantly made case by case, based on policy decisions.

CHAPTER 7: CONCLUSION

One of the essential principles in company law is that a company has a distinct legal personality separate from its members.³⁴³ As a result, the shareholders' right is a right of participation in the company in accordance with the company's memorandum of incorporation and founding documents;³⁴⁴ thus the company's property belongs to the company and not to the shareholders. In instances where a wrong is done against the company, the correct plaintiff to claim against the wrongdoer would be the company, as held in *Foss v Harbottle*. In addition, *Percival v Wright* held that directors do not

³³⁹ Havenga M (2006) 18 SA Merc LJ 229 at 235.

³⁴⁰ Havenga M (1996) 8 SA Merc LJ 366 at 371.

³⁴¹ *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 at 23-24; *S v Heller* 1971 (2) SA 29 (A) at 44A-B; *Sibex Construction (SA) (Pty) Ltd and Another v Injectaseal CC* supra at 67E.

³⁴² Havenga M (1996) 8 SA Merc LJ 366 at 370.

³⁴³ *Salomon v Salomon & Co Ltd* [1987] AC 22 (HL); *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 550-551.

³⁴⁴ *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) para 9. As such, a company's property belongs to the company and not its shareholders. The rights which shareholders have in the assets of the company are deferred until the company is wound up, and then only subject to the claims of creditors; see *S v De Jager and Another* 1965 (2) SA 616 (A) at 625.

owe shareholders fiduciary duties. It is only in instances where there exists a special, factual relationship between the directors and shareholders, which gives rise to fiduciary obligation, as held in *Peskin v Anderson*. Due to a company's separate legal identity, the imposition of personal liability on a director for damage caused to a third party while acting on behalf of the company is restricted by company law, and other statutory provisions.

Before the 2008 Act, directors' fiduciary duties were not codified, however s 424 of the 1973 Act imposed a statutory liability upon directors and others, in relation to fraudulent or reckless trading. In proving such claims, causation need not be proven. The burden of proof rests upon a balance of probabilities.

To impute liability on a director with respect to a breach of the duty of care and skill, as per s 77 of the 2008 Companies Act, the correct plaintiff would be the company, and thus a shareholder would not in this instance be able to hold directors liable personally. S 218(2) establishes a *sui generis* liability and provides a remedy to any person to hold any person who contravenes a provision in the 2008 Act liable for loss or damages. However, a claimant would have to prove causation or at least a causal link between the contravention and the loss suffered. Thus, claims for the diminution in the value of shares have not been upheld on this basis, and upon the principle of the 'no reflective loss rule'.

In addition, where the company acts *ultra vires* shareholders may bring a claim for damages in terms of s 20(6) against any person, including directors, who intentionally, fraudulently or due to gross negligence cause the company to act inconsistently with the Act or a restriction therein, unless the action has been ratified by the shareholders. However, fraud and a breach of fiduciary duties cannot be ratified.

Beyond the scope of company law, other statutory provisions impose liability on directors, such as the s 332 of the Criminal Procedure Act, s 34 of the Prevention and Combating of Corrupt Activities Act, s 4 of the Unemployment Insurance Contributions Act, and s 12(1)(bD) of the Long-term Insurance Act. However, in most of these instances, the directors' duties are owed to a specified state organ or party. Delictual law provides an alternative remedy to shareholders, as per the principle that everyone

must answer for his or her delictual acts. However, in addition to the requisite that the elements of a delict be proven, the claimant would have to prove, in the absence of a contractual basis for the claim, that the directors owed a duty of care to them directly. A delictual claim will also lack legal certainty as decisions are predominantly made case by case, based on policy decisions.

It is therefore submitted that in essence shareholders are left with little recourse for harms or loss which they believe they suffered as the result of the conduct of a director(s). This is as the company is separate legal person, and directors' duties are to the company alone. It is submitted that to hold that directors owed a further fiduciary duty directly to shareholders would result in an unfair and uncertain burden on the board, which would put them in a position where their actions would either conflict with shareholders or the interests of the company. Lastly, it is submitted that there is an inherent risk involved in being a shareholder and holding a right of participation within the company which shareholders would have acknowledged; however, this being said, a company's separate existence remains a figment of law, which may be curtailed or withdrawn when the very existence is being abused.

BIBLIOGRAPHY

BOOKS

Beuthin RC and Luiz SM *Beuthin's Basic Company Law* 3 ed (2000) Butterworths: Durban

Cassim F, Cassim M, Cassim R, Jooste R, Shev J and Yeats J *Contemporary Company Law* 2 ed (2012) Juta: Cape Town

Cilliers HS, Benade ML, Hening JJ, Du Plessis JJ, Delport PA, De Koker L and Pretorius JT *Corporate Law* 3 ed (2000) Butterworths: Durban

Davies PL, Worthington S, Micheler E and Gower LCB *Gower and Davies' Principles of Modern Company Law* 9 ed (2012) Sweet & Maxwell: United Kingdom

Delport PA, Vorster Q, Burdette D, Esser IM and Lombard S *Henochsberg on the Companies Act 71 of 2008* (2012) Butterworths: Durban

Jorge A "Corporate Governance Regulation in South Africa" in Campbell D and Woodley S (ed) *Trends and Developments in Corporate Governance: The Comparative Law Yearbook of International Business* (2004) Kluwer Law International: The Hague

Lipton P and Herzberg A *Understanding Company Law* 19 ed (2018) Law Book Co.: Sydney

Neethling J, Potgieter JM and Visser PJ 7 ed (2015) *Law of Delict* LexisNexis: Durban

Steyn C and Everingham G *The New Companies Act Unlocked* (2011) Siber Ink: Cape Town

JOURNAL ARTICLES

Cassim MF "Da Silva v C H Chemicals (Pty) Ltd: Fiduciary Duties of Resigning Directors" (2009) *SALJ* 126 (1) 61

Cassim R "Piercing the corporate veil 'Unconscionable abuse' under the Companies Act 71 of 2008" (2012) August *DR* 22

Cassim R “The Launching of Delinquency Proceedings under the Companies Act 71 of 2008 by Means of the Derivative Action: *Lewis Group Limited v Woolman* 2017 (2) SA 547 (WCC)” (2017) *Orbiter* 673

De Jong B “Shareholders Claims for Reflective Loss: A Comparative Legal Analysis” 14 (2013) *EBOR* 97

Du Plessis JJ “Direkteure se Vertrouenspligte en die Grondslag van Aanspreeklikheid vir die Verbreking Daarvan” (1993) 56 *THRHR* 11

Du Plessis JJ “A Comparative analysis of Directors’ Duty of Care, Skill and Diligence in South Africa and Australia” (2010) *Acta Juridica* 263

Esser I-M and Delpont P “The protection of stakeholders: The South African Social and ethics committee and the United Kingdom’s enlightened shareholder value approach: Part 1” (2017) *De Jure* 97

Havenga M “Breach of Directors Fiduciary Duties: Liability on What Basis?” (1996) 8 *SA Merc LJ* 366

Havenga M “The business judgment rule – Should we follow the Australian example?” (2000) 12 *SA Merc LJ* 25

Havenga M “Directors’ Co-liability for Delicts” (2006) 18 *SA Merc LJ* 229

Havenga M “Directors’ exploitation of corporate opportunities and the Companies Act 71 of 2008” (2013) *TSAR* 257

Idensohn K “The Regulation of Shadow director’s” (2011) 22 *SA Merc LJ* 326

Kanamugire J C and Chimuka T V “The Directors’ Duty to Exercise Care and Skill in Contemporary South African Company Law and the Business Judgment Rule” (2014) 5 *Mediterr J Soc Sci* 70

Levenberg PN “The Mystery of the Corporate Veil: Comparing Anglo-American Jurisdictions (2019) 7 *Penn St JLIA* 115

Lombard S and Joubert T “The Legislative Response to the Shareholders v Stakeholders debate: A Comparative Overview” (2014) 14 *Journal of Corporate Law Studies* 211

Phungula S “Lessons to be learned from reckless and fraudulent trading by a company: Section 424(1) of the Companies Act 61 of 1973 and sections 22 and 77(3)(b) of the Companies Act 71 of 2008” (2016) 2 *SA Merc LJ* 238

Restrepo C A “The Need for Increased Possibility of Director Liability: Refusal to Dismiss In re Wells Fargo & Co. Shareholder Derivative Litigation, a Step in the right direction” (2019) 60 *Boston College Law Review* 1689

Rider BAK “Percival v Wright Per Incuriam” *The Modern Law Review* 40 (1977) 471

Schoeman N “Piercing the corporate veil under the New Companies Act” (2012) June *DR* 10

Skeen St Q ‘Criminal Law’ in WA Joubert (ed) *LAWSA Vol 6(2)* (2004) 129

Stevens R and De Beer P “The duty of care and skill, and reckless trading: Remedies in flux” (2016) 28 *SA Merc LJ* 273

Tan CH, Wang J and Hofmann C “Piercing the Corporate Veil: Historical, Theoretical & Comparative Perspectives” (2019) 16 *Berkeley Business Law Journal* 139

Van der Linde “The Personal Liability of Directors for Corporate Fault – An Exploration” (2008) 20 *SA Merc LJ* 439

Williams RC “Attributes or Consequences of The Company’s Corporate Personality” in Joubert WA (ed) *LAWSA Vol4(1)* (2012) 67

SOUTH AFRICAN CASE LAW

ABSA Bank Bpk v CL von Abo Farms BK 1999 (3) SA 262 (O)

African Claim & Land Co Ltd v Langermann 1905 TS 494

Afrisure CC and Another v Watson NO and Another [2009] 1 All SA 1 (SCA)

Anderson and Others v Dickson Another NNO 1985 (1) SA 93 (N)

Atlas Maritime Co SA v Avalon Maritime Ltd (No.1) [1991] 4 All SA 769

Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173

Bellini v Paulsen and Another [2013] 2 All SA 26 (WCC)

Big Catch Fishing Tackle Proprietary Limited and Others v Kemp and Others (17281/18) [2019] ZAWCHC 20 (5 March 2019)

Body Corporate of Greenwood Scheme v 75/2 Sandown (Pty) Ltd (1999) (3) SA 480 (W)

Burley Appliances v Grobbelaar NO and Others [2003] 3 All SA 505 (C)

Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others 1995 (4) SA 790 (A)

Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another 1990 (3) SA 547 (AD)

Chemfit Fine Chemicals (Pty) Ltd t.a SA Premix v Maake and Others (5772/2016) [2017] ZALMPPHC 27 (1 September 2017)

Cohen NO v Segal 1970 (3) SA 702 (W)

Collard v Jatara Connect (Pty) Ltd and Others [2017] JOL 38032 (WCC)

Cooper NNO v SA Mutual Life Assurance Society 2001 (1) SA 967 (SCA)

Cronje NO v Stone 1985 (3) SA 597 (T)

Cuninghame and Another v First Ready Development 249 [2010] 1 All SA 473 (SCA)

Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd 2000 (3) SA 806 (C)

Da Silva v CH Chemicals (Pty) Ltd 2008 (6) SA 620 (SCA)

Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530

Dhlomo NO v Natal Newspapers (Pty) Ltd 1989 (1) SA 945 (A)

Dorbyl Ltd v Vorster 2011 (5) SA 575 (GSJ)

Dorklerk Investments (Pty) Ltd v Bhyat 1980 (1) SA 443 (W)

Du Plessis NO v Phelps 1995 (4) SA 165 (C)

Ebrahim and Another v Airport Cold Storage (Pty) Ltd 2008 (6) SA 585 (SCA)

Ex parte Donaldson 1947 (3) SA 170 (T)

Ex parte Gore and Otherls NNO 2013 (3) SA 382 (WCC)

Ex parte Lebowa Development Corporation Ltd 1989 (3) SA 71 (T)

Extrasure Travel Insurance Ltd v Scattergood [2003] 1 BCLC 598

Fisheries Development Corporation of SA Ltd v Jorgensen 1980 (4) SA 156 (W)

Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd 2009 (2) SA 150 (SCA)

Gentiruco AG v Firestone SA (Pty) Ltd [1972] 1 All SA 201

Gheri v Tiber Developments (Pty) Ltd 2007 (4) SA 536 (SCA)

Golf Estates (Pty) Ltd v Malherbe and Others 1997 (1) SA 873 (C)

Gordon NO and Rennie NO v Standard Merchant Bank Ltd and Others 1984 (2) SA 519 (C).

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

Grancy Property Limited and Another v Gihwala and Others; In Re: Grancy Property Limited and Another v Gihwala and Others (1961/10; 12193/11) [2014] ZAWCHC 97 (26 June 2014)

Heneways Freight Services (Pty) Ltd v Grogor 2007 (2) SA 561 (SCA)

Hillock and Another v Hilsage Investments (Pty) Ltd 1975 (1) SA 508 (A)

Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others 2019 (4) SA 569 (GP)

Howard v Herrigel and Another NNO 1991 (2) SA 660 (A)

Huey Extreme Club v McDonald t/a Sport Helicopters 2005 (1) SA 485 (C)

Hülse-Reutter and Others v Götde 2001 (4) SA 1336 (SCA)

Itzikowitz v ABSA Bank Ltd 2016 (4) SA 291 (SCA)

Kalinko v Nisbet and Others 2002 (5) SA 766 (W)

Kruger Investments Group Limited and Another v Nuberry Holdings Limited and Others (14184/15) [2015] ZAWCHC 159

L & P Plant Hire BK en Andere v Bosch en Andere 2002 (2) SA 662 (SCA)

Letseng Diamonds Ltd v JCI Ltd; Trinity Asset Management (Pty) Ltd v Investec Bank Ltd 2007 (5) SA 564 (W)

Levin v Felt & Tweeds Ltd 1951 (2) SA 401 (A)

Lewis Group v Woollam and Others (No1) [2017] 1 All SA 192 (WCC)

Maake and Others v Chemfit Finechemical (Proprietary) Ltd (5772/2016, HCAA04/2018) [2018] ZALMPPHC 71 (22 November 2018)

Mafeking Mail (Pty) Ltd v Centner (No1) 1995 (4) SA 603 (W)

Magnus Diamond Mining Syndicate v Macdonald and Hawthorne 1909 ORC 65

Manong & Associates (Pty) Ltd v City Manager, City of Cape Town and Another 2009 (1) SA 644 (EqC).

McLelland v Hulett and Others 1992 (1) SA 456 (D)

Media 24 v SA Taxi Securitisation 2011 (5) SA 329 (SCA)

Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC)

Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co. Ltd 2006 (5) SA 333 (W)

Mitchell's Plain Town Centre v McLeod 1996 (4) SA 159 (A)

Motor Industry Bargaining Council v Botha and Another (34198/2013) [2016] ZAGPPHC 615 (10 June 2016)

Nel and Others NNO v McArthur and Others 2003 (4) SA 142 (T)

Noordman NO and Another v De Bruin 2016 (3635/2013) [2016] ZASHC 9 (29 January 2016)

Novick v Comair Holdings Ltd 1979 (2) SA 116 (W) 153

Orkin Bros Ltd v Bell and Others 1921 TPD 92

Ozinsky NO v Lloyd 1992 (3) SA 396 (C)

Ozinsky NO v Lloyd 1995 (2) SA 915 (AD)

Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)

Phillips v Fieldstone Africa (Pty) Ltd (2004) 1 All SA 150 (SCA)

Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others 1998 (2) SA 138 (SCA)

Powertech Industries Ltd v Mayberry 1996 (2) SA 742 (W)

R v Milne and Erleigh (7) 1951 (1) SA 791 (A)

R v Van den Berg & Another 1955 (2) SA 338 (A)

R v Wax 1957 (4) SA 399 (C)

Rabinowitz v Van Graan and Others [2014] 3 All SA 454 (GJ)

Roestorf and Aoter NNO and Another v Johns 2013 (2) SA 459 (KZD)

Robinson v Randfontein Estates Gold Mining Co. Ltd 1921 AD 168

S v Coetzee and Others 1997 (3) SA 527 (CC)

S v Dhlamini 1988 (2) SA 302 (A)

S v Goertz 1980 (1) SA 269 (C)

S v Harper 1981 (2) SA 638 (D)

S v Heller 1971 (2) SA 29 (A)

S v Klopper 1975 (4) SA 773 (A)

S v Ostilly (1) 1977 (4) SA 699 (D)

S v Parsons 1980 (2) SA 397 (D)

S v Shaban 1965 (4) SA 646 (W)

Saincic and Others v Industro-Clean (Pty) Ltd & Another 2009 (1) SA 538 (SCA)

Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd and Others [2014] 3 All SA 454 (GJ)

Sibex Construction (SA) (Pty) Ltd and Another v Injectaseal CC 1988 (2) SA 54 (T)

Simon NO and Others v Mitsui and Co. Ltd 1997 (2) SA 475 (W)

South African Fabrics Ltd v Millman NO 1972 (4) SA 592 (A)

Symington v Pretoria-Oos Privaat Hospitaal Bedryf (Pty) Ltd [2005] 4 All SA 403 (SCA)

Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4

Transvaal Cold Storage Co Ltd v Palmer 1921 AD 168

Treasure Trove Diamond v Hyman 1928 AD 464

Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and Others 2014 (5) SA 179 (WCC)

Viraland Inc v Ole Media Group (Pty) Ltd and Another (9699/2015) [2016] ZAWCHC 10 (18 February 2016)

FOREIGN CASE LAW

Australasian Case Law

Brunninghausen v Glavanics (1999) 46 NSWLR 538

Daniels v Anderson (1995) 13 ACLC 614 (CA) NSW

Pioneer Concrete Services Ltd v Yelnah Pty Ltd (1986) 5 NSWLR 254

Canadian Case Law

Canadian Aero Service Ltd v O'Malley (1973) 40 DLR (3d) 371 (SCC) 381

Cooks v Deeks [1916] 1 AC 554

Mentmore Manufacturing Co v National Merchandise Manufacturing Co (1978) 89 DLR (3d) 195

Teck Corporation Ltd v Millar 1972 33 DLR (3D) 288

New Zealand Case Law

Coleman v Myers [1977] 2 NZLR 225

United Kingdom Case Law

Adams v Cape Industries plc 1990 Ch 433 (CA)

Allen v Hyatt (1914) 30 TLR 444

Ashbury Railway Carriage and Iron Co Ltd v Richie (1875) LR 7 HL 653

Briess v. Woolley [1954] 2 WLR 832 [HL]

Daimler Co Ltd v Continental Tyre and Rubber Co [1916] 2 AC 307

Edwards v Halliwell [1950] 2 All ER 1064

Fanning v Murtagh [2009] 1 IR 551

Foss v Harbottle (1864) 2 Hare 461

Fulham Football Club Ltd v Cabra Estates plc [1994] 1 BCLC 363

Howard Smith Ltd v Ampol Petroleum Ltd 1945 AC 821

Industrial Development Consultants Ltd v Cooley [1972] 1 WLR 443

In re Equitable Fire Insurance Co Ltd [1925] 1 Ch 407 (CA)

In re Smith & Fawcett Ltd [1942] Ch 304 (CA)

In re William C Leitch Brothers Ltd [1932] 2 Ch 71

Johnson v Gore Wood & Co [2001] 1 All ER 481

Lagunas Nitrate Co v Lagunas Nitrate Syndicate Ltd [1899] 2 Ch 392

Lennard's Carrying Company Ltd v Asiatic Petroleum Company Ltd [1915] AC

Overend & Gurney Co v Gibb (1872) LR 5 HL 480

Parke v The Daily News Ltd [1962] Ch 927

Parker v McKenna (1874) LR 10 Ch App 96

Pender v Lushington (1877) 6 Ch D 70

Percival v Wright [1902] 2 Ch 421

Pergamon Press Ltd v Maxwell [1970] 2 All ER 809

Peskin v Anderson [2001] 1 BCLC 372

Piercy v S Mills & Co Ltd 1920 1 Ch 77

Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2) [1982] CH 204

Re Brazilian Rubber Plantations and Estates Ltd (1911) 1 Ch 425

Regal (Hastings) Limited v Gulliver and Others [1967] 2 AC 134

Salomon v Salomon & Co Ltd [1897] AC 22

Smith v Croft (No 2) [1988] Ch 114

Woolfson v Strathclyde Regional Council [1978] 2 EGLR 19

Wallersteiner v Moir (No 2) [1975] 1 All ER 849

White Horse Distillers Ltd & Others v Gregson Associates Ltd & Others [1975] QB 180

United States of America Case Law

Aronson v Lewis 473 A.2d 805 (Del. 1984)

William H Sanders v. Roselawn Memorial Gardens Incorporated 159 S.E.2d 784, 800 (W. Va.1968)

LEGISLATION AND GOVERNMENT PUBLICATIONS

South African Legislation and Government Publications

Board Notice 158 of 2014 in *Government Gazette* 38357 of 19 December 2014

Companies Act 61 of 1973

Companies Act 71 of 2008

Criminal Procedure Act 51 of 1977

Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution 1993)

Prevention and Combating of Corrupt Activities Act 12 of 2004

South African Company law for the 21st century Guidelines for Corporate Law Reform
Government Gazette 26493 of 23 June 2004

Foreign Legislation

Australian Corporations Act of 2001

INTERNET SOURCES

Anonymous "Corporate Governance: A Guide for Directors" (2019) *Cliffe Dekker Hofmeyr* Available at:

<https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/sectors/downloads/Corporate-governance-A-directors-guide.pdf> [Accessed 14 May 2019]

Anonymous "Piercing the corporate veil: when directors can be held responsible for losses" *C & A Friedlander Attorneys* Available at:

<https://caf.co.za/2018/06/05/piercing-the-corporate-veil-when-directors-can-be-held-responsible-for-losses/> [accessed 4 September 2019]

Levenstein E and Harduth N "Claims Against Directors in terms of the Companies Act, 2008" (6 July 2012) *Werksmans Legal Brief* Available at:

<https://www.werksmans.com/legal-updates-and-opinions/claims-against-directors-in-terms-of-the-companies-act-2008/> [Accessed 5 May 2019]

Lewis A "Piercing the corporate veil has been extended" (17 March 2013) *The South African Institute of Tax Professionals* Available at:

<https://www.thesait.org.za/news/119587/Piercing-the-corporate-veil-has-been-extended.htm> [accessed 18 July 2019]

Loxton D "Criminal Liability of Companies Survey: South Africa" (2008) *Bowman Gilfillan* Available at:

https://www.lexmundi.com/images/lexmundi/PDF/Business_Crimes/Crim_Liability_South%20Africa.pdf [Accessed 23 September 2019]

Maple T “Liability of directors or shareholders – Can you pierce the veil?” (6 July 2016)
Field Seymour Parkes Attorneys Available at: <https://www.fsp-law.com/liability-of-directors-or-shareholders-can-you-pierce-the-veil/> [Accessed 11 October 2019]