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# The Convergence of Labour and Commercial Law: Executive Dismissals in Contemporary South Africa.

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**Signed at Cape Town this 17th day of February 2014**

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**The Convergence of Labour and Commercial Law: Executive Dismissals in Contemporary South Africa.**

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## I Acknowledgments

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Koos taught me the finer intricacies of being a lawyer, the delicate art of cross-examination but most importantly Koos taught me compassion and that a man must follow his passion. I dedicate this dissertation to you and the abundance of knowledge you have taught me.

## II List of Abbreviations

**The following is a list of the most commonly used abbreviations in this dissertation.**

| | |
|---|---|
| **CCMA** | **Commission for Conciliation, Mediation and Arbitration** |
| **LC** | **Labour Court** |
| **LAC** | **Labour Appeals Court** |
| **SCA** | **Supreme Court of Appeal** |
| **LRA** | **Labour Relations Act** |
| **FWA** | **Fair Work Act** |
| **SEA** | **Singapore Employment Act** |
| **EU** | **European Union** |
| **EPA** | **Employment Protection Act** |
| **USA** | **United States of America** |
| **ILO** | **International Labour Organization** |
| **FLSA** | **Fair Labour Standards Act** |
| **CLC** | **Canada Labour Code** |

# 1. Introduction

The intricacies and legalities concerning the notion that under certain circumstances a director may be regarded as an employee have given rise to much litigation in the past two decades. It is humbly submitted that few scenarios have created as much confusion and grief as the aforementioned idea in our South African jurisprudence.

For the past two decades lawyers have jousted in the CCMA, Labour Court and Labour Appeals Court on the question of whether or not a company director is an employee and subject to the protection from unfair dismissal contained in the LRA.

This dissertation approaches the controversial topic by examining the history and origin of the concept of the office of director. The legislative framework concerning company and labour law is examined along with the judicial decisions which have shaped this particular aspect of the law. A brief overview of comparative labour law is discussed in an attempt to gain a multi-national view of the matter.

Throughout this dissertation it is of cardinal importance to view the text through both the lenses of Company- and Employment Law. Failing to do so will have the inevitable result that one does not properly reflect and weigh in on the theoretical implications associated with the development of both these branches of law.

As with any systematic analysis it is imperative to elucidate certain key features and fundamental aspects to ensure that the subject matter in question is understood in its entirety.

A brief excursion to the grass roots of company law, and more specifically, scrutinization of the *sui generis* nature of the concept of a company, director and a board of directors is warranted.

In the following chapter the abovementioned concepts will be explored to ensure that a thorough understanding of the fundamentals of company law accompany this study into the unique convergence of labour and commercial law.

The objective of this dissertation is to ascertain to which extent the statement that a dismissal of an executive is *sui generis* and differs from that of a regular employee proves correct. Accordingly, it is necessary to venture into

the unique aspects of the Director's fiduciary role in the company and the boards they serve in order to fully understand why it has been argued that a director is a *sui generis* employee.

## *1.1* The origins of the concepts of Directors, Boards and Companies

### ***1.1.1*** **The 1694 Charter of the Bank of England**

Whilst it is generally accepted history that the origins of the concept of "Director" and a subsequent board of Directors is estimated to be several hundred years old scholars are unable to pinpoint the exact time and place. Contrary to popular belief the existence of companies and directors predates the industrial revolution when a vast array of machines were engineered to increase productivity and technology advanced in leaps and bounds.

The earliest known recording of the term "Directors" is contained in the 1694 Charter of the Bank of England ("the Charter").[1] The Charter also referred to a court of proprietors which were responsible for electing the Directors.[2] One can only surmise that this would be contemporaneously be known as shareholders exercising voting rights at a meeting of shareholders or annual general meeting.

The Charter provided that there had to be a *quorum* of twenty four Directors, weekly meetings had to be held regarding the running of the affairs of the Board (and inversely, the Bank of England) and one third of the Directors could not run for re-election.[3]

It is interesting to note that many of the requirements placed upon the bank of England form part of the standard parcel of clauses found in the articles of association of a varied and diverse range of companies in the contemporary world. Quorum and tenure clauses are found in the articles of association or similar founding documents of nearly every company to ensure that the directors remain accountable to the shareholders of the company.

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1 O'Donnel, C. *Origins of the Corporate Executive* 26 Bull Bus Hist Soc'y 55 (1951).

2 Gevurtz, F.A. *The Historical and Political Origins of The Corporote Board of Directors* Hofstra Law Review.

3 Ibid p 110.

### 1.1.2 The English Trading Companies

During the 1600-1700's the English, using their status as the old world's foremost naval superpower, employed the use of trading companies to charter and explore the New World. These trading companies, *the East India Company, South Sea Company and the Levant Company inter alia,* provide evidence that early formations of corporate structures, reminiscent of our modern day Board of Directors, were intimately involved in the management of the entities.

The East India Company for example was provided with its managing board by Queen Elizabeth I.[4]

It is evident that the subsequent charters to the New World, in particular the Americas', provided the catalyst for the reception and formation of the corporate board in North America.

The Bank of America provided in its Charter of 1791 for a twenty five member board of directors, with the *caveat* that a quarter of its directors were barred from re-election. It is submitted that the causal link between the 1791 Charter and the English Charter of 1694 is quite evident.[5]

### 1.1.3 The Dutch East India Company

The Dutch East India Company, which was eventually responsible for the construction of a supply post on what is today known as the Cape Peninsula, also functioned in accordance with a board of directors-like structure.

This "board" was known as the *bewindhebbers,* it consisted of sixty members from various Dutch towns and could likely have attributed to the eventual reception of early forms of corporate governance in South Africa.[6] This possibility is also shadowed by the fact that our Law of Contract is shaped, and to a large extent inherited, from the English Law of Contract.

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4 The "Board" was known as The Governor and Company of Merchants of London , Trading in the West Indies.

5 Ibid p. 125

6 Ibid p.127

It is submitted that it is an impressively difficult task to ascertain exactly when and where the first Board of Directors came into practice. The aforementioned information provides a base point from where speculation can be made as to where the concept of a Board of Directors was first introduced. A far easier enquiry is why it was necessary to formulate the concept. The notion of a board of directors responsible for the management and long term viability of a company may seem obvious and is taken for granted in modern civilization but the establishment thereof was a novel and exciting development of mercantile law.

## *1.2 The* raison *d'*être

It has already been established (to a certain extent permissible with the limited information available) that the first signs of something remotely similar to our modern Board of Directors and executives originated from England.

England, with its rich feudal history and concomitant arrangement of villages living beneath the authority of the Feudal Lord who in turn served as the subordinate of the King (or Queen) was perhaps the perfect locale for the development of the concept of a Board of Directors.

The old fable of King Arthur and his Knights of the Round Table seem an apt enough simile for a Board of Directors with its Chief Executive Officer (Arthur), Directors (the Knights) and shareholders (the bourgeoisie in a benevolent Monarchy).

In reality (perhaps unfortunately), early forms of corporate governance appeared more readily in the local clergy and political spheres of the Middle Ages than descended from myth.[7]

The discovery of the new world and the impending riches which became available via the use of trading companies as proxies presented a new type of dilemma for aspiring businessmen. How do we manage this massive and

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[7] Gevurtz, F. A. *The European Origins and the Spread of the Corporate Board of Directors* p 926 Stetson Law Revied 2004.

intricate business model? A rather obvious solution came in the way the local Church was composed.[8]

Medieval Europe, and England specifically, was dominated by the Christian theology and the Roman Catholic Church. The clergy was held in high esteem and separation of state and church was but a notion held by only a few of the more rebellious philosophers. It was therefore only natural that the structure of the local Church would be adopted to a certain extent.

An early example of basic corporate governance exercised by the Church can be found in the conversion of the Roman Maxim "*quod omnes tangit ab omnibus approbetur", or,* "What touches all, must be approved by all" from a guideline to codified Canon Law.[9] The aforementioned principle eventually migrated to other entities or collective groups of people.[10]

It can be readily accepted that the adoption of governance structures by early medieval associations was motivated by the need for effective management of the commercial affairs of ever expanding companies. The rise in trade and the accessibility of foreign markets coupled with the increased need for goods and services due to colonisation and expansion into new territories served as the perfect catalyst for the transition of guilds into mercantile powerhouses.

The aforementioned attempts to understand and answer the question of how and when the notion of a company, directors and their concomitant boards, were established. It does not answer what the purpose of the board was.

Moving away from the historical origin and more to the conceptual rationale for a corporate board the following question begs answering; is it appropriate to state that sole purpose of a board of directors is to ensure improved management of commercial affairs?

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8 Further examples were found in parliamentary assemblies, town councils, mercantile guilds. All of the aforementioned entities were normally run by an elected representative body. Gevurtz, F. A. *The European Origins and the Spread of the Corporate Board of Directors* p 926 Stetson Law Review 2004.

9 See in this regard Watner, C. *Quod Omnes Tangit: Consent Theory in the Radical Libertarian Tradition in the Middle Ages* Journal of Libertarian Studies Volume 19 Edition 2 2005 P67 and Gevurtz *European Origins* p 949 – 950.

10 Gervurtz, Origins p 950.

The Code of Corporate Practices and Conduct contained in the King Report on Corporate Governance for South Africa[11] provides that, *inter alia,* the Board is responsible for determining the purpose and values of the company, the Board should exercise leadership and implement strategy to ensure the company fulfils the purpose which it was created for and the Board should ensure compliance with applicable legislation.

It appears from the above mentioned that the true role and purpose of the Board entails a trichotomy between effective management of the company's affairs, strategic leadership and acting as curators in the best interests of the company.

The Board is duty bound to act in the best interests of the company and to ensure that its function is carried out properly it relies on the expertise and actions taken by its individual directors. The following section will examine the nature and scope of a Director's role under the common law and statutory law.

### 1.3 Directors under the Common Law

It cannot be disputed that Directors hold a unique and significant position in the companies in which they serve. The executive decisions they make serve to carry out the fundamental core business of the company and their strategic leadership is intrinsically linked to the commercial fate of the enterprise.

The office of director preceded the statutory legislative framework and as a result thereof the legal consequences of occupying the office of director was largely regulated by the common law as the need arised for development. In contemporary South Africa a large portion of these duties and obligations have been codified.[12]

Directors are in a position of trust vis-à-vis the enterprise they serve as a result of the *ex officio* nature of their position. For purposes of brevity and to

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[11] Specifically King II (2002)

[12] This will be handled in more detail in the following section focussing on statutory enactments.

avoid prolixity, several of such fiduciary duties shall be mentioned hereunder:[13]

I. The duty to act *bona fide* in the interests of the company;
II. To exercise powers for their proper purpose;
III. To exercise independent judgment in decision making;
IV. Not to use confidential information for personal profit;
V. To exercise care and skill in the discharge of their functions;
VI. To avoid conflicts of interest.[14]

It is clear that since the introduction of companies there has always been an appreciation for the fact that a Director is something more than just a regular employee hence the reason for burdening them with the abovementioned fiduciary duties. The position and office of director has since its inception been held in high esteem and reserved for only the most capable of people.[15]

Even though many of these duties have been codified by the Companies Act[16] the importance of the common law is still evident in the jurisprudence of the Courts.

### 1.4 Directors under the statutory law

#### 1.4.1 History

It is widely known that South Africa inherited its company law[17] from England largely as a result of the political relations we shared as an early dominium within the British League of Nations.

Without any legislative framework of its own South Africa relied on the Joint Stock Companies Registration Act[18] which was later amended by the Limited

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13 A in-depth review and examination of the duties is beyond the scope of this dissertation.
14 Directors Guide 2011 Smit Tabata Buchanan Boyes.
15 It may well be observed that this is unfortunately no longer the case.
16 Act 71 of 2008.
17 South Africa's law of contract is also inherited from English law and our law of delict is based largely on the English Tort Law see in this regard Cohen v Segal 1970 (3) SA 702 (W).
18 1844.

Liability Act[19]. A plethora of derivative acts ensued mainly as a result of legislative changes to the English framework.[20]

The Companies Act 61 of 1973 served as the first piece of legislation that started the emancipation from English Law (although South African company law is still heavily influenced by the English law).

The Companies Act 71 of 2008, as amended, is the current source of South African company law and its Part F governs the appointment, removal of and status of Directors.[21]

The remainder of a director's duties and aspects unique to such office flow forth from the common law which has been passed over by generations of jurisprudence.

### 1.5 Fiduciary duties and *sui generis* employees

The following quote is perhaps one of the most apt and succinct explanations of the duties, role and importance directors play in a company:

"The directors of a limited company are the creatures of statute and occupy a position peculiar to themselves. It has often been said that they are really commercial men managing a trading concern for themselves and all other shareholders in it. They occupy 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. They may not advance their own interests at the expense of the company."[22]

Directors stand in a unique position and are not merely senior managers but something more.[23] As the gatekeepers for the company's strategic goals and final decision makers directors have certain fundamental fiduciary duties which vest in them *ex lege.* Traditionally it has been considered that "Directors are the company's directing mind and will, they are the human

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19 1855.

20 See *inter alia;* The Cape Companies Act of 1892, Union Companies Act 46 of 1926. Hahlo's South African Company Law Through the Cases 6th Ed

21 To be discussed further detail later in this dissertation.

22 Cohen v Segal 1970 3 SA 702 W.

23 There is however jurisprudence to the effect that senior managers also have certain fiduciary duties which are bestowed unto them.

agents of a company tasked with its management. Although the office they hold also resembles that of a trustee or managing partner, directors remain a creature of statute, occupying a position peculiar to themselves".[24]

Prior reference has been briefly made in regard to certain of these duties and it is deemed apposite to venture into South African jurisprudence to examine the extent and nature of the duties owed by directors in order to fully comprehend that directors are encumbered with duties beyond that of the ordinary employee.

### 1.5.1 The Duty of Care and Skill

Directors have a duty to perform their functions with the utmost care and skill. Should a Director be found to have acted with malice or gross negligence in relation to the exercise of his function he could be held liable for the ensuing damage as a result thereof.

Our jurisprudence has also confirmed that where a director has specialised knowledge of the business of his company (e.g. a rubber manufacturer) it is expected of him to use such knowledge to the advantage of the company and a director with such knowledge will face greater liability for an error in judgment than one without.[25] Even though the specialist knowledge does not fall within the ambit of the specific director's duties the mere fact that he is in position thereof yet does not apply it already infringe upon this duty.

### 1.5.2 The Duty to Act in the Best Interests of the Company

Whilst the abovementioned duty ought to form the basis of any contract of employment between a company and its employees our Courts have specifically regarded this as an essential fiduciary duty which Directors must comply with at all material times.[26]

It can be argued that the duty to act in the best interests of the Company forms the foundation from which the remainder of a director's duties flows

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24 Stoop, H *The company director as employee 2011 32 ILJ 2367.*

25 *In Re:* Brazillian Rubber Plantations and Estates Ltd [19110 1 Ch 425. See also *In Re:* City Equitable Fire Insurance Co Ltd [1925] 1 Ch 407.

26 Treasure Trove Diamonds Ltd v Hyman 1928 AD 464.

from. Should a director act *ultra vires* the scope of his appointment, act only as a conduit for an external third party, act in a manner which is not illustrative of the utmost skill and care or allows themselves to be placed in a position with a conflict of interest then such a director has failed to act in the best interests of the Company.

Irrespective of the aforementioned, Directors are officers of the company entrusted with the management and implementation of its strategy. This flows from the duty to act in the best interests of the company and are perhaps on the most important fundamental elements of a Director's role and responsibility in a corporate enterprise.

### 1.5.3 The Duty to Act within their Powers

Directors cannot act outside the power of their mandate, this forms part of the essential checks and balances to ensure that the shareholders are protected against flagrant abuse of the company by the directors. They cannot make decisions which fall squarely within the ambit of shareholders such as declaring a dividend without input from the shareholders.[27]

It stands to reason that any decision taken *ultra vires* which has subsequently caused damages would entitle the company to take action against such director to recoup the damages.

### 1.5.4 The Duty to Act Independently

A decision taken by a Director must be done without any undue influence exerted by an external party. A Director must remain independent and exercise "unfettered discretion" in the best interests of the Company.[28]

A director may not agree to vote a certain way or bind themselves to the will of a third party e.g. a director may not agree to receiving a commission in regard to a transaction which was concluded between the company and a third party due to the director exercising a decision based upon the undue

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27 See in this regard *In Re:* George Newman & Co [1895} 1 Ch 674.

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

influence of such third party. In certain cases it might be excessively difficult to distinguish between this duty and the duty to avoid a conflict of interest.

### 1.5.5 The Duty to Avoid a Conflict of Interest

One of the fundamental principles which all employees subscribe to is to undertake to avoid a conflict of interest vis-à-vis themselves and the Company they work for. As Directors are in a position of trust the Courts have identified a distinct duty imposed upon them to ensure they are never placed in a position where their integrity may be compromised due to a conflict of interests.

This does not mean that a Director may never receive an income from a source indirectly linked to the company in which they are employed. A notable example of such an additional stream of income would be ownership of shares in a holding company which leases immovable property to the company. The true purpose of the aforementioned fiduciary duty is to determine whether or not the director has made a secret profit.

If the conflict has been disclosed and the other directors have signified that they have no objection to the transaction the conduct may be deemed to be lawful. The most basic tenet of this duty is that a Director never places themselves in a position where they must make a decision between their own personal gain or that of the company.

## 1.6 *Sui generis* employees

When one has regard to the aforementioned information and the litany of cases involving Directors and the fiduciary duties which encumber them it is undeniable that Directors are not ordinary employees but stand in a unique position.

They are the custodians of the Company tasked with proper and due management in the best interests of the Company and, by implication, looking after the best interests of the shareholders. The position of trust between a company and its Directors implies that the relationship between the entity and its executives is one of *uberimma fides.*

The abovementioned and the inherent need for business flexibility have given rise to the notion that directors are not “mere units of labour” and that the entrenched employment laws of the Republic are not applicable to Directors. It will be seen in the study of the ensuing law reports that employers have tried this approach multiple times.

The basic premise of the argument is that directors occupy a special position in the hierarchical structure of the company and that employment laws concerning fair labour practices and protection from unfair dismissal apply only to regular workers. It has further been argued that as the rationale for protective labour laws is the disproportionate balance of power between employee and employer, directors, not necessarily bound to this balance of power, should be excluded from the ambit thereof. [29]

At the opposite end of this argument lies the belief that Directors, in essence, hold two distinctive positions in a company. One, as an executive, governed by company law and, secondly, an employee, governed by employment law. The latter approach seems to have been the preferred interpretation by the South African Labour Courts and Tribunals.

In the matter of Greaves & Others v Barnard[30] the Supreme Court of Appeal held that the fact that the Appellant before the court was a director was a significant factor to consider when deciding whether or not to grant a spoliation order for the settings aside of a decision to suspend the Appellant.

The Court held that:

> “ 'Respondent occupied the property in question in his capacity as an executive director of and shareholder in third appellant with the rights and interests described in the shareholders' agreement. The respondent's interest in his possession of the property materially transcended those of a mere agent or employee. He clearly performed his work and occupied his office "with the intention of securing some benefit for himself'.”

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29 See PG Group Limited v Mbambo N.O and Others JR 215/2004 2004 ZALC . See further Singh, S Are Directors also Employees? www.europassistance.co.za Date of Access 5 August 2013.

30 2007 2 SA 593 (C).

A regular employee's only right of recourse against an unfair suspension is to apply in terms of the LRA to the CCMA or Labour Court for the settings aside thereof. The fact that a director is entitled to bring a spoliation order against the company who has suspended him is indicative of the fact that a director is not a mere employee.

There has been a litany of cases regarding the thorny issue of whether or not directors are employees and entitled to the protection of employment laws. It is humbly submitted that the matter should not yet be viewed as settled law given the sheer volume of cases involving a near carbon copy of the argument that directors are not employees.

## 2. The Companies Act

### 2.1 Definitions

The Companies Act (hereafter "the Act)" is the cornerstone of commercial and corporate law in the Republic and was promulgated in 2008 after immense scrutiny and dissent regarding earlier drafts of the Companies Act which replaced the previous Companies Act of 1973[31].

It is deemed apposite to include the following definitions in this dissertation[32]:

#### 2.1.1 Alternate Director

The Act defines an alternate director as a person elected or appointed to serve, as the occasion requires, as a member of the board of a company in substitution for a particular elected or appointed director of that company.

#### 2.1.2 Director

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31 Act 61 of 1973.

32 For ease of reference the definition s applicable to this piece will be listed in alphabetical order.

The Act defines a Director as a member of the board of a company…or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated.

There are a number of interesting aspects in this definition which may be expanded upon. Firstly, does a non-executive director or a professional director meet the requirements to be regarded as a director? The definition of “board” leaves us with the perplexity of an infinite loop and does not assist in answering this question.

Secondly, an alternate director is included in the definition. If it is assumed that an alternate director would normally be a senior manager in the company, if that senior manager is dismissed or resigns does he have a right to remain on the board or does he have a right to sue for damages as a consequence of the loss of office?

Third and finally, any person occupying the position of a director, irrespective of his title, is also considered to be a director in terms of the definition and concomitantly is bound by the fiduciary duties of care, skill and diligence.

Upon closer scrutiny it is evident that the definition is wide enough to cover so called “de facto directors”. In *In Re* Hydrodam (Corby) Ltd[33] the Court held as follows:

“A *de facto* director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person is a *de facto* director of a company, it is necessary to plead and prove that he undertook the functions in relation to the company which could properly be discharged only by a director”.

What is the impact of this distinction for labour law in South Africa? The question whether or not someone is a *de facto* director may indeed have a far-reaching effect the reason being that Directors are held to a different standard in the workplace. A Director is expected to hit the ground running

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33 [1994] 2 BCLC.

and poor performance of his duties can cause massive damage to the company as a whole.

The regular norms and standards of progressive discipline do not necessarily apply *mutatis mutandis* to Directors due to the very nature of their office and the responsibilities which they bear.

The following hypothetical situation can serve as an apposite example of the abovementioned:

Company A, a wholesale supplier of fruit to Retailer A, intends embarking on a disciplinary process against its in-house accountant. The accountant has only been with the company for six months. The company is run by its managing director, who is the sole appointed director for the company. There is no properly constituted board of directors or corporate governance as it is a small business and the incorporated company is merely used for its legal personality.

The accountant compiles the general ledger, does all the financial reporting and legislative requirements to ensure compliance with the relevant acts. The accountant negligently forgets to pay the Receiver of Revenue timeously and as a result the company is forced to pay penalty fee of several thousands of rands. The company could argue that the accountant is a *de facto* financial director and should have known better, that he did not comply with the common law duties of care, skill and diligence. Not only would this lower the bar required to prove that the negligence was serious that it breached the trust relationship between employee and employer it would also open the door for allowing additional charges to be levelled against employees.

The converse would also be possible, what if the employee were to claim that he was actually a *de facto* director entitled to voting rights and / or directors remuneration. What if he were to be dismissed as an employee but then claim damages in terms of the Act.[34]

[34] sec 71(9).

These questions are, regrettably, beyond the scope of this dissertation but provide interesting food for thought nonetheless.

### 2.1.3 Board

The Act defines this simply as “the board of directors of a company”. Given the context that has been given to “Director” “Alternate Director” and a *de facto* Director the brevity of this definition could serve to cause more confusion than necessary.

The problems which arise are numerous. If we were to look at the hypothetical situation of the fruit wholesaler how would we describe the composition of the Board. Would it only be the owner/statutory director or would the *de facto* Director need to be included. If we were to take the example further and suggest that the accountant has been dismissed, proves his dismissal was unfair, that he was a *de facto* Director and is awarded compensation by the CCMA would the commissioner be entitled to take this fact into consideration.

### 2.1.4 Ex Officio Director

The Act defines and ex officio director as “a person who holds office as a director of a particular company solely as a consequence of that person holding some other office, title, designation or similar status specified in the company’s Memorandum of Incorporation. This type of director is not appointed specifically by a vote of the shareholders. This relates to people who are in a managerial position yet do not use the title of “Director”. A company’s Memorandum of Incorporation (hereafter “MOI”) may determine that the financial manager of the company will always be an *ex officio* Director.[35]

## 2.2 Conflict of Laws

As the title of this dissertation suggests, any convergence of two or more branches of law will inevitably cause some or other conflict between them.

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35 Webber Wentzel Companies Act 2008 Snapshot http://mailstreams.cambrient.com/mailstreams/admin/mailer_instance/view.jsp?mailerid=2318&mid=3028.

The question which is relevant to this text is which branch of law triumphs above the other one.

The Companies Act is the principal regulatory act in respect of company law in South Africa. As mentioned briefly above it regulates the formation of and affairs of existing companies in South Africa.

The Companies act provides a mechanism for the removal of directors in its chapter dealing with directors.[36] The act provides that irrespective of anything to the contrary contained in the articles of association, rules or any other agreement, a director may be removed from office by means of an ordinary resolution adopted at a shareholders meeting by the persons entitled to vote for the appointment of such director.[37]

The Companies act provides certain conditions which must be met before a meeting as mentioned above may be called. The director must be informed of the meeting and the proposed resolution and must be afforded an opportunity to make a presentation before the resolution is voted on. It must be noted that the relevant section contains a disclaimer to the effect that the director who has so been removed still has a right to claim damages, whether in terms of the common law or otherwise, which he can prove was incurred as a result of the loss of office as a director or loss of any other office as a consequence of being removed as a director.

In terms of the above it is quite clear that a director may easily be removed from the office of director. The conflict of laws comes into play when the director asserts that he is also an employee of the company in addition to the holder of the office of director.

A lawful removal in accordance with the Companies Act may then be contested in the CCMA or Labour Court. In terms of the LRA an employee

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36 S 71.

37 It is interesting to note that a further requirement is that the resolution to remove the director may only be voted on by shareholders who were eligible to vote for the appointment of such a director. S 71(1) of the Companies Act states that a director may be removed only by 'the persons entitled to exercise voting rights, in an election of that director'. See in this regard Stoop, H The Company Director as Employee *2011 32 ILJ 2367.*.

may only be fairly dismissed on the grounds of misconduct, incapacity and/or the operational requirements of the employer.

It is a well-known principle of labour law that lawfulness is not equated with fairness, last mentioned being the yardstick by which the CCMA and Labour Courts must measure the dismissals of employees.

One of the more contentious issues in this regard concerns reinstatement orders issued under the auspices of the CCMA. It has been argued, and judicially stated that a Court or Tribunal cannot reinstate a dismissed director back into his office as a director once he has lawfully been removed from office in terms of the Companies Act.

## 3. The Labour Relations Act

The Labour Relations Act, as amended, is the cornerstone of our labour law jurisprudence. The LRA gives effect to the constitutionally enshrined right to fair labour practices. The LRA contains the prohibitions against unfair dismissals and governs the manner in which the CCMA and Labour Courts must adjudicate disputes relating to various labour matters.

For purposes of completeness, certain sections of the LRA dealing with the question of whether or not directors may also be employees will be examined to ensure that an informed opinion may be developed once the law reports are analysed and a conclusion developed.

### 3.1 Definition of Employee

The definition of the term employee has been the cause of much contention in our labour law. According to the LRA[38] an employee is defined as:

(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and;

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[38] S 213.

(b) any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of employee.

The dissemination of this particular definition has been rehashed time and again in various legal journals and case law. For the purposes of brevity it needs merely to be elucidated that "…who works for another person…" can also refer to a juristic person and accordingly, the definition is sufficiently broad to include a director.

It is interesting to note that the LRA further provides a presumption of employment.[39] According to this presumption, regardless of the form of the contract between the parties a person who works or renders services to any other person is presumed to be an employee until the contrary has been proven.

The section contains seven factors which must be considered when determining whether a person is an employee or not. One of the more relevant factors to this dissertation specifically lists "..in the case of a person who works for an organisation, the person forms part of that organisation".[40]

Whilst it may appear that the relevant subsection contains a logical fallacy in that it presumes that in the case of a person who *works* for an organisation, forms part of that organisation, it nonetheless provides sufficient scope to include a director in the definition of "employee". The following subchapter will examine case law regarding the inclusion of a director under the definition of "employee".

It must however be mentioned that subsection 2 determines that the aforementioned criteria and presumption does not apply to people who earn in excess of the threshold amount as determined by the Minister of Labour from time to time.[41]

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39 S 200A.

40 S200A(1)(c).

41 The threshold is R183,008.00.

It is interesting to note that South Africa is one of the few jurisdictions who do not differentiate between different groups of employees in its definition of employee. Many foreign labour law systems list and differentiate between categories workers such as employees, managerial staff and executives.

### 3.2 Proposed amendments to the Labour Relations Act

On the 14th of March 2012 proposed amendments to the Labour Relations Act [42] were submitted to the Cabinet by the Minister of Labour for consideration. The proposed amendments reflect a broad array of subject matter from temporary employment to the situation with Temporary Employment Servicers or, in more colloquial parlance, labour brokers.

For purposes of this dissertation we need only investigate a proposed section 188B to be inserted into the LRA. The relevant section regulates the termination of employees who earn above a certain remuneration threshold.[43]

In terms of the proposed amendments an employer may lawfully and fairly dismiss an employee earning above the remuneration threshold as set by the Minister of Labour from time, if the employer has given the employee concerned a notice period of three months. Further requirements are that the employer pay the employee concerned compensation equal to three months' notice should no notice have been given in advance. The subsection does also not apply should the dismissal be classified as an automatically unfair dismissal.[44]

The new subsection also provides that it will apply retroactively to contracts of employment concluded prior to the inception of the amended provisions but only after a period of two years have elapsed since the entry into force.

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[42] Labour Relations Amendment Bill 2012.

[43] The popular rumour is that the threshold amount will be set at R1,000,000.00 http://www.cliffedekkerhofmeyr.com/en/news/press-releases/2013/Employment/labour-relations-amendment-bill-adopted-by-the-national-assembly-.html

[44] It is submitted that the inclusion of these requirements will undoubtedly lead to litigation as it provides ample opportunity for abuse.

The explanatory memorandum to the Labour Relations Amendment bill [45] provides clarity on the purpose of the introduction of the subsection to the LRA and an extensive analysis of the "intention of the legislator" is deemed appropriate.

From the onset it is stated that the purpose of the new section is to assist employers in dealing with the termination of high earning employees. It is imperative to quote certain key aspects of the memorandum in order to highlight the contentious nature the dismissal of executive employees;

> "At the heart of the change is the disproportionate cost, complexity, and impact on an employer's operations of procedures to terminate the employment of high earning employees in circumstances where the reason for doing so may not fall clearly and neatly within the fair reasons for dismissal specified in section 188(1)(a)(i) and (ii)."

The legislature recognizes that there is a disproportionate cost and impact on the termination of senior executives. The legislature proceeds to deliver a rather obtusely written statement which in effect states that the subsection assists employers to dismiss senior employees for reasons "which may not fall clearly and neatly within the fair reasons for dismissal specified in section 188(1)(a)(i) and (ii).

The legislature attempts to illustrate its ill-conceived statement by providing the example of a company which wishes to introduce a new executive with a different managerial style or culture because the incumbent employee no longer fits the corporate culture of the company.

Firstly, it must be stated that the LRA specifically provides that a dismissal which is not automatically unfair, is unfair if the employer fails to prove that the reason for the dismissal is a fair reason related to the employees (i) conductor capacity or (ii) based on the employer's

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45 http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendment-bills/memoofobjectslra.pdf.

operational requirements.[46] The LRA does not provide for the provision of "other" fair reasons for dismissal whether they fall neatly and clearly within the LRA or not.

Dismissal on the grounds of misconduct, incapacity and operational requirements are the only grounds upon which a dismissal may be found to be for a fair reason. This has been the cornerstone of the unfair dismissal jurisprudence of the Republic of South Africa for two decades.

Secondly, the scenario proffered by the legislature can quite easily be resolved by reference to existing case law. The problems identified by the legislature fall squarely within the principles of incompatibility which has been found to be a sub-element of incapacity, which in turn, is one of the reasons listed in the LRA which may constitute a fair reason for dismissal.[47]

The legislature proceeds to recognise that the application of section 188 of the LRA an especially onerous task to perform at the upper levels of the corporate ladder. It is also recognised that there are significant costs involved with performance management and discipline at the top level of employment in the company.

It is then explained that the primary rationale for protective labour law relates to an inequality in bargaining power. The legislature states that:

> "Providing uniform protection against unfair dismissal to lower skilled or lower paid employees, on the one hand, and highly skilled or highly paid executives, on the other, fails to recognise the significant difference in bargaining power that employees in these categories have in negotiating employment contracts and in dealing with their employers during employment."

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[46] Section 188(1)(i) & (ii)

[47] See in this regard the matter of Jabari v Telkom SA (Pty) Ltd 2006 10 BLLR 924 (LC).

The abovementioned statement is the founding argument for the movement against classifying executives as employees. The argument was first used in the 1980's and readily appears in the numerous law reports discussed in detail in the following chapter.

The legislature further states that it has analysed the labour law of comparable legal systems which specifically exclude executives or top-tier employees from dismissal protection. The selection criteria employed by section 188B is on the basis of a threshold amount as opposed to by reference to the status or role of the employee. The memorandum states that "this approach will avoid the need for disputes about whether employees fall inside or outside an identified class of employee that may give rise to costly collateral litigation."

It is humbly submitted that the proposed amendment by way of the implementation of section 188B is a far cry from a proper resolution to the thorny and loaded question of executive dismissals and the concomitant effect thereof on commercial law. On the one end of the scale the legislature has given appreciation to the fact that executive dismissals are *sui generis* and different from "regular" dismissals in complexity, style and approach.

On the other hand the legislature does not intervene to properly identify and separate the legal principles one and for all – it merely provides a mechanism where employees can throw money at the problem to make it go away.

The memorandum ends the commentary on this section of the amendment bill by stating that its vision is that the proposed amendment will serve as a balance between the company's requirement to swiftly dispose of issues at its top managerial level and the rights and interest of highly paid employees who "remain protected against arbitrary or summary action".

The most basic deficiency in the approach adopted by the legislature is found in the fact that many companies cannot afford, whether by fiscal

issues or time related exigencies, to provide executives with three months' notice or compensation. A proper law reform based on principles rather than an easily applied mechanism would ensure fairness for the parties concerned.

The primary objective of a law reform process is to bring the law in line with changing values and changing environments. It is humbly submitted that a principle-based approach is to be preferred above the utilization of a simple mechanism which does not fully consolidate the relevant legal principles.

The memorandum's reasons for the proposed amendment to the LRA confirm the argument that senior executives are a *special* type of employee (if they are indeed employees for that matter). If there had been no need to develop the law applicable to the dismissal of executives it would not have featured in such depth in the amendment bill.

South African labour law has identified various types of employees which form part of especially vulnerable groups such as domestic workers[48], security personnel[49] and farm workers[50]. It is humbly submitted that the sectoral determinations applicable to the aforementioned groups of employees in practice differentiate between different types of employees. It is submitted that a differentiation between regular employees and "executive employees" would not be perverse as the sectoral determinations already distinguish between various groups of employees.

The basis on which the distinction would apply would not be vulnerability but the exact opposite thereof. It is not argued that a sectoral determination should be made to apply to executive employees yet merely illustrates that our labour law implicitly provides for differentiation between employees.

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48 Sectoral Determination 9.
49 Sectoral Determination 6.
50 Sectoral Determination 13.

Despite the aforementioned criticism of the proposed amendments to the LRA it can be accepted that it is a step in the right direction. It is likely that the final version of Section 188B will differ slightly in appearance from the draft proposed in the 2012 version of the Amendment Bill.

It is submitted that as the development of the internet and the digital age progresses (ever more rapidly) the changing face of business will force the Law Reform Commission to re-evaluate its position on section 188B when it enters into force. As technology advances the Directors on the Boards they serve must ensure that they are adequately acquainted with the developments as they are responsible for the long term vision and strategy of the company. The need to restructure and change direction will be faster than ever before and it is vital that labour law evolves accordingly to remain relevant.

## 3.3 Case Law

### 3.3.1 Stevenson v Sterns Jewellers (Pty) Ltd

The judgment of Stevenson v Sterns Jewellers (Pty) Ltd[51] in the Industrial Court before Fabricius (as he then was) is the earliest recorded judgment involving the alleged unfair dismissal of a director. The arguments contain therein feature prominently in the ensuing law reports. It is quite unfortunate that the very first case to ask the question of whether or not a director may also be an employee was decided prior to the promulgation of the LRA.

The Applicant ("Stevenson") was the managing director of the Sterns Jewellers (Pty) Ltd. Barely three weeks after his employment he was dismissed under the auspices of what can best be described as incompatibility due to his "managerial style". Stevenson petitioned the Industrial Court to find that his dismissal was procedurally and substantively unfair specifically due to the absence of a proper hearing.

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[51] (1986) 7 ILJ 318 (IC).

The Respondent countered his petition by arguing that Stevenson was employed as an executive and not a "mere unit of labour". It must be mentioned that Stevenson was employed as a "title director" and had not yet been appointed to the board in line with the statutory requirements of the Companies Act.

During the proceedings it emerged that Stevenson had been informed of allegations of poor conduct and attitude towards the staff of the Respondent company. Mr Barnett, the Chief Executive Officer of the group cautioned the Applicant whereupon the Applicant indicated that in his new position he would undoubtedly upset people as he was employed to change the *status quo*.

The Respondent indicated that continued employment of the Applicant would be unsustainable and cited his relationship with the other directors as one of the causes for the unsustainability.

The Respondent further argued that Stevenson, in his position of managing director, is not considered a mere unit of labour. It was argued that the position he occupied was a personal one and the management of the top tier of the company is imperative for its continued success. It was specifically argued that his "dismissal" was substantively fair.

Counsel for the Respondent argued that an order for reinstatement would force a managing director upon a company which would be harmful to the company, that the Applicant could not be reinstated as a director, that the company has paid to the Applicant three month's salary,

The Court expressed its displeasure at the term of "mere unit of labour" and declined to classify employees. The Court did not accept the Respondent's argument that the Applicant was not a mere unit of labour.

In a rather startling judgment the Court dismisses the application. The Court did not base its finding on the concept of a misconduct hearing but rather looked at the "equities of the case" considering all the circumstances referred to.

Despite the Court's finding which effectively recognises the Applicant as an "employee" and rejects the notion of a managing director being a "mere unit of labour" the Court, with all due respect, proceeds to depart from the regular adjudication of procedural and substantive fairness and bases its judgment on the "equities" of the case.

This despite the fact that it was common cause that no disciplinary hearing was held, there was no compliance with the common law requirement of *audi alteram partem* and that the Court factually accepted that the Applicant was an employee of the company and thus entitled to the protection of the statute.

There appears to be sufficient and convincing evidence from the Respondent that there was sufficient grounds for dismissing the Applicant due to incapacity, specifically incompatibility, but this does not excuse the fact that the dismissal was at the very least procedurally unfair and devoid of merit.

The acclaimed jurist, M P Larkin, in commentary on the judgment asks the question why "ordinary directors" as mentioned in the judgment, may not also be considered to employees as the definition of employee contained in the LRA is exceedingly wide.[52]

Larkin reviewed the matter of R v Mall[53] where it was stated that:

> 'There is a material difference between the situation of a director and that of a manager. Directors are required by statute; they are essential to a company, and their functions and duties are defined by law. They are appointed by the shareholders and are vested with the management and control of the company. They represent the company, and there is a degree of permanence attaching to their position. They act as a body save so far as powers are lawfully delegated. Their identity, the law intends, should be undoubted and easily discoverable from the company's records.'

In referring to the abovementioned passage in R v Mall, Larkin criticizes the contention that solely due to the fact that directors are mandated by statute to perform the duties of their office in the interests of the company they are to

52 Distinctions and Differences: A Company Lawyer Looks at Executive Dismissals 1986 7 ILJ 248.

53 1959 4 SA 607 (D).

be considered distinct from employees. Larkin draws the parallel to an Atomic Power Station where certain people would be mandated by statute to perform duties there (an example would be a safety officer), the law does not exclude these workers from the definition of employee so why should it do so with ordinary directors.

The question is then asked if a written contract of employment is required to establish that an ordinary director is also an employee. Inversely, Larkin questions whether such a contract of employment is a bar to the acknowledgement of the ordinary director's status as an employee. The answer to this question is in the negative when one has regard to the wide ambit of the definition of employee in the LRA.

### 3.3.2 Brown v Oak Industries[54]

The Applicant *in casu* found himself in a rather precarious situation. He was appointed as managing director of the respondent company in 1984. In 1985 the Respondent company (which at the time was owned and operated by a North-American Company) was acquired by a listed South African company. A director of the listed company which acquired the Respondent company ("hereafter the Respondent company") was appointed to the Board of Directors and occupied the position of chairman.

The gist of the law report concerns the Respondent company's denial that the Applicant was validly appointed as managing director of the Respondent company. The Respondent sought to argue that the Applicant's petition to the Industrial Court was ill-fated on the grounds that, as a director of the Respondent company, the applicant did not fall within the scope of the meaning afforded to "director" under the previous LRA.[55]

The Respondent further argued that the actual dispute was one of shareholding and, concomitantly, a dispute between the shareholders which is to be adjudicated in a civil court in terms of company law as opposed to a

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[54] (SA) PTY LTD 1987 8 ILJ 510 IC.
[55] Act 28 of 1956.

specialist tribunal applying labour law principles. In its pleadings before the Court the Respondent admitted that it considered the Applicant to be the managing director of the company, albeit as a result of laxity on the part of the Respondent.

The Respondent argued, and rather convincingly at that, that the LRA did not apply to the Applicant as director of the company. They argued that a director is not an employee as a director is appointed by vote at a general meeting of the shareholders of the Company and not employed by the Company in the traditional sense.

The Respondent referred to the "control-test" and specifically sought to illustrate that the shareholders have no explicit right to control of the director during the day to day functioning of the business. The Board of Directors are accountable to the shareholders of the company at a general or extraordinary meeting of shareholders and it is their duty to manage the day to day affairs of the company as they see fit.

Despite the Respondent's argument the Applicant referred to the definition of "employee" in the LRA, specifically the section referring to "any other person whomsoever who in any manner assists in the carrying on or conducting of the business of an employer" as authority for the proposition that the director was indeed an employee in terms of the LRA.[56]

Given the sufficiently wide ambit of the definition the Court had no problem in accepting that as a director contributed to the carrying on of the business that a director would indeed fall within the scope of the definition if it can be factually proven that the director was involved with the day to day management of the company and performed duties which would also be performed by employees in the ordinary course of business.

The Court sought to differentiate between the various different forms a directorship might take.[57] The Court took cognisance of the fact that there might very well be directors which fall within the scope of the definition as

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[56] Act 28 of1956.
[57] As mentioned in chapter 2 *supra.*

provided by the Respondent, that these directors were merely appointed by the shareholders and occupied no specific role nor were they subject to the exercise of control. The Court accepted that the LRA would not apply to directors in the aforementioned class.

The Court *in casu* specifically ruled that non-executive directors or so-called "professional directors" who merely act in an advisory capacity on the Board of Directors' of the Company would not be considered to be employees of that company. These directors' are paid a director's fee and do not apply for leave nor have specific hours of work which they must adhere to.

The Court further identified directors who are first and foremost employees of the company subject to the control of more senior directors or managers.[58] The Court pointed out that this specific approach was not incompatible to prior case law such as the Stevenson case above.

The Court noted that the Respondent cannot have its case both ways; it either acknowledges that the Applicant was just a director, reporting to no one with his core focus on his duties of care, skill and diligence or he was a subordinate and had to comply with lawful commands given by his superior.

Based on the pleadings as they stood and, without the benefit of hearing *viva voce* evidence the Court concluded that the Applicant fell into the category of directors who in addition to being office bearers of the company were also employees at the same time.

The Court examined various alleged breaches of the conditions of service between the Applicant and Respondent and ultimately ordered that the Respondent reinstate the applicant in its employment "on terms and conditions not less favourable to him" in accordance with the principles of the LRA.

The Court *in casu* sought to deal more extensively with the question of whether or not a director can be considered an employee of the company than the Court in the Stevenson case. In effect the Court is required to

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[58] The office of Creative Director and Chief Commercial Director seem to illustrative of this fact.

examine the true relationship *inter partes* in order to establish whether or not the director concerned is merely an office bearer or an employee at the same time.

An interesting question which the Court sought to avoid was the position regarding reinstatement orders of directors and executives. The Court's order did not state that the Applicant must be reinstated as managing director of the Respondent but merely that he must be re-employed on terms and conditions not less favourable than those governing the relationship between immediately before his dismissal.

While the argument has been made that it is not for a Court to force the shareholders of the Company to call a general meeting and vote on a resolution to re-appoint a dismissed director to his former office it still begs the question what are terms not less favourable?

Surely the position and title of director is one of much esteem and pride for the vast majority of executives. There are certain agreements and actions which may only be authorised by directors and it is doubtful whether a dismissed director returning to his position without his title and appointment of office in terms of the Companies Act is allowed to action such decisions. The title and status of "director" is an important factor in the business networking- and marketing sphere were the executives are required to meet with their peers for the joint benefit of both companies.

Practical implications aside, the dismissed director's own sense of worth and job satisfaction will be hampered by the fact that he is no longer a "true" statutory director and formally appointed to this office. I verily believe that an argument can be constructed that not being afforded a formal appointment to his office does indeed constitute terms which are on the whole less favourable than those which were applicable prior to the unfair dismissal. The practical aspects of reinstatement orders of executives are discussed later in this dissertation.

### 3.3.3 Hydraulic Engineering Repair Services v Ntshona & Others[59]

The present case involves a review application in the Labour Court against a jurisdictional ruling in the CCMA confirming that the Respondent before the Labour Court was an employee and that the CCMA accordingly had jurisdiction to hear the Respondent's (Applicant in the CCMA) alleged unfair dismissal matter.

Mr Page was the only shareholder in the Company and also acted as its Managing Director. Sometime in 2003 Mr Page recruited the services of Mr Ntshona to work as its Marketing Director. The facts listed by the court in the law report does not identify nor state whether Mr Ntshona was appointed as a statutory director.

A sale of shares agreement was drafted by the Company in terms of which Mr Ntshona would acquire 50 % shares of the company by means of a deferred payment scheme wherein Ntshona would pay R150 000 over five years or R75 000 over a period of 10 years to acquire the shares.

The parties furthermore agreed to a binding shareholders agreement which, although unsigned, they agreed regulated the relationship between them. The shareholders agreement contained clauses which, *inter alia,* designated Ntshona as the marketing director, listed his duties in accordance with the aforesaid designation and contained the particulars of his remuneration.

During the tail end of 2003 the managing director of the Company addressed a letter to Ntshona advising him to resign from the office of director, failing which he will be removed as director. The letter cited various reasons for the request, principally, Ntshona's failure to "advance the Company".

The Applicant argued that the *de facto* position was that the parties were partners in a partnership which was used as a vessel to facilitate the business relationship between them. As a result of the partnership it would be impossible for the Respondent to be both an employer and employee at the same time.

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59 2008 29 ILJ 163 (LC).

It was further argued by the Applicant's counsel that as the parties were partners in a partnership both were jointly responsible for the actions of the partnership and that a "lawful dismissal" could only take place if both partners consented. According to the Applicant this absurd state of affairs would mean that the dismissed partner is suing his own partnership and, as he himself is a partner jointly responsible for the management of the affairs of the partnership, he would have to sue himself. The Applicant also illustrated that the Respondent never relinquished any rights as a partner and was accordingly jointly responsible for the decision making process.

In its assessment of the facts of the case the Labour Court examined the definition of "employee" in the LRA.[60] The Labour Court further relied upon the *ratio decidendi* of the court in PG Group (Pty) Ltd v Mbambo[61] where it was held that a director is not necessarily precluded from also being an employee of a Company.

The Court restated the well-established legal principle that when the parties agree on a contract between them which seeks to regulate or categorize the relationship *inter partes* as being something other than one of employment, such a contract is not the only factor which must be taken into account to determine the true relationship *inter partes*. The Court is entitled to investigate the true relationship between the parties and in doing so must seek to examine the substance thereof as opposed to form.[62]

The Court proceeded to apply the so called "dominant impression test[63]. In applying the aforementioned test the Court must analyse the relationship between the parties *in toto,* identifying aspects which indicate a contract of employment and aspects which indicate a contract of service. Once these factors have been listed, attached appropriate weight and due consideration

60 S 213.

61 2004 25 ILJ 2366 (LC).

62 The Labour Courts specific tendency to explore legal relationships on the basis of substance as opposed to form is well documented.

63 The "control" test used to be an important tool in assisting the judiciary in determining whether a contract is one of service or one of employment. See in this regard Mandla v LAD Brokers (Pty) Ltd (2000) 21 ILJ 1807 (LC). Since the *dictum* of the Court in Ongevallekommissaris v Onderline Versekeringsgenootskap AVBOB 1976 (4) SA 446 (A) the Courts have applied the dominant impression test with more fervour.

has been given the Court is in a position to determine the type of relationship *inter partes.*

The Court found that the Applicant had remained in control of the operations of the Company and that the reason the Respondent was not afforded equal power and control was to protect the interests of the Applicant. The Court found that the mere fact that a party had ownership rights in a business did not render them unable to be regarded as an employee.

The Court laid particular emphasis on the fact that the Respondent was paid a salary by the company, that UIF and other statutory deductions were applied to the Respondents payslip and that the Company paid for the medical aid of the Respondent. The evidence before the Court indicated that the Respondent was obliged to oversee and manage the operations of the sales team and was expected to be an integral part in the daily activities of the company in respect of marketing and sales. The Court specifically stated that the Respondent was not solely responsible for duties which fell squarely within the executive sphere of management.

The Court accordingly found that the relationship between the Respondent and that of the Company was indeed one of employment and that the Respondent was both a director and employee at the same time. The Court ordered that the matter be remitted to the CCMA for arbitration.

The Applicant's defence was premised in the assumption that the Respondent was not an employee however it differs from those similar arguments raised in the aforementioned cases discussed above. The Applicant argues that the actual relationship between the parties was a "partnership" and a partner cannot be an owner and employee at the same time.

The Applicant argued that the Respondent had not signed away his rights as partner and a "dismissal" in the narrow sense could not have occurred as a partner could not dismiss himself (an action which would be necessary for a lawful dismissal where both partners have equal rights).

It appears as though the litigating parties have moved away from the notion that a director is not an employee based solely on the fact that there is normally not an uneven distribution of power between the parties and the Company. The Applicant in this case went particularly far in devising a “partnership” as the vessel within which they conducted their business activities.

Whilst it may appear at first glance that the Applicant’s counsel devised a far-fetched scenario in order to attempt to argue his way out of the protective provisions of the LRA it is humbly submitted that the difficulties mentioned above are germane to executive dismissals and provide a distinctly different problem for companies when contemplating a shuffle of the executive management of the company. The litany of cases with various degrees of arguments against the inclusion of directors under the status of employees is indicative of the fact that a law reform process would be a welcome change to the law.

### 3.3.4 South African Post Office Ltd v Khutso Mampeule[64]

This matter came before the Labour Appeal Court by virtue of the dismissal of the Appellant’s application for a declaratory order that the Respondent’s automatic termination did not fall under the definition of dismissal in terms of the LRA.

The Appellant (the South African Post Office Ltd) is a government company with the Government of the Republic of South Africa as its only shareholder. The Appellant was represented by the Minister of Communication in his official capacity.

The Respondent was appointed as the Managing Director of the Appellant on 30 October 2005, the aforesaid contract entering into force on the 20th of June 2005. The contract was for a fixed term of five years and, upon his appointment as Managing Director, automatically appointed the Respondent as an executive director on the Appellant’s board.

64 JA29/09 (LAC).

The Appellant's articles of association determined that an executive director may only be appointed for a period of five years and also provided that it was a requirement of an "executive director's *employment"* that he holds the office of director. The articles of association further determined that if the executive director ceases to hold the office of director for any reason that his employment would automatically terminate at the same time. It was this automatic termination clause in the articles of association between the parties which formed the basis for much contention and argument before the Court.

During the first half of 2007 the Respondent received a letter from the Minister of Communication, acting on behalf of the shareholders of the Appellant, which letter removed the Respondent from the office of director. The letter further advised the Respondent that his employment relationship with the Appellant was terminated concurrently with his removal as director as per the articles of association of the company.

The Court referred to the articles of association which further provided (and was attached as an annexure to the Respondent's contract of *employment)*. The executives of the Appellant's board were bound by the terms and conditions contained in the articles of association. The articles provided that the directors would be appointed for a maximum period of five years yet made provision for the early termination thereof on the grounds of incapacity, poor work performance, misconduct or operational requirements. It is clear that the reasons for which the contract may be terminated prior to the expiry thereof are the same as the grounds in the LRA upon which an employer may lawfully dismiss an employee.[65]

The articles also affirmed that should the contract of employment be terminated before the five year period has expired that fair labour practices would be a factor in the equation. The Labour Court, with reference to the abovementioned, found that the automatic termination clause the Appellant relied on curtailed the right to fair labour practices and effectively amounted to contracting out of the LRA. The Labour Court also expressed its concern

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65 S188 of the LRA.

that creating a precedent could pave the way for a slippery slope whereby employers could contract out of the LRA.

On the legal question pertaining to whether or not the Respondent was dismissed by virtue of the automatic termination clause the Labour Court held that any act which directly or indirectly terminates the employment contact falls squarely within the scope of the definition of "dismissal" as defined in the LRA.

The Appellant's counsel sought to prove its case by attacking the legal and factual causation of the Respondent's dismissal. The argument was further advanced that the automatic termination clause was a *novus actus interviens* which had the effect of establishing that the removal as director was not the proximate cause of the termination of the Respondent's contract of employment. The Appellant also disputed that it was the entity that removed the Respondent from office.

The Appellant argued that the decision to remove the Respondent from the office of director was done in accordance with company law, with the Minister of Communication acting on behalf of the shareholders as the ultimate owners and controllers of the enterprise. The argument went further that shareholders have no relationship with the employees in terms of labour law and operate solely on the plane of commercial law. The Court held that the decision of the shareholders of a company is effectively the decision of the company.

The gist of the Appellant's argument was that the termination of the Respondent's employment was merely the knock on effect of the Minister's issuing of the resolution removing the Respondent as a director. It was not the act which terminated his employment. His employment was terminated as a result of him not holding the office of director and he was not pertinently dismissed.

The Respondent's counsel not surprisingly argued that the automatic termination clause was abhorrent and contrary to the prohibition on the limitation of statutory rights found in the opening chapters of the LRA. [66]

The LAC proceeded to review the definition of "dismissal" in the LRA and stated that dismissal means "*any act* by an employer which results, directly or indirectly in the termination of an employment contract" (own emphasis). The Court acknowledged that the Respondent's removal was premised on the removal sections found in the Companies Act which have already been dealt with in detail elsewhere and shall not be repeated here.[67]

The Court was referred to the matter of NULAW v Barnard N.O and Another[68]. In NULAW the question which the LAC was called upon to answer revolved around the issue of causation. The shareholders of the employer company passed a unanimous vote to voluntarily wind-up the company and the cardinal issue before the Court was whether or not this constituted a dismissal in terms of the LRA. The LAC held that due to the fact that the shareholders passed the resolution to set the process in motion that it was indeed sufficient to constitute a dismissal. It accordingly fell within the ambit of "any act by the employer".

However, the Court also compared the hypothetical scenario of a compulsory winding up and found that this would not constitute a dismissal as the Court's intervention broke the chain of causation. The compulsory winding up application brought by a creditor of the company would be an external action and would not amount to the company terminating the services of an employee.

The Respondent sought to rely on NULAW to prove that a resolution passed by shareholders could indeed constitute a dismissal in terms of the LRA. The Court took cognisance that to find that a shareholder's act of removal in

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66 S 5.

67 For a detailed and thorough analysis of the aforementioned provisions see in this regard Ngube, C You're Fired, the Removal of Directors under the Companies Act 2011 128 SALJ 33.

68 2001 9 BLLR 1002 (LAC).

terms of the Companies Act could render shareholder rights nugatory and ineffective.

The LAC held that a managing director is the holder of two positions in the company should this be factually proven; both director and employee. The fact that the Respondent's duration of tenure could be ended prematurely as a result of misconduct, incapacity or operational requirements served to confirm that he was indeed regarded as an employee of the Appellant.

The LAC restated the well-known principle that in labour law lawfulness cannot be equated with fairness.[69] The Court accordingly dismissed the appeal with costs.

### 3.3.5 PG Group (Pty) Ltd v Mbambo N.O. and Others[70]

The abovementioned case concerns a review application in the Labour Court against a jurisdictional ruling conducted by a commissioner under the auspices of the CCMA. The Third Respondent (hereafter the Respondent) *in casu* was appointed as the Financial Director of the Applicant company, PG Group.

It is important for purposes of this matter to elucidate that the sole shareholder of PG Group was a holding company named PGSI. During 2003 the Respondent received a notice in terms of the Applicant's articles of association which had the effect of requiring him to vacate his office of director. Subsequent to this termination the Respondent filed an unfair dismissal claim at the CCMA.

At the CCMA hearing the Applicant raised a point *in limine* that the CCMA could not hear the matter as the Respondent was not dismissed. It sought to argue that the notice terminating his directorship was in accordance with the articles of association. The Applicant clearly attempted to separate labour from company law.

69 Numsa v Vetsak Co-operative Ltd and Others 1996 17 ILJ 455 (A).
70 2004 25 ILJ 2366 (LC)

The CCMA dismissed the point *in limine* and found that it did indeed have jurisdiction to entertain the matter. The main ground of review persisted in proceedings before the Court was that the CCMA commissioner failed to apply their mind to the cogent issues in dispute, namely, that the Respondent had not been dismissed by the Applicant.

The interesting argument raised in this case is that the Applicant did not wish to dismiss the Respondent and neither did it set in motion the mechanism for their dismissal. The Applicants holding company, PGSI, in terms of their right as sole shareholder and in terms of the articles of association of the Applicant caused the termination notice to be sent to the Respondent. Evidence was however lead which revealed that prior to the Respondents dismissal the Applicant attempted to retrench the Respondent. The operational requirements dismissal procedure was not persisted in.

The Applicant's counsel argued that the commissioner failed to apply their mind to the point *in limine* by failing to understand the "unique relationship" between the Respondent, the Applicant and its holding company, PGSI. The Applicant argued that PGSI was entitled to terminate the Respondent's office by a vote in terms of its articles of association and this decision need not be in the best interests of the Applicant as a shareholder does not owe the company the same duties of care, skill and diligence a director does.

The Applicant also sought to argue that such a vote taken at a meeting of shareholders does not necessarily bind the Applicant. The decision to terminate the directorship of the Respondent was taken by PGSI and not the Applicant. [71] The Applicant also argued that the Respondent was not employed by the Applicant but rather appointed by the shareholders.

The Applicant's counsel invoked the doctrine of supervening impossibility of performance and argued that the Respondent's contract was terminated by operation of law and this does not constitute a dismissal as required by the LRA to trigger jurisdiction.

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[71] In the matter of SA Post Office Ltd v Mampheule *supra* it was held that a decision taken by shareholders acting at a meeting of shareholders is to be attributed as a decision taken by the company itself.

The Court examined the applicable company law principles and specifically stated that the Companies Act, its own articles of association and the common law regulate the distribution of power in a company.

The Court examined the provisions of the Companies Act in terms of which a director may be removed from office[72]. In terms of the aforementioned the shareholders of a company may remove a director before his term of office expires by exercising a vote by extraordinary resolution. The Respondent's counsel argued that in such a case the shareholders decision ultimately binds the company and becomes the company's decision.

The Applicants articles of association determined that should shareholders who were entitled to vote at a general meeting make a decision such decision shall be deemed to have been made at a general meeting. A teleconference was held where it was collectively approved to terminate the Respondent's office of directorship.

The Respondent argued that, as per the Applicants articles of association, the decision was taken by members at a general meeting. This had the effect that it was actually the decision of the Applicant and not PGSI. The Applicant referred to the well-known rule of attribution in that the shareholder's decision taken at a general meeting was considered to be the company's decision.

The Court found without hesitation that the Applicant had indeed made and taken the decision to terminate the Respondent's office. The second leg of the enquiry which the Court had to pronounce on was whether or not the Respondent was to be afforded the protection of the LRA.

The Applicant's counsel, Martin Brassey (as he then was), argued that the earlier cases concluded in the Industrial Court regarding executives and the protections against unfair dismissals were not properly considered and needed to be revisited.

The Court took cognizance of the fact that the *raisson d' être* of the LRA and its precursors is to protect ordinary workers against the commercial power

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72 S 220.

and might which their employers inevitably wield against them. The Court found support for this notion in the many requirements the LRA lays down in respect to retrenchments, unions and collective bargaining.

The Court restated the principles enshrined in Stevenson *supra,* that directors hold two positions in the company they serve; one as employee and one as an office bearer. The Court found that it has consistently been held that whether or not a director is an employee is a factual enquiry and that there is no valid reason to preclude a director who is also an employee from the protection from unfair dismissal mechanisms in the LRA.

The Court ultimately found that the decision to dismiss the director was taken by the Applicant and that the respondent was also an employee in addition to the office he held. The matter was remitted to the CCMA for arbitration.

### 3.3.6 Amazwi Power Products (Pty) Ltd v Turnbull[73]

The Respondent in this matter was appointed as the Appellant's financial director as a result of good work performance in prior years as the company's financial manager which subsequently led to the Respondent's promotion within the ranks of the company. When the economic climate started deteriorating the Respondent sought to resign from the office of director and reclaim her previous position as financial manager.

When the Respondent tendered her resignation from the Board of Directors it was accepted by the company and the Respondent was advised not to return to work as she was only appointed as a director and her resignation terminated the relationship between herself and the company.

The Respondent accordingly lodged an unfair dismissal claim and during arbitration the Arbitrator found that she was indeed unfairly dismissed and awarded her compensation. Aggrieved by this ruling the Appellant sought to review the award in the Labour Court but the review application was dismissed. This appeal is against the dismissal of the review application in the Labour Court.

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[73] (2008) 29 ILJ 2554 (LAC).

The Court stated that when a person is appointed as a director without an agreement reflecting the appointment then the position will be regulated by the company's articles of association. The Court stated that strictly speaking a director is not an employee of the company but the same individual can be an employee and director at the same time should this be factually proven before the court. The court took cognisance of prior case law in this regard, specifically the *locus classicus*, Stevenson v Sterns discussed earlier in this chapter.

The Court was of the opinion that the matter could be resolved without detailed reference to legal principles and doctrine as the Respondent had clearly set out in her resignation from the office of director that she was only stepping down from the office of director and did not wish to terminate the employment relationship between herself and the Company.

The Court stated that a notice to resign must be clear and unequivocal in order to be legally sound. The Court found that the Respondent had never had the intention to terminate the employment relationship between herself and the company.

The Appellant argued that the Respondent only held one position in the company and that she was only appointed as its financial director. The Appellant was of the opinion that when the Respondent resigned she could only resign from the one position she held at the company.

The Appellant sought to argue that the Respondent's previous position as internal accountant fell away when she was given a substantial increase to her remuneration. There was correspondence between the parties indicating that there was an intention to have a new contract drafted subsequent to her appointment to the board of directors.

The Court examined various court cases and academic articles and gave credence to the approach adopted by the Courts before it.[74] The Court found that a director is not an employee but the holder of fiduciary duties in respect of an office of a private company. This must be tempered by the fact that the

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74 Specifically the Oak Industries case mentioned above.

Court stated there is no reason why a director may not also be an employee of the company.

In formulating its judgment the Court emphasised that litigation involving directors as employees was not a novel concept. The Court found that the appeal may be dismissed by simply scrutinising the Respondent's "letter of resignation". The Court held that it was abundantly clear that the Respondent had the intention of only resigning from the office of director and not also as an employee of the company. The Respondent confirmed that she would still be committed to the company and would perform her duties with the same vigour and skill.

The Court accepted the Respondent's argument that the Appellant had been opportunistic in attempting to utilise the Respondent's resignation from office as a resignation from the employment of the Company.

An important element of the judgment of the Labour Appeal Court is that it essentially confirms that a director may resign from office and demand to continue working in the position he held (or perhaps still holds as employee depending on the philosophy one wishes to apply). This is of critical importance as the articles of association of many companies' determine that it must keep a minimum number of directors on its board.

The South African private sector is filled with small to medium sized companies which cannot afford to employ new directors while having directors which resigned from office yet demand to remain employees of the company. The aftermath of such a decision will normally result in inevitable litigation as the company's only option is to terminate the employment of the director in compliance with the prescripts of the LRA and in terms of the lawful reasons for termination.

It is submitted that a company would be able to prove that it is an operational requirement to appoint a new director and the only manner in which to do that would be retrench the director who resigned. The Company would still need to be able to prove that it had valid operational requirements for

effecting the dismissal and that its criteria for selecting those to be retrenched must be fair and objective.

It is abundantly clear that the challenge posed by a director resigning from office yet intending to stay on as an employee causes a number of problems for the company concerned. The procedure which must then be adopted is unnecessarily cumbersome, costly and time consuming.

### 3.3.7 Chillibush Communications (Pty) Ltd v Johnston N.O. and Others[75]

This was an application by the Applicant to set aside and review a jurisdictional ruling of the CCMA in terms whereof the CCMA found that the Third Respondent (hereafter the Respondent) was an employee of the Applicant, entitled to lodge a claim of unfair dismissal irrespective of the fact that he was a director.

The Respondent was appointed as the “managing creative director” of the Applicant. The Respondent filed an unfair dismissal application with the CCMA in early 2007. As in earlier cases dealing with the unfair dismissal applications by executives the Applicant (the Respondent before the CCMA) raised a point *in limine* that the CCMA did not have jurisdiction to hear the matter as the Respondent was not dismissed by the Applicant and that the Respondent was accordingly not an employee of the Applicant.

The CCMA dismissed the point *in limine* and ruled that the Respondent was indeed an employee and that the CCMA had jurisdiction to hear the application. The matter was scheduled for arbitration before a different commissioner and at the onset thereof, by agreement by all parties, it was agreed that the commissioner would only determine two issues; was the Respondent an employee and, was he dismissed by the Applicant.

The parties at the arbitration did not inform the arbitrating commissioner (Johnston) of the prior jurisdictional ruling. The parties led evidence on whether or not the Respondent was an employee of the Applicant. In the

[75] 2010 31 ILJ 1358 (LC).

interim Johnston was informed that the Respondent was already found to be an employee of the Applicant in the jurisdictional ruling. Johnston berated the parties and ruled that the matter was to be set down *de novo* solely for the determination of whether the Respondent was unfairly dismissed. The parties argued that the jurisdictional ruling was made before conciliation and that it was not conclusive of the fact that the Respondent was an employee in the arbitration proceedings which were distinct from the *in limine* hearing. The present application concerns a review of this ruling.

The Labour Court held that the aforementioned ruling was patently reviewable and that it had sufficient evidence before it to issue a judgment on the matter thus rendering the remittance of the matter back to the CCMA for a hearing *de novo* superfluous. The Court proceeded to analyze the evidence and heads of argument before it.

The Respondent was employed as managing creative director on 5 April 2006 and, in terms of a shareholders' agreement, held 20% shares of the Applicant. A point of cardinal importance was that the shareholders agreement determined that should a shareholder cease to be a director of the company or have his employment terminated, by his own resignation or acts of the other shareholders, which must be approved by the chairperson of the board, the shareholder would be obliged to resign as director and offer to sell his shares. The shareholders agreement did not provide for an automatic termination as the articles of association did in Mampheule *supra* but merely mandated that the director would be required to resign.

On 14 November 2006, two other directors of the Applicant, Dlamini and Hefer, convened a meeting of shareholders to be held on 7 December 2006. On 7 December 2006 the Respondent's attorneys conveyed a letter to the Applicant cancelling the shareholders agreement, tendering his 20% shares, indicating that the Respondent did not consider the shareholders agreement

binding upon him, tendered his resignation as director and stipulated that he would remain an employee of the Applicant[76].

The Respondent did not attend that meeting of shareholders and it was unanimously voted that he be removed as director and suspended from performing any duties.

The parties were in agreement that at all material times the Applicant complied with the Companies Act in removing the Respondent from the office of director.[77] The Applicant's attorneys conveyed a letter to the Respondent advising him that it was of the view that his employment ended concurrently with this removal from office and that there was no position for him in the Applicant's employ. The Respondent accordingly filed an unfair dismissal application at the CCMA.

The Applicant's counsel sought to argue that the Respondent was not dismissed but that his employment with the company terminated automatically when he resigned as director and cancelled the shareholders agreement. The Applicant also referred to the Applicants articles of association in support of this contention.

The Respondent countered by arguing that he was dismissed from the employment of the Applicant, that he was an employee notwithstanding his resignation as director and that he was accordingly entitled to the protection of the LRA.

There were two questions before the Court; was the Respondent an employee and was he dismissed by the Applicant. The Court found that the Applicant did not provide sufficient evidence to prove that the Respondent was not an employee. The Court deemed it apposite to not only contain its finding to factual analyses but also to investigate and analyse the law.

The Court stated that normally a director *may* also be an employee of the company and will accordingly act in two different capacities. One as director,

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76 Compare the facts of this matter to the Amazwi Power v Turnbull matter where the financial director of the company resigned from the office of director yet demanded to stay on as an employee of the company.

77 S 71.

subject to the Companies Act and the common law duties of care, skill and diligence. The director may also be an employee of the company and accordingly be governed by the LRA. In support of this averment the Court referred to the judgment in the PG Group matter as discussed earlier in this dissertation.

The Court held that there is no reason in law why a director cannot also be an employee. To answer the question a court or tribunal must engage in a factual enquiry to determine the true nature of the relationship between the parties.

The Respondent's counsel argued that in terms of the PG Group matter the Respondent was indeed an employee and that the LRA should apply to such a person even if the articles of association or shareholders agreement determines that should a director lose his office this will result in the simultaneous termination of his employment.

The Court restated the principle in PG Group that when a director also holds a position as an employee their rights as an employee will not be adversely affected. The Court referred to the matter of Whitcutt v Computer Diagnostics and Engineering (Pty) Ltd [78] as authority for the proposition that the Companies Act does not limit the rights of an employee under the LRA.

The Court also held that it is clear that where there is a conflict between the LRA and the Companies act, the provisions of the LRA must prevail.[79]

The Court referred to the dominant impression test to determine whether or not the Respondent was an employee of the Applicant. The Court examined criteria which were used in previous cases.[80] The Court examined *In casu* incontrovertible facts such as that the Respondent was granted a salary increase, that UIF deductions were made, that he was involved in the day to day activities of the Applicant and that he received a standard payslip which was given to all employees.

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[78] 1987 8 ILJ 356.

[79] S 210 of the LRA.

[80] See in this regard Denel (Pty) Ltd V Gerber 2005 26 ILJ 1256 (LAC) and Hydraulic Engineering Repair Services v Ntshona & Others (2008) 29 ILJ 163 (LC) above.

The shareholders' agreement also provided that except with the approval of 80% of the shareholders, the directors shall be in the full employment of the company. The Court accordingly held that it was clear that the Respondent was indeed an employee of the Applicant.

Having found that the Respondent was an employee the Court proceeded to consider the vexed question of so called automatic termination clauses. The Court expressed its hesitation at accepting that an employer and employee can contractually agree that an employee's employment with a company can automatically terminate once certain suspensive conditions have been met (there are obvious exceptions such as fixed term contracts which expire automatically by way of effluxion of time).

The Court found that any agreement in terms whereof a contract of employment or the articles of association of a company provide for the automatic termination of employment would contravene the LRA's prohibition on the contractual limitation of the employee's statutory rights.[81] Each and every employee has the fundamental right to fair labour practices and such a clause would undermine the protection afforded by the Constitution. The Court also referred to SA Post Office Ltd v Mampeule[82]where it was held that a clause providing for the automatic termination of a contract of employment is invalid.

The Court further held, after referring to the PG Group and Ntshona cases, labour law and company law are distinct from, and operate in different spheres. The Court looked at the example of the provisions of the companies act that deal with the termination of the directorship of directors. The Court stated that it was clear that the shareholders have the right to terminate the directorship of any of the directors at their discretion. This does not strip the director of a right of recourse in terms of the LRA.

The Court laid particular emphasis on the fact that the procedure in validly dismissing the director (assuming he is also an employee) in terms of the LRA is far more onerous and that the pivotal concept is fairness as opposed

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81 See s 5(2)(b) and 5(4) of the LRA in this regard.

82 2009 30 ILJ 664 (LC).

to lawfulness. The Court unambiguously stated that a lawful removal from office in terms of the Companies Act does not guarantee that the company would be favoured with a successful outcome in a unfair dismissal case.

### 3.3.8 Conclusion

It appears that this matter has been the death knell for the proposition that a director cannot also be regarded as an employee in addition to his position as an office bearer of the company. The Court's judgment is clear and unambiguous and the Court made a clear distinction that the LRA and that its concomitant rights do not operate in the same sphere or in an inferior spectrum as the Companies Act. The LRA states expressly that should there in any matter arise a conflict of laws that the provisions of the LRA must prevail.

What the Chilbush case has not confirmed is that every director is automatically an employee of the company. The fact remains that certain non-executive directors which only perform guidance and advise on corporate issues will in all probability not constitute employees in terms of the LRA. The regular termination procedure found in the Companies Act would be sufficient in severing them from the company.

The first part of the objective of this dissertation has been answered by this case; whether or not directors are also employees of the companies they serve can only be answered by engaging in a factual enquiry to determine the true nature of the relationship between the parties. The onus to prove that a director was not an employee of the company will rest squarely with the company due to the presumption of employment contained in the LRA.

Factors which the Court or Tribunal may assess when developing their judgments or rulings include; the prior history of the director, whether they received a payslip, statutory deductions from such payslip which would indicate remuneration as opposed to a director's fee, the manner and extent in which the director was involved in the running of the day to day activities of the Company and the manner in which the company was controlled.

It has been illustrated that over the course of the last two decades numerous cases have been heard by the Courts where employers have attempted to either contract out of the LRA or deny that its directors were dismissed by the companies.[83] The approach of the Courts has been to look at substance as opposed to form (an approach specifically enforced by the Labour- and Labour Appeals Courts) with the ever present requirement of fairness and not lawfulness.

The following chapter will deal with comparative legal systems and the manner in which the dismissal procedure as it relates to executive appointments is followed. It is imperative to stipulate that this comparison is subject to the realisation that South Africa's socio-economic history performs and exceptionally large role in the development of public policy and the statutory framework of the Republic.

Accordingly, it is intrinsically difficult to compare a developing nation with developed nations where the balance of economic (and perhaps social) power is not distributed in the same ratio. Arguably it may be even more difficult a task to compare our domestic legal system with that of another developing nation with its own distinct socio-economic factors.

## 4 International Law

### 4.1 Basis of study of comparative legal systems

For the purposes of brevity only a few unique legal systems will be evaluated and analysed in-depth, namely, France, Australia and Singapore. A brief overview of unfair dismissal law (or wrongful termination as the international parlance coins the subject) as applicable to executives (or their comparable position abroad) in certain companies will be given for purposes of completeness, *inter alia,* Sweden, United States of America and Canada.

### 4.2 France

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[83] See in this regard Boumat Ltd v Vaughan 1992 13 ILJ 934 LAC ; Van Rensburg v Austen Safe Co 1998 19 ILJ 158 LC ; Long & Another v Chemical Specialities Tvl (Pty) Ltd 1987 8 ILJ 523 IC ; Whitcutt v Computer Diagnostics & Engineering (Pty) Ltd 1987 8 ILJ 356 IC.

The French people are well known for their art, fine dining and wine. A lesser known fact is that the French legal system displays a particular affinity to strong labour laws even when equated with those of South Africa.

The French employment law is sourced from the Labor Code, collective bargaining agreements and case law of the higher courts in terms of the doctrine of *stare decisis.* The unfair dismissal system is substantially the same as South Africa with claimants for unfair dismissal required to first attend a conciliation session at the Conciliation Committee of the Labour Courts. Should conciliation prove to be fruitless the aggrieved party may apply to the Judgment Committee where evidence must be led and a judgment handed down.

Any party aggrieved by the outcome of such a matter set down in the Judgment Committee may approach the Court of Appeal in an attempt to vindicate his rights.

One major difference between South African labour jurisprudence and that of our Huguenot cousins is the manner in which the French treat the office of directors. The universal phenomenon of company law is virtually the same in France as in South Africa with the same organisational structure of a board of directors reporting to the shareholders who own the company.

An interesting fact is that the French Labour Code does not specifically regulate the working hours of several workers it does not deem to be "employees". Directors, managers of non-limited liability companies are part of the category which is not seen as employees.[84] This distinction exists despite the fact that there might very well be a director which performs tasks relating to the day to day management of the company.

To fully comprehend the novel manner in which the French approach the subject matter of this dissertation is it of cardinal importance to examine the semantics of the French language. The general approach in France is that

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84 http://www.businessweekly.co.uk/export-to/europe/14173-employment-law-guide-france.

directors (as we know them) are not employees of the companies for which they work but rather officers of the company discharging a specific function.[85]

French company law regulates the relationship between the company and the director, not French employment law. A direct translation of the word "director" as we understand it translates roughly to "manager" in French. A more apt translation for director in terms of an office bearer of the company would be "*Administrateur".* One similarity between the legal systems is that a French director or *administrateur* does not qualify for the protection of the French labour law as such a director is not held to be an employee in terms of the definitions in the statute.

In terms of French law an *administrateur* may be removed without notice pay or even advance notice of such a decision taken to remove the *administrateur*. The only legal requirement is that the reason for the decision must be objectively defensible and not vexatious or spurious. It is not defined which reasons may constitute an objectively defensible reason for the termination of the director's contract.

There have also been reported cases where, in addition to holding the office of *administrateur*, the aforementioned has also been found to be an employee of the company. The employee could be a director and human resources manager at the same time. This overlapping trend between South African and French law confirms that there exists a possibility where a convergence of French company- and employment law would also overlap.

The position is much the same as in South Africa where not only must the director be removed from office in accordance with the relevant statutory provisions or the clauses in the articles of association of the company but adherence must also be given to the provisions of the protective clauses of the employment law to validly terminate the employment contract between the employee and the company.

It is submitted that the fact that both countries, despite a major difference between the socio-economic history of France, a developed nation and South

85 http://aubyn.fr/texte.php?id=.

Africa, a developing nation, share this same conundrum of a dual spectrum of employment and the holding of the office of director is worthy of a few observations in this regard.

The chief argument against comparing one legal system to another is that every country, its history and its people, are vastly different from each other and one cannot precisely compare the legal position in one country to another. The fact that both a developed and developing nation share legal principles expressly providing for the protection of individuals who are directors and employees at the same time can only provide evidence for the argument that the affording of protection against unfair dismissal to the director is based on the development of legal principles.

It is internationally accepted and has been mentioned previously in this dissertation that the reason for the existence of labour law is to protect employees who are on the weak side of the balance of economic power between employee and employer. It can be indulged that directors in general do not face the same power struggle which the ordinary employee faces.

When one keeps in mind that the purpose of labour law is to protect those who do not have the power to do so themselves it seems illogical to apply the protections of the labour law to directors, even if they are employees, who do not face an imbalance in the equilibrium of power.

As will be seen in the preceding sections, this same argument which has been raised in the South African courts features prominently in the international jurisprudence and legislation.

## 4.3 Australia

The cornerstone of Australian labour law is the Fair Work Act[86] which was promulgated in 2009 and led to the establishment of the Australian Industrial Relations Commission.[87]

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86 Act 28 of 2009.

87 http://www.airc.gov.au/.

Similar to our domestic labour law, the FWA only applies to "employees" and specifically excludes independent contractors from the protective provisions of the act. The FWA rather obtusely defines an employee as "includes a reference to a person who is usually such an employee"[88] The definition specifically excludes employees on vocational placements.[89]

The FWA contains an earnings threshold which provides a jurisdictional limitation on certain high earning employees or executives. The threshold amount is currently set at 118,000.00 Australian Dollars. Any employee, irrespective of their title or position, earning above the aforementioned remuneration threshold cap may not apply for an unfair dismissal claim in accordance with the provisions on the FWA.[90]

The ubiquitous nature of the requirement to balance the bargaining power of employees with that of the employer is clearly found in the Australian labour law. Executives and other high-earning employees are considered to be "sophisticated investors"[91] capable of fairly negotiating the terms and conditions of their own employment. These executives who fall within the ambit of the definition of an employee are excluded from the protection from unfair dismissal. There is no requirement in Australian law to provide a three months' notice period or comparative payment in lieu thereof as proposed in the LRA amendment bill discussed earlier in this dissertation.

The exclusion from the protection offered by the FWA does not render the executives and other high earning employees powerless against the corporate might of the companies in which they are employed. The excluded class of employees retain their common law and statutory rights to damages should they be removed unlawfully or for an ulterior purpose.

Whilst the burden of proof would rest on the excluded class of employees in a regular civil suit in the High Court for damages as opposed to the onus to prove fairness on the employer in an unfair dismissal action in the Australian

88 S 15.
89 S 15(1) i.e. Apprenticeship .
90 S 382.
91 Workplace relations update, DLA Piper 2013 http://www.mondaq.com/australia/x/144412/Redundancy+Layoff/Dont+dismiss+me+so+easily+because+Im+an+executive.

Industrial Relations Commission there are other benefits associated therewith.

In terms of the FWA, compensation awarded to an employee who has lodged a successful unfair dismissal claim against an employer is limited to compensation equivalent to six months' remuneration as set at date of dismissal. The compensation to be awarded may also not exceed half of the amount of the high income threshold which is set by regulation from time to time.

A civil suit in the High Court for damages suffered as a result of the unlawful termination of the office of director is only limited to the amount the aggrieved party may prove in terms of the principles of the law of delict.[92] The basis for such action would be found in terms of the common law, contractual law or the Australian Corporation Act[93].

The dismissed director would be entitled to sue for damages based on various heads of damages including, but not limited to, the removal from office prior to the expiration of their term of office, damage to reputation and *inuria* resulting from such a removal from the office of director.

The most evident difference between the manner in which the Australian law differs from South African law (and specifically the LRA amendment bill once it is signed into law) is that there is no notice requirement or compensation which must be paid to effect the termination of the executive who earns above the income threshold amount.

In terms of Section 188B of the LRA amendment bill either three months' notice must be given to the executive affected or the equivalent of three months' compensation pay. In terms of the FWA the executive or high earning employee is specifically excluded from the provisions of the FWA dealing with the subject of unfair dismissal claims. The executive, if he is also deemed to be an employee of the company, retains the remainder of the rights conferred by the FWA in so far as the employee has a right to fair work

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92 Or tort law as it is commonly known and referred to in various commonwealth nations.

93 Act 50 of 2001.

practices[94] and may sue if the company intrudes on those rights irrespective of the income threshold amount.

Executive employees are not specifically excluded from the definition of employee and will in general be considered to be employees in addition to their role as directors of the company. This is comparatively the same as what has been held to be the case throughout the jurisprudence of the South African courts.

It is interesting to note that even though Australian law differentiates between employees who earn above the threshold amount these employees are not left powerless without a right of recourse should they be removed from office. They retain their claim in terms of delict and / or contract law for the unlawful termination of their services. The South African equivalent is found in the provisions of the company act which specifically reserves such a right of recourse for damages a director may suffer as a result of the loss of office of director. This right may be vindicated in a regular civil court and instituted in accordance with the principles applicable to delictual / law of contract principles as the case may be.

This proves to show that providing high earning employees and / or executives with statutory protections in terms of labour law is an unnecessary addition to the existing quiver of common, civil or contractual remedies a unlawfully terminated director may have in any case.

### 4.4 Singapore

Singapore is one of the most interesting countries in the world to study in terms of labour law. A former British colony, a common trait between Singapore and South Africa, Singapore embarked on a long term strategy to transform the country into an industrial manufacturing powerhouse. The move was precipitated as a result of the growing unemployment rate and substantial poverty which was beginning to manifest and take hold of the newly independent nation.

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94 Compare to the safeguard in our LRA regarding unfair labour practices.

The surge in manufacturing was created by the introduction of the Singapore Economic Development Board[95] in the 1960s'. Industrialisation began with the development of manufacturing factories for wood, textiles and clothing. The country grew to be the chief exporter and market stalwart of Asia's economy.

One of Singapore's most attractive economic attributes is the readily available affordable labour. As a result thereof many of the world's largest corporations have invested in the development and introduction of factories in Singapore.

Singapore and South Africa share several traits which make them excellent countries to compare in terms of labour law. They are both former British colonies, have an abundance of unskilled labour available and depend mainly on exports to keep the economy on the up.

The foundation of Singapore's system of labour law can be found in the Singapore Employment Act[96]. The act contains the usual generic provisions which are found in the vast majority of employment codes and legislation around the world. The most striking and interesting difference is the definition of employee.

The SEA defines an employee as;

> "employee" means a person who has entered into or works under a contract of service with an employer and includes a workman and any officer or employee of the Government included in a category, class or description of such officers or employees declared by the President to be employees for the purposes of this Act or any Part or section thereof; but does not include any seaman, domestic worker, or any person employed in a managerial, executive or confidential position or any person belonging to any other class of persons whom the Minister may, from time to time by notification in the Gazette, declare not to be employees for the purposes of this Act"

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95 http://www.edb.gov.sg/content/edb/en/why-singapore/about-singapore/our-history/1960s.html

96 Act 17 of 1986, as amended.

The definition identifies a litany of classes of people who are specifically excluded from the status of “employee” and most importantly, for purposes of this dissertation, any person employed in a managerial, executive or confidential position. The SEA does not define precisely what may be regarded as a managerial or executive position but the Ministry of Manpower has given the following description when referring to professionals, managers and executives:

> "These functions include the authority to influence or make decision on issues such as recruitment, discipline, termination of employment, assessment of performance and reward, or involvement in the formulation of strategies and policies of the enterprise, or the management and running of the business. Professionals are those with specialised skills and whose employment terms are comparable to those of executives and managers."[97]

It is interesting to note that Singapore is one of the few countries in which the definition of employee exhibits an express exclusion clause rather than a blanket definition which covers the vast majority of people connected to a company barring independent contractors.

On the 21st of November 2013 the Ministry of Manpower announced draft amendment bills to extend the protections afforded by the SEA to certain groups of professionals, managers and executives. The amendment bill, formally entitled the Employment, Parental Leave and other Measures Bill, proposes to extend the application of the act to Managers and Executives earning up to 4500 Singapore Dollars per month.[98]

The only additional requirement which must be fulfilled is in respect of junior executives who must have completed a minimum of one year’s service at the company prior to being able to institute a claim for unfair dismissal. The reasoning behind this suspensive condition is to enable employers to pertinently assess the competency of junior executives without the risk of onerous pre-dismissal mechanisms should the candidate prove to be ill-equipped for the position.

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97 www.mom.sg/documents/employment-practices/FAQsonemploymentreview

98 As at the date of writing of this dissertation the conversion is roughly R39,072.52.

The Singaporean model is perhaps one of the best examples of the development of labour law in accordance with the evolution of the business world. It has been stated *ad nauseam* that the true purpose of labour law is to protect employees who are not sufficiently powerful to counter the bargaining power of the employer.

As more and more start-up companies rise in accordance with the evolution of the digital age many directors will receive salaries which may be perceived to be middle management salaries in larger enterprises. The extension of protective clauses to *those* executives who are in a weak bargaining position is perhaps the most appropriate application of labour law.

The manner in which the Singaporean model deals with the termination of executive employees is preferable to the mechanism suggested by the LRA amendment bill. The Singaporean model differentiates between executives in a relatively weak bargaining position and seeks to protect only those employees who are essentially earning the salary of a decent manager. It strives to reach the equilibrium between vulnerable groups and business efficacy.

It must be noted that the core argument underpinning this dissertation is still that a director is a *sui generis* employee as a result of his office. A distinction must inevitably be made between an executive director which makes decisions according to his mandate and only reports to the Board and a "title" director, with little to no authority above that of a manager. [99] The Singaporean model serves to ensure that even a "title" director retains some manner of protection due to the inadequate bargaining power they have available to them.

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[99] The Singapore model features prominently in the ultimate conclusion to this dissertation and is engaged in greater depth in the final chapter.

## 4.5 Sweden

The Swedish Employment Protection Act[100] is the source for contemporary labour law in Sweden, an EU member state and member of the ILO. The opening provisions of the EPA determine that the protective labour laws are applicable to public and private sector employees. The EPA specifically excludes several groups of people from the application of the act. Employees whose duties and conditions of employment are such that they may be deemed to occupy a managerial or comparable position form part of the group of excluded employees.

There is no specific definition of executives or directors but it is submitted that this falls comfortably within the wide ambit of a “comparable position. It seems that the Swedish labour law is primarily concerned with the protection of rank and file employees as opposed to the inclusion of managerial employees which may not necessarily be much better off than their immediate subordinates.

It is submitted that the Swedish EPA goes too far and offers little protection for managerial employees. The exclusion of executives cannot be faulted. The exclusion ensures that there is no clash between labour and commercial law. The right of the shareholders to appoint and change the leadership of the company is unfettered and provides for a swift, simple and inexpensive mechanism to effect a change of leadership at the top tiers of the company.

Even though it may seem as though the labour laws in Sweden do not provide sufficient protection for employees the unemployment rate in Sweden is a mere 7.9 percent as at October 2013.[101]

Sweden is one of the few European Union states to completely exclude managers and executives from the application of its labour law.

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[100] Act 80 of 1982.

[101] http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/dataset?p_product_code=UNE_RT_M

### 4.6 United States of America

No comparison of law would be complete without a brief overview of the labour law system in the USA. The USA is a federal democracy divided into 52 states. The Constitution of the USA determines that federal laws receive precedence over local or state law dealing with the same subject matter. This comparison will thusly be confined to an analysis of federal labour law in the USA.[102]

The principal federal act dealing with labour law in the USA is the Fair Labour Standards act[103] ("FLSA"). The FLSA regulates conditions of employment including overtime, annual leave and maximum hours of work *inter alia.*

There are certain exemptions and so called "exemption tests". To be considered exempt from the application of the statute an employee must earn a minimum of $455.00 per week and a minimum of $100,000.00 per annum. Employees who perform executive duties are also exempt from the application of the statute.

Regulations have been promulgated in terms of the FLSA which seek to determine and classify what is traditionally considered to be executive duties. The non-exhaustive list includes:

- Employees whose primary duty is the management of the enterprise or of a customarily recognized department or subdivision thereof;
- Customarily and regularly directs the work of two or more other employees; and
- Authority to appoint or dismiss employees and whose opinion on the promotion, appointment or dismissal of employees carries sufficient weight.

The remainder of the regulations paint a clear picture that the typical executive will be exempt from the application of the FLSA. Executives typically develop and plan processes and procedures, identify and select market strategies to push sales and are engaged with the performance

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[102] Employment Law Review P Shea M Mosvick p720
[103] 1938.

management of subordinates. All of these duties are considered to be executive duties.

The fact that the FLSA does not provide specific protection for executives does not automatically mean that an executive will never have a cause of action to institute wrongful dismissal claims. The relationship between the company and the executive will typically be governed by a contract of appointment and the parties will negotiate between themselves the procedure and manner in which the company may sever the executive from the company and *vice versa.*

Typical provisions in contracts of service between executives and companies in the USA reflect generic “exit clauses” in terms whereof the executive and the company agree on the manner and procedure which the company must adhere to should it consider terminating the services of the executive.

A comparison between South African labour law and the legislation contained in the USA is a particularly difficult one to make as a result of the USA’s status as the worlds’ economic powerhouse. The most powerful corporations in the world emanate from the USA and it comes as no surprise that the USA’s labour law is in favour of the corporates.

That being said it is submitted that the ability to keep the executive management of a company dynamic is one of the core competencies required to remain competitive in a hyper competitive and vastly changing world. The rank and file employees who bear the brunt of the power struggle between employer and employee receive sufficient protection from the FLSA.

With the vast majority of the world’s largest corporate companies emanating from the USA it seems as though the exclusion of executives from the ambit of protective labour laws does not serve as a bar to the successful management and performance of the Board of Directors.

## 4.7 Canada

The relevance of a comparison to Canadian jurisprudence and legislation stems from the fact that large sections of the drafting of our Constitution[104] was based upon or influenced by Canadian law as the two countries share fundamental Roman law backgrounds.

The sole source of statutory labour law in Canada is derived from the Canada Labour Code[105]. Canada, like the USA, has a federal law system which overrides local or regional law on the same subject matter.

The CLA defines an employee as:

> "employee" means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations;

From the abovementioned definition it is clear that the CLA contains an express, intrinsic exception in relation to the application of the statute to managerial employees (which include executives).

The unjust dismissal chapter[106] applies only to employees who have served at least 12 months' continuous service with an employer.[107] As executives do not fall within the ambit of the definition of employee the remainder of the CLA does not apply to them and, consequently, their terms of service are regulated by commercial law.[108]

Historically, South Africa has shared many legal principles the Canadian jurisprudence. Canadian law reports have featured in many of our domestic law reports regarding criminal, contractual and commercial law. It is interesting to note that executives and managerial employees do not enjoy protection against unfair dismissal (barring any terms and procedures they have negotiated in their contracts of appointment).

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104 Constitution of the Republic of South Africa, 1996.
105 1986.
106 Chapter XIV contained in section 240.
107 The requirement of 12 months completed service prior to the institution of unfair dismissal claims is also found in the labour law of Singapore.
108 Specifically the Canadian Commercial Corporation Act 14 of 1985.

Whilst the countries have a similar legal background a comparison based upon social security and policy legislation is difficult to make as a result of the vastly different socio-economic circumstances of the respective countries.

Canada, one of the world's foremost zealots of human rights deems it apposite to restrict an executive worker to enforcing a contractual claim against a company for an unfair termination. It is humbly submitted that the Canadian system serves to prove that a country can have exceptionally strong human rights views and labour laws yet find the balance between individual employment security and business efficacy. The two do not necessarily involve a trade-off between each other.

## 5 Conclusion

It is submitted that the current legal position regarding the dismissal of directors has been largely codified in the judgments of the Labour- and Labour Appeals Court. The Chillibush case has confirmed that, for purposes of labour law, directors fall squarely within two distinct groups;

Directors who are solely holders of the office of director, provide the company with expert advice regarding the long term strategy and development of the company and are not involved with the day to day running of the company. These directors typically earn a director's fee as compensation for their input at the board table and are normally directors of several companies. They do not accumulate nor apply for annual leave and are holders of a certain set of skills. They are normally only accountable to the shareholders of the company.

The other group of directors are ordinary employees who have been promoted in the ranks or been headhunted. These directors are not only engaged in top tier board meetings and decisions but are also responsible for day to day tasks involving the management of the company. They receive a salary from the company from which statutory deductions such as unemployment insurance and pay as you earn tax are deducted. They accumulate and apply for leave and typically report to a senior or managing director.

A golden thread runs throughout the plethora of law reports examined in this dissertation. Directors, subject to their grouping as mentioned above, are either holders only of the office of director or hold a dual role where they are appointed as directors in terms of the articles of association and remain employees of the company.

It has now been clearly established that compliance with Section 71 of the Companies Act will be sufficient to remove the first mentioned type of director. What has proved to be more cumbersome (and the thorny issue in the vast majority of the law reports) is the removal of the latter type of director.

Such a director may be removed in accordance with the statutory mechanism mentioned above or in terms of the company's articles of association. This does however not terminate the employment relationship between the company and the director. As seen in the Amazwi Power matter such a director may even resign from the office of director and demand to remain in the employment of the company.

To effectively sever the relationship between the company and the latter type of director the company is obliged to dismiss the director in accordance with the LRA and its relevant codes of good practice. It has already been illustrated that there are scenarios when the intervention of the LRA has ensured that justice prevails.

It must also be borne in mind that due to the very nature of how companies are structured, with the board of directors reporting to the ultimate owners of the company, the shareholders, limitation of the shareholders will must be tempered. Due to their size once a company has identified that an issue exists within the ranks of its executives it must act concisely and speedily to ensure a resolution is made. Problems in the management of a company affect more than just the employment of a single employee. Should a company suffer accumulated losses as a result of ineptitude, poor management or inappropriate business decisions it affects the livelihood of all the other employees, directors, shareholders, contractors who depend on

the company and the ultimate consumer of the company's products or service.

Due to the above reasons it has been submitted and argued that the position of a director as a dual holder of office and employment should not render them to be employees in the regular sense. The LRA and BCEA make a distinction between employees and senior managerial employees for certain of the rights afforded to employees. It follows that it can be argued that a director who is also considered to be an employee of the company is in fact a *sui generis* employee.

The learned author, H Stoop, also expresses the view that South African labour law could benefit from a law reform process. Stoop argues that

"A more flexible solution may be needed, especially if one considers the matter from the company's point of view. It is often true that a director's position is a composite one. This is because practical requirements frequently dictate that the two capacities should vest in the same person. If one allows a director to resign from one component of this composite post, an extra post, possibly superfluous, would in many cases have to be created for the director who has resigned. This might prove especially problematic for smaller companies which do not have the capacity to accommodate the extra position. Furthermore, in instances where there has been a breakdown in trust, retaining the former director in any position whatsoever may be untenable. In other words, automatic terminations of employment clauses serve an important purpose in a company law context and simply disallowing them is perhaps an unnecessarily legalistic approach."[109]

It has been argued above that section 71 of the Companies Act provides sufficient protection for directors in that it mandates that certain conditions be met prior to the termination of a director. The Companies Act requires the director to receive adequate notice of the nature and date of the impending resolution and be afforded an opportunity to make representations on the reasons why he should not be removed from office.

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[109] Stoop, H The Company Director as Employee

It may be accepted that all the company has to do is ensure legal compliance with the subsections of the statute, allow the soon to be ex director to make their representations then rubber stamp the predetermined voting order to pass the resolution. The Companies Act however, specifically provides that the director is not stripped of his right of recourse for damages which he may prove as a result of his loss of office or any other office as a result of the resolution passed at the meeting.

An aggrieved director may then approach the relevant court seeking to enforce his damages claim. The court presiding over such matter will have to enquire upon the company's reason for the termination and the court will have to determine whether the company is blameworthy or not.

It is humbly submitted that a director removed in terms of the Companies Act has sufficient protection in the form of a right of recourse in the ordinary courts to vindicate his rights. The further protection offered by the LRA is superfluous and is an excessive limitation of the shareholder's right to appoint and remove directors from the company they own. In certain unfair dismissal cases it has been held that informal meetings between employees and their superiors were *de facto* hearings and the employees were provided ample opportunity to state their case where they have been accused of misconduct. Stoop argues that:

"It is true that reinstatement will not always be ordered as the LRA does indeed recognize the fact that this is not always a suitable remedy. However, it may not be appropriate to sanction the company at all. Arguably, the right of the general meeting to remove board members should not be undermined by labour law provisions; especially not given the fact that board accountability and shareholder activism is becoming increasingly important in the current socio-economic climate. In regulating the matter, labour law and company law currently co-exist, but each does little to enhance the efficiency of the other.

The restriction placed on the removal of ex officio directors and directors appointed by designated persons in the 2008 Companies Act protects such directors from arbitrary removal to some extent: the Act affords the director the opportunity to state his case and it makes provision for the court to review the removal and for damages to be awarded when appropriate. In spite of these remedies the new Act does not provide for the substantive and procedural fairness that labour law does, especially not in the case of a

director appointed by the shareholders. Although it is conceded that such protective measure will at times be appropriate this will certainly not always be the case."

This begs the question why a meeting of shareholders in terms of section 70 of the Companies Act cannot be equated with a disciplinary hearing which has become the cornerstone of procedural fairness in our law of dismissal. It is humbly submitted that the current legal position where a *bona fide* director appointed in terms of the Companies Act or the articles of association must be afforded two "hearings" is unnecessarily time consuming and onerous.

The spirit and purport of the LRA was to ensure that employees who are caught on the back end of the balance of power be afforded adequate protection. It is incomprehensible that the purpose of the LRA was to ensure directors receive effectively two hearings before their services may be terminated.

One cannot place a director and a regular blue collar employee on the same playing field. The proposed amendments to the LRA as discussed above will no doubt be utilized to a large extent in securing the dismissals of directors and senior managerial employees however this can hardly be called fair and equitable for the majority of companies in South Africa. Few companies can truly afford to pay an executive three months' salary *in lieu* of dismissal.

Evidence for the proposition that a director is a *sui generis* employee can be found in the fact that a court is unable to order the reinstatement of that employee to the office of director following a successful unfair dismissal suit. The court can at most order the company to take the director back into its hierarchy but a different position will have to be made to accommodate such an employee. Unlike the dismissal of any other type of employee the Court cannot order the company concerned, even if it was manifestly unjust, the primary remedy provided by the LRA.

The court's reluctance (or inability) to order such reinstatement orders comes from the fact that this would be a gross intrusion on company law and would effectively render shareholder rights nugatory in this regard. When one

considers that the primary purpose of the LRA is to ensure that employees are not unfairly dismissed it must be kept in mind that the principal remedy employed by the CCMA and the Labour Courts is a reinstatement order.

The fact that the CCMA or Labour Courts cannot reinstate a dismissed director back into his office as such lends credence to the argument that a director must be considered as a *sui generis* employee. It may be argued that the reinstatement order is directed not at such a dismissed director's office which he held *but his employment relationship* with the company. Whilst this argument does seek to provide clarity and attempts to elucidate the perception that the director held two distinct relationships within the company there are certain questions it cannot answer.

One such question relates to a standard provision in a reinstatement order declaring that the dismissed employee be reinstated on terms not less favourable or the same as the ones which were applicable on the date of dismissal.

Reinstating an employee and paying him the same salary he earned prior to his dismissal is only one aspect of such an order. Holding the office of director is accompanied with a sense of pride, prestige and dignity. Should a director be reinstated as merely an employee it serves to reason that they would feel isolated as they would not be able to perform many of the same tasks they would have as directors. Certain actions may only be performed by directors specifically concerning the opening of accounts, changing of bank details and an array of others which bind the company.

In addition thereto, it has been established by the Labour Courts, particularly in cases of unfair suspension that irrespective of the fact that an employee continues to receive remuneration while placed on suspension, the ability to work and perform your tasks form part of the integral right to dignity. Some people feel defined by the work that they do and a reinstatement as anything other than a director may well be considered to be a demotion to the employee concerned.

The reinstatement order will also cause unease in the workplace and the former director will now be on the same hierarchical plane as many of his subordinates in his former position. The director will have effectively become a mere colleague of theirs and the concomitant respect which comes with the title of director will be lost. The final result leaves the company overstaffed, the employees annoyed and the former director dismayed.

Much like a divorce a termination between a company and one or more of its directors should attempt to hold onto the “clean break” principle as far as possible. The long term affects are simply nothing except negative. It is not argued that directors should not be protected against unscrupulous employers but merely that a legislative reform process is required to ensure that companies are not exorbitantly burdened and pulled down when the time has come to shuffle the positions at the top.

A director who may only rely on the Companies Act for protection may find solace in the fact that his remuneration, benefits and work environment is commensurate with this role and responsibilities at the upper echelons of the organisational structure. Another proponent of the ideology that directors are *sui generis* employees can be found in the fact that directors are burdened with a collection of fiduciary duties and responsibilities which do not apply *ex lege* to mere employees of the company.

The role a director performs in the success of a company cannot be understated, a director is the mechanism through which the shareholders control and manage the company, this is the sole reason for affording such a vast array of important and onerous duties and responsibilities upon its executive officers. The same level of commitment, professionalism and skill is not expected of ordinary employees yet forms the cornerstone of the employment and appointment of a director. It is humbly submitted that these factors are valuable in ascertaining the true form of employment between a company and its directors.

The law as a whole makes a monumental distinction between employees and directors yet only the LRA does not differentiate between types of employees

(barring senior managerial employees[110]). A vast body of international law and jurisprudence provides support for the notion that a director is a *sui generis* type of employee and not necessarily requiring special protection in terms of labour law.

Singapore, the USA and Canada amongst others provide explicitly for the exclusion of executives from the protective provisions of the respective labour laws of the countries. Many of these countries have advocated the use of an earnings threshold system in addition to the non-applicability of unfair dismissal rights to executive employees. This strikes a balance between the legal principles of affording protection to employees yet is also alive to the fact that not all employees are on equal ground when it comes to the distribution of power in the office.

Irrespective of the nature of the mechanism which will eventually be adopted by the legislature the most important factor behind the amendment is the acknowledgment that directors' are a group of *sui generis* employees and should not be treated in the same fashion as blue collar works in the employment law sphere.

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110 Which may include directors but this is unfortunately a matter which is far beyond the scope and purpose of this dissertation.

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