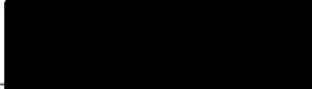




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:18374/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
<u>17 August 2023</u> DATE  SIGNATURE	

LOMASTEP (PTY) LTD

Plaintiff/Respondent

And

CARLOS ALBERTO PEREIRA GALEGO

First Defendant/Excipient

MANUEL ANTONION DA FONSECA

VASCONCELOS DA MOTA

Second Defendant/Excipient

NUNO MIGUEL DE SOUSA ALEXANDRE

Third Defendant/Excipient

CARLOS ALBERTO GRILO PASCOAL

Fourth Defendant/Excipient

TEMBALIKAYISE JOHN LUPEPE

Fifth Defendant/Excipient

MHANSI MALABA

Sixth Defendant/Excipient

CARMEN KHETIWE NONDUMISO MCCLAIN

Seventh Defendant/Excipient

NOLOTISO LULAMA MHLONGO

Eighth Defendant/Excipient

PEDRO MIGUEK PEREIRA GONCALVES

Ninth Defendant/Excipient

JUDGMENT – LEAVE TO APPEAL

NEUKIRCHER J:

1] On 27 June 2023 I delivered a judgment in which I upheld an exception taken by the defendants against the plaintiff's particulars of claim. The issue in the action revolves around the personal liability of directors of a company – in this case the defendants – in terms of s 218(2) of the Companies Act 71 of 2008 (the New Companies Act). In upholding the exception, the following order was granted:

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

2] The reasons for the order are set out in the judgment and need not be repeated herein.

3] Before me is an application for leave to appeal, filed by the plaintiff (Lomastep) against the whole of the judgment and order. In order to avoid any confusion, the parties are referred to as they appear in the action pleadings. The parties agreed that

the application for leave to appeal would be decided on the Notice for Leave to Appeal and the heads of argument that were filed by the parties.

4] The plaintiff argues that the court erred on not giving a wider meaning to s 218(2) of the New Companies Act and furthermore erred in failing to find that s 77(3)(b) of the New Companies Act, properly interpreted, does not restrict the general ambit of s 218(2). The plaintiff argues that this is because the purpose of the New Companies Act is to enhance the responsibility of directors of companies which it does by holding directors liable for delinquent conduct to all persons in respect of any breach of the New Companies Act. It argues that the restrictive interpretation placed on s 218(2) is inconsistent with the purpose of the New Companies Act.

5] The plaintiff argues thus that leave to appeal should be granted as:

- (a) there are conflicting judgments handed down in the Gauteng Division on the interpretation of s 218(2);¹ and
- (b) the judgment raises an issue of fundamental importance in company law, being the extent to which directors of companies may be held liable to third parties for their delinquent conduct.

6] The argument is based on the fact that in **Rabinowitz v Van Graan**² the court allowed such a claim; however, in **De Bruyn v Steinhoff International Holdings NV and others**³ the court found that the remedy was not available to the creditors. The defendants argue that it is not simply these two judgments that are applicable and that

¹ S17(1)(a)(ii) of the Superior Courts Act 10 of 2013

² 2013 (5) SA 315 (GJ)

³ 2022 (1) SA 422 (GP)

the issue has been dispositively decided in that two further courts have declined to follow the **Rabinowitz** decision.⁴

7] In my view it is clear from the Supreme Court of Appeal (SCA) judgment in the **Hlumisa Investment Holdings** matter, that the issues raised before me, and in the previous judgments in this Division, were not expressly raised before that court and therefore the SCA has not had an opportunity to pronounce on those issues. I am therefore of the view that s17(1)(a)(ii) does find application here. I am also of the view that it is in the interests of justice that the SCA has a final word on the issue.

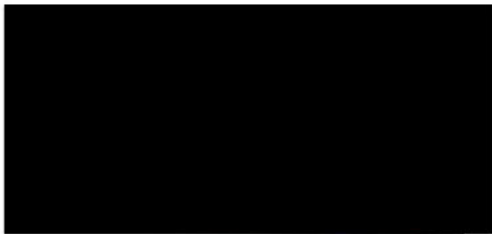
8] Given this, I am of the view that the requirements set out in s 17(1) of the Superior Courts Act have been met and that leave to appeal should be granted to the Supreme Court of Appeal.

ORDER

9] The order I make is the following:

- 9.1 The plaintiff is granted leave to appeal to the Supreme Court of Appeal.
- 9.2 Costs shall be costs in the appeal, which costs shall include the costs consequent upon the employment of two counsel.

⁴ Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others [2019] 2 SA 569 (GP) which was confirmed on appeal: [2020] 3 All SA 650 (SCA); Venator Africa (Pty) Ltd v Bekker and Another [2022] 4 All SA 600 (KZP)



B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected, and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 17 August 2023.

Appearances:

On behalf of plaintiff/applicant	:	Adv P Ellis SC; with him Adv R Ellis
Instructed by	:	Mina Raptis Inc
On behalf of defendants/respondents	:	Adv N Redman SC; with him Adv Z Cornelissen
Instructed by	:	C de Villiers Attorneys

Heads of argument received on	:	15 August 2023
Date of judgment	:	17 August 2023