COMPANY LAW AND THE INTERESTS

OF COMPANY EMPLOYEES

RESEARCH DISSERTATION PRESENTED FOR
THE APPROVAL OF SENATE
IN FULFILMENT OF PART OF THE REQUIREMENTS FOR
THE DEGREE OF MASTER OF LAWS
IN APPROVED COURSES AND A MINOR DISSERTATION.
THE OTHER PART OF THE REQUIREMENT FOR THIS DEGREE
WAS THE COMPLETION OF A PROGRAMME OF COURSES

W.M. VENTER
CAPE TOWN
OCTOBER 1991

INDEX TO CONTENTS

PREFACE

The present state of law in South Africa appears to create a dichotomy between labour lawyers on the one hand, and commercial lawyers applying their revered company law principles, on the other. This dissertation will deal with some aspects of law which create tension between the two and discuss some solutions towards resolving such tension.

The development of the employment relationship makes it imperative to remove from labour law excessive influences of patterns of company law which may exacerbate the relationship between employer and employee. Some of the difficulties created by company law which manifest themselves in the employment relationship will be examined. This task becomes necessary in order to find some means in the South African labour scene, towards lessening conflict between employers and employees. One needs to search no further than to consider an example such as the impact of sophisticated mergers or take-overs. The application of the legal fiction of the separate entity of a company in these circumstances is perhaps too rigid to inflict upon a relatively unsophisticated workforce which otherwise enjoys little or no assistance from company law. There is also no touchstone in South African law to guide company directors towards recognising the need for some form of protection of company employees since the company director is currently bound, in the exercise of his fiduciary duties, to act only in the "interests" of his company.

It seems more than likely that South Africa will have a mixed economy based on market principles for the foreseeable future until constitutional issues have been laid to rest. The future South Africa is not likely to have a political economy which is either vigorously worker controlled or entirely free enterprise in character. This may dictate future policy, but the need to be resilient during the period of change, is imperative. This prognosis

of the South African labour law scenario makes it extremely difficult to attempt to lay down strict guidelines for dealing with the problems, but a closer examination of the shareholder/employee positions within a company, the duty of directors, legislation and socio-political trends impacting upon companies, may result in alleviating at least some of the social disorders created by retrenchments. The current situation within the country with its massive unemployment, demands that labour law and its peer, company law, recognise the effect of loss of employment on the well-being of workers and that it is inevitable, in instances where tensions are created between these disciplines, that these be addressed to attain urgent conciliation. This may conceivably add to the fiduciary duties of directors of companies by setting mandatory standards which will recognise the severe socio-economic impact of dismissals. It must somehow also be captured within the ambit of the "interests" of a company which the director is obliged by common law to protect.

Loss of employment as a result of workforce reductions is widely seen as a major social issue requiring the attention of policy-makers at governmental level as well as that of industry and of undertakings. Lawyers also, must not be seen to be lacking in ability and willingness to create an equitable balance in the modern.day employment relationship. In the last decade, at least, policies applicable to workforce reductions have undergone considerable development in many countries through legislative or administrative action and collective bargaining. It is the purpose of the present study to attempt, through the medium of company law, to address some of these issues with the view to attenuating their dire social results and thereby create a territory on which commercial lawyers and labour lawyers are able to exist in relatively peaceful condominium. This dissertation examines the effect of the company as a legal person and argues for a change in the "interests" of a company from a solely profit making enterprise, to one which, by force of circumstances, must change to

keep pace with developments in the employment relationship. This inevitably leads to a discussion of the relationship between the shareholders of a company and its employees and an examination of extended duties of its directors. This becomes necessary if the welfare and interests of a company's employees are to be catered for. Finally, some comment on take-overs, mergers and transfers will be offered and a conclusion, which includes some aspects of juridification, is reached.

CHAPTER 1

THE COMPANY AS A LEGAL PERSON

A company is a corporation, and therefore is, in the eyes of the law, quite distinct from the individuals who are its members. Also, for the company lawyer and the common law labour lawyer, a company's obligations towards its employees extend no further than its contractual obligations in accordance with the traditional employment contract.[1] As a distinct person the company can own property, have rights and be subject to liabilities,[2] and it does not hold its property merely as an agent or trustee of its members.[3] Its members cannot sue to enforce its rights[4] nor can they be sued in respect of its liabilities.[5]

The inviolability of the corporate personality as enunciated by the English law[6] was enshrined by the Appellate Division in *Dadoo v Krugersdorp Municipal Council.*[7] It is, therefore, also one of the cardinal principles of South African company law that:- *"A registered company is a legal persona distinct from the members who compose it..... . This conception of the existence of the company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; property*

---

1 *R v Smit 1955(1) SA 239 (C) at 241H - 242A; cf Media Workers' Association of SA and Others v Perskor (1989) 10 ILJ 1062(IC); Lord Wedderburn : Labour Law : From Here to Autonomy (1987) 16 I.L.J. 1 at 7 "'It is no good asking the common law how to render void the unjust dismissal of ordinary workers. The answer to that problem must be the one given to the man who asked the way to York : You do not start from here'".*

2 *Salomon v A. Salomon & Co. Ltd [1897] A.C. 22.*

3 *Macaura v Northern Assurance Co. [1925] A.C. 619.*

4 *Foss v Harbottle [1843] 2 Hare 461.*

5 *Daimler Co. v Continental Tyre and Rubber Co. Ltd (Great Britain) [1916] 2 A.C. 307.*

6 *L.C.B. Gower : Gower's Principles of Modern Company Law 4th ed (1979) Ch 5 p 97; Robert R. Pennington : Company Law 5th ed (1985) Ch 2 p 46.*

7 *1920 AD 530.*

vested in the company is not, and cannot be, regarded as vested in all or any of its members" - per Innes C.J. in *Dadoo*.[8] The South African courts have been markedly reluctant to stray from the dicta of the Appellate Division in *Dadoo,*[9] and, although on occasion the courts have had the opportunity to focus on the person or persons "behind" the company, they have failed to grasp the opportunity of taking the enquiry any further.[10] The seeds sown in the venerable soil of *Salomon*[11] and perpetuated in South Africa by *Dadoo*,[12] leaves the law in a state of uncertainty as to the circumstances in which the court can or should "lift" or "pierce the veil" of corporate personality.

This veil of corporate personality is said to conceal the internal workings of a company but in South Africa, and elsewhere, the legislature has been compelled to *"forge a sledgehammer capable of cracking open the corporate shell".*[13] In company law it has done this by the insertion of various sections in the South African Companies Act.[14] Sections to which

---

[8] *Above, p 1, n7 at 550 - 551.*

[9] *Andrew Domanski "Piercing the Corporate Veil - A New Direction?" (1986) 103 SALJ 224.*

[10] *Lategan and Another NNO v Boyes and Another 1980 (4) SA 191(T); Banco de Mocambique v Inter-Science Research and Development Services (Pty) Ltd 1982 (3) SA 330(T); Botha v Van Niekerk en 'n Ander 1983 (3) SA 513(W).*

[11] *Above, p 1, n2, c.f. Lord Denning M.R. who observed in Littlewoods Mail Order Stores Ltd v I.R.C. [1969] 1 W.L.R. 1241 at 1254 that "The doctrine in Salomon's case has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can, and often do, draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit"; Ebrahimi v Westbourne Galleries [1973] AC 360 H.L.*

[12] *Above, p 1, n7.*

[13] *Gower above, p1, n6 112.*

[14] *Act No. 61 of 1973.*

reference may be made are those dealing with the so-called *"just and equitable rule"* that a company ought to be wound up,[15] a member's remedy in cases of oppressive or unfairly prejudicial, unjust or inequitable conduct in the affairs of the company,[16] and the rights of, inter alia, any creditor or member, to apply to the Court for a declaration that any person (usually a director) who was knowingly party to the carrying on of the company's affairs in a reckless or fraudulent manner, as defined, may be held responsible for the liabilities of the company.[17] To these must be added the relationship between holding and subsidiaries and the control which the holding company has over its subsidiaries.[18] The robust judgment of Lord Denning MR in *DHN Food Distributors Ltd and Others v London Borough of Tower Hamlets* in the Court of Appeal cannot pass unmentioned.[19] This case dealt with the expropriation of land which belonged to a subsidiary. Lord Denning held that there is evidence of a tendency to ignore the separate legal entities of various companies within a group, and to look instead to the economic entity of such group. The court in consequence held that three companies should, for the purposes of the judgment, be treated as one, and that the "parent" company should be treated as that one and, accordingly, it was entitled to the proceeds arising from the expropriation.

---

[15] *s 344 (h); Erasmus v Pentamed Investments (Pty) Ltd 1982 (1) SA 178(W).*

[16] *s 252; Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd 1979 (3) SA 713(W) and the first appeal in this case reported in 1980 (4) SA 204(T).*

[17] *s 424; S v Goertz 1980 (1) SA 269(C); Orkin Brothers Ltd v Bell 1921 TPD 92.*

[18] *Gower above, p 1 n6 117 et seq.*

[19] *[1976]3 ALL ER 462.*

Lord Denning's approach is of particular importance to the labour lawyer in his quest to identify, in given circumstances, the true employer. This difficulty particularly manifests itself in mergers and take-overs which will be discussed. The industrial court has on occasion found solace in the judgment of Lord Denning in *DHN Food* when attempting to ascertain the "employer" entity in cases involving subsidiaries and associates[20] since there is nought for the court's comfort which flows from the pens of South African company lawyers.[21] Notwithstanding the approach of Lord Denning in *DHN Food*, the English law still sees every company as a separate person, even if it is in a group where subsidiaries are all controlled by a parent company. Where three giant multinational oil companies created subsidiary companies in Nigeria and Britain that failed, causing losses of £75 million to creditors, the giant shareholders could not be made liable for the debts of those other "persons", their wholly controlled subsidiary companies.[22] Each multinational and each subsidiary company is one legal person and one separate employer and this represents a very important notion for labour law.

Whilst it has been said that a company is a person apart but a person without a soul, it is suggested that since dicta of the South African courts on piercing the veil are by and large *obiter*,[23] it is necessary to search further afield than South African and even English law to ascertain some

---

[20] *S.A. Allied Workers Union and Others v Contract Installations (Pty) Ltd and Another (1988) 9 ILJ 112 (IC); Paper, Printing, Wood and Allied Workers Union and Others v Kaycraft (Pty) Ltd and Another (1989) 10 ILJ 272 (IC).*

[21] *cf Sage Holdings Ltd v The Unisec Group Ltd and Others 1982 (1) SA 337(W).*

[22] *Multinational Gas and Petrochemical Co. v Multinational Gas and Petrochemical Services Ltd [1983] Ch. 258.*

[23] *Above, p 2, n10. The Banco de Mocambique and Lategan cases.*

semblance of balance and conviction in "piercing" cases. It is submitted, with respect, that direction is to be found in *Glazer v Commission on Ethics for Public Employees*.[24] This is an American case decided in the Louisiana Supreme Court. The plaintiff, Glazer, was the sole stockholder, president and chairman of the board of Glazer Steel Corporation and he was personally charged with having violated certain conflict-of-interest provisions in the State's Code of Ethics for Public Employees. The charge arose out of Glazer's membership of the State Mineral Board since his corporation sold materials to seven companies that held leases with the State of Louisiana. The crucial question was whether the corporation's corporate veil should be pierced so that Glazer could be held personally liable for the conflict of interest. In the event, the Louisiana Supreme Court on appeal held that Glazer was personally accountable for the activities of his wholly-owned corporation.

Carteaux[25] in discussing *Glazer*, deals with the "balancing test" for piercing the corporate veil which was expressed in the judgment. It is said that the this test is one whereby the policies behind the recognition of separate corporate existence must be balanced against the policies justifying piercing. In order to justify piercing the facts must indicate either a misuse of the separate entity privilege or a need to limit the privilege in the interests of justice and equity. The approach in *Glazer* appeals and, with respect, makes out a far easier test than the somewhat vague references to fraud[26] or clearly improper conduct which represents unconscionable injustice[27]

---

[24] *431 So 2d 752 (La 1983).*

[25] *Patricia A. Carteaux "Corporations - Shareholders Liability - Louisiana Adopts a Balancing Test for Piercing the Corporate Veil" Tulane Law Review (1984) Vol. 58 at 1089.*

[26] *Lategan v Boyes above, p 2, n10.*

[27] *Botha v Van Niekerk above, p 2, n10.*

pronounced by South African judges. Furthermore, *Glazer* is based on policies of justice and equity and the application of these principles appear to meet with the approach of at least some South African labour lawyers who strive to promote industrial rights of employees by the application of the principles of fairness and equity.[28]

The company as a legal person has been dealt with at some length since the principles of separate legal identity as pronounced in *Salomon,*[29] which remains almost unscathed in the annals of South African law, has to be borne in mind in any attempt to bring closer together some sort of alliance between the labour lawyer and his jurisprudentially more experienced colleague, the company lawyer.[30]

It, therefore, seems incontrovertible that ever since the House of Lords decision in *Salomon,* attempts have been made to weaken or lift the veil which is drawn over a limited company to protect its identity as an independent entity, distinct and in isolation from the personality of its directors, shareholders or other subsidiary companies.[31] Whilst statutory deviations to the principle of corporate entity exist,[32] these do not sufficiently undermine the general principle. As to common law exceptions, it is difficult to perceive in what form they are conceived other than by the

---

[28] *National Union of Mineworkers v Marievale Consolidated Mines Limited (1986) 7 ILJ 123 (IC).*

[29] *Above, p 1, n2.*

[30] *Bob Hepple : "The Making of Labour Law in Europe" at 6:- "The subject which is now generally called "labour law" is of recent origin. In most countries it became recognised as a distinct division of law only after the second world war".*

[31] *Adams and Others v Cape Industry plc and Another [1990]2 WLR 657 and Sage Holdings above p 4, n21.*

[32] *Above, p 3, n15, 16 and 17.*

generalised and indefinable equitable spirit of fairness and justice. The decisions in *DHN Food* and *Glazer*[33] substantiate this view. Gower[34] suggests that not much progress had been made in producing principles or a consistent policy and the most that can be said is that a court will lift the veil if it is of the view that justice demands it. The results, says Gower, smacks of palm-tree justice rather than the application of legal rules and the individual employee therefore faces an employer fundamentally different from him. The company employer is in reality a collective entity, an aggregation of capital, but endowed with an individual personality by the law.

All this having been decided by the courts, there remains a fundamental and apparently contradictory reality. The company is utterly dependant for its very operation on the thoughts and actions of the human beings who are directly connected with it.[35] The management of a company is assigned to the board of directors in accordance with its articles of association. It may here be stated that there is a difference between the so-called full-time or executive director, who participates in the day to day management of a company's affairs, and, the non executive director who has not undertaken any special obligation.[36] The latter are often appointed for so-called window dressing purposes[37] whilst the executive directors of modern

---

[33] *DHN Food above, p 3, n19 and Glazer above, p 5, n24.*

[34] *Gower above, p 1, n6 at 138.*

[35] *Harry Rajak : A Source Book of Company Law (1989) Chap 2 p 85; Kuwait Asia Bank EC v National Mutual Life Nominees Ltd [1990] BCLC 868 at 888.*

[36] *Fisheries Development Corporation v Jorgensen 1980 (4) SA 156 (W) 165H.*

[37] *In re City Equitable Fire Insurance Co. Ltd [1925] Ch 407 at 426.*

companies are also employees[38] who, it is suggested, owe a fiduciary duty to their companies but, at the same time, are bound to obey the reasonable commands of their company/employer. According to Rajak:- *'The genius of company lies in the suppression of the legal existence of the people who create, service and direct the venture. Multiple identities are replaced by one. Contracts and other transactions are effected by that single entity. This facilitates dealings with outsiders and streamlines internal management. Shareholders may have the right to vote, but they do not have a right to manage".*[39]

This chapter may close with the thoughts expressed by Lord Wilberforce in *Ebrahimi v Westbourne Galleries*[40] where he discusses the English Companies Act's equivalent of the South African act's section 344(h)[41]:- "*..... a limited company is more than a mere judicial entity, with a personality in law of its own ..... there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.*"

---

38 *Brown v Oak Industries (S.A.) (Pty) Ltd (1987) 8 ILJ 510 (IC) at 513.*

39 *Rajak above, p 7, n35 at 87.*

40 *Above, p 2, n11 at 379B.*

41 *Above, p 3, n15.*

CHAPTER 2

A COMPANY'S "INTERESTS" AND ITS EMPLOYEES

INTRODUCTION

It is said that a company must be viewed "as a separate entity in which many conflicting interests must be reconciled (such as those of its shareholders, creditors, employees, and environmental and consumer interests)". The fiduciary duties of directors *per se* will be dealt with under a separate heading. This chapter will be confined to the changing nature of the modern day company which appears to reveal increasing tendencies towards steering away from an entity whose sole aim is the attainment of as large an amount of profit as possible, to one which recognises constituencies, other than only its shareholders, to which it owes an accountability.[42] One of these, and by no means the least important, is the work force employed by the company's enterprise. This new concept of the Company was recognised in the United Kingdom by all political parties. The White Paper on Company Law Reform, published by the Conservative Government in July, 1973, stated:- *"In formulating these proposals the Government are specifically recognising, in the context of company law, the generally accepted fact that ownership involves responsibilities as well as rights. This requires company directors, on behalf of the shareholders, to discharge their social responsibilities as well as to protect their legitimate interests. The boards of companies, and their managements, thus have a manifest obligation towards all those with whom they have dealings - and none more so than the employees of companies".*[43] The English Committee of Inquiry on Industrial Democracy - (the Bullock Report) subsequently endorsed that modern company management also

---

[42] *Dawson (1984) II NZULR 68 at 75; Gower above p 1, n6 at 62; Clive M. Schmitthoff : Commercial Law in a Changing Economic Climate (2ed) 1981 at 37.*

[43] *Cmnd. 5391, 5.*

takes into account the interests of employees.[44] Davies and Wedderburn[45] discuss the comments of Kahn-Freund on the Bullock Report. Kahn-Freund[46] is of the view that the *"interests of the company"* cannot be identified with *"the interests of both shareholders and employees"*. This is so because, according to him, the *"interest of the company"* is always identical with an interest of its shareholders. The authors question this view and arrive at the conclusion that the proposition is tenable only on the basis that the sole legitimate purpose of the company is to maximise profits. If this assumption is relaxed and it is assumed that a company is able to pursue other goals such as a balance among profit, growth, size and employment opportunities, then no particular group is able to claim permanent identification of the company's interests with its interests. This is the view of *Bullock* and appears to be the goal towards which the future South African industrial society may be compelled to strive.

One ventures into this field with some trepidation since the concept is notionally repugnant to commercial lawyers who administer the traditional company law; in addition, one has to contend with a confrontation between different disciples, mainly law, economics, sociology and political science. A synthesis of these disciplines falls outside the ambition of this writer but suffice it to state that whilst it cannot be gainsaid that such a confrontation does indeed exist, such synthesis is probably not feasible. This dissertation will, in any event, confine itself to the relationship between company and labour law but this notwithstanding, it would be folly to ignore the existence

---

[44] *Cmnd. 6706, (1977).*

[45] *Paul Davies and Wedderburn of Charlton : "The Land of Industrial Democracy" [1977] 6 I.L.J. 197 at 198 et seq.*

[46] *Sir Otto Kahn-Freund : "Industrial Democracy" - [1977] 6 I.L.J. 65 at 76 - 77.*

of these disciplines since they are so closely woven into the pattern which represents the problem which we are attempting to resolve.

THE COURTS

In *Parke v Daily News Ltd*[47] the company was not transferring the whole of its undertaking but proposed to continue trading. However, the board had agreed to sell two of its newspapers, "New Chronicle" and "The Star", and proposed to distribute the purchase price, which was not inconsiderable, among former employees. A general meeting was called to approve the transaction although the company was not legally bound to pay any compensation to the employees. A minority shareholder claimed that the proposed payment was *ultra vires*. Plowman J. held that the proposed payment was *ultra vires* and incapable of ratification by the majority of the shareholders. The decision to pay compensation was motivated by a desire to treat the employees generously, but was not taken in the interests of the company. *"Stripped of all its side issues, the essence of the matter is this, that the directors of the defendant company are proposing that a very large part of its funds should be given to its former employees in order to benefit those employees rather than the company, and that is an application of the company's funds which the law, as I understand it, will not allow"* - per Plowman J in *Parke*.[48]

Who, in truth, is able to fault the motives of the good Colonel Cramphorn who opposed a take-over bid of a company of which he was a director since

---

[47] *[1962] Ch. 927.*

[48] *Above, n47 at 963.*

"the offer would unsettle the company's staff".[49] Indeed, the court found that Colonel Cramphorn and his co-directors were not activated by any unworthy motives in issuing additional shares in order to frustrate a take-over bid by a third party. The court found that the honour of the directors was not in the least impinged but the means which they adopted to attain their ends, however honourable, were not permissible in company law.[50] In the event the court found that the directors had exceeded their fiduciary powers by issuing the shares and found for the plaintiff Hogg notwithstanding that the court found that the board believed that to keep the management of the company's affairs in the hands of the existing board would be more advantageous to the shareholders, the company's staff and its customers than if it were committed to a board selected by the raider.

Even though *Parke* and *Hogg* were decided in the nineteen sixties, the formalism of company law by the application of the doctrine of proper purpose resulted in the court totally ignoring the interests of a company's employees and directing its attentions solely to company law principles. In order to find acceptance in law that a company is an aggregate comprising its legal personality and business and all of those persons who participate in or are affected by that business, one needs to turn to the judgments of other jurisdictions since there is no direction from South African courts.

In *Unocal Corp v Mesa Petroleum Co.*,[51] the Supreme Court of Delaware saw the corporate enterprise as including stockholders and other

---

[49] *Hogg v Cramphorn [1966] 3 All ER 420 at 423A; Daniel D. Prentice : Companies Act 1980 (1980) Chap 17 p 137.*

[50] *Hogg above, n49 at 426F.*

[51] *(493 A 2d 946 (1985) at 955; c.f. Re Smith and Fawcett Ltd [1942] Ch. 304 at 306 per Lord Greene M.R. who held that directors are bound to exercise the powers conferred upon them "bona fide in what they consider - not what the court may consider - is in the interests of the company.....".*

constituencies such as creditors, customers, employees and perhaps even the community generally within the particular circumstances of that case. If the view of the court in this case, in recognising that a company has more obligations than merely being a profit-maximization entity, is correct, it aligns itself with the views of the labour lawyer because profit can no longer be the only normative touchstone of an organisation such as a company. The court's judgment represents a translation into legal norms of at least the economic and sociological disciplines briefly mentioned above which labour lawyers ought to encourage in the face of judgments such as that of Buckley J. in *Hogg*.[52] The facts in *Unocal* were similar to those in *Hogg*. It was a decision based on the issue of shares to avert a hostile tender offer by a minority shareholder and the Court arrived at its conclusion influenced by the so-called business judgment rule of the American courts. This represents a presumption that in making business decisions the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company. This approach reveals extremely interesting channels in extending the traditional *Hogg* type approach for the courts to develop specific guidelines for directors to ensure that the well being and interests of their companies' employees are adequately secured. In *Teck*,[53] the British Colombia Supreme Court, per Berger J., deals at some length with the decision of Buckley J. in *Hogg*[54] where he discusses the fiduciary duties of directors. The learned judge seeks to distinguish *Hogg's* case which states that directors may not allot shares to frustrate an attempt to obtain control of the company even if they believe it is in the best interests of the

---

[52] *Above, p 12, n49.*

[53] *Teck Corporation Limited v Miller (1972) 33 D.L.R. (3d) 288.*

[54] *Above, p 12, n49.*

company. Berger J. suggests that *Hogg* is inconsistent with the law as stated in *Re Smith and Fawcett Ltd*[55] for how can it be said that the directors have the right to consider the interests of the company when an exception is made where they exercise their powers to issue shares? After reviewing Canadian and English authorities, Berger J. accepts that the classical theory is that the director's duty is to the company but then asks the question by what standards are the shareholders interests to be measured? The learned judge adopts a practical view when considering the fiduciary duties of directors. He is of the view that the law must take account of the realities of life and accept that, in the Canadian economy in any event, companies provide resources for the generation of wealth. As authority for his view he relies on a judgment in the court below of a case decided in the Supreme Court of Canada - *Peso Silver Mines Ltd (N.P.L.) v Cropper.*[56] The learned judge in *Teck* goes on to say that:- *"A classical theory that once was unchallenged must yield to the facts of modern life. In fact, of course, it has. If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting bona fide in the interests of the company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in the commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of shareholders".*[57] *Teck*, was decided in 1972 and had Buckley J. in *Hogg* applied the reasoning of Berger J. in *Teck*, his judgment could have been a simple affair praising Colonel Cramphorn for his laudable and genuine concern for his company's employees and even had he had some personal

---

[55] *Above, p 12, n51.*

[56] *56 D.L.R. (2d) 117 at 154-5.*

[57] *Above, p 13, n53 at 314.*

motive for preventing the company from being taken over, it would not have mattered, provided he acted in the interests of his company. It is submitted that Colonel Cramphorn's genuine concern for the good of his employees, adequately expresses what Berger J. referred to in *Teck* as being in the interests of the company, for how is a company able to prosper if it is saddled with dissatisfied employees? It is conceded that *Teck* and *Hogg* are oft cited cases when company lawyers deal with the doctrine of proper purpose but, it is submitted, these cases must be considered in an enquiry as to the shape a company ought to assume to meet the aspirations of labour law. It is also conceded that Berger J. may have gone too far in *Teck* when dealing with the ability of directors, in certain circumstances, to enjoy a personal advantage in the exercise of their fiduciary duties.[58]

ACADEMIC COMMENTARIES

Lord Wedderburn,[59] in a widely researched article, finds that the English courts in their application of equity have, this notwithstanding, persisted in the views expressed in *Salomon*[60] despite notions of social responsibility and even though this has resulted in the once exclusive equation of the company being questioned. Wedderburn concludes that if the law can or should no longer assume that profit-maximization is the only goal of corporate responsibility, it is obliged to give to private capital guidance on the price which it demands for that special privilege. One must immediately retort by quoting from *Schmitthoff*[61] "..... *a fundamental*

---

[58] *Howard Smith Ltd v Ampol Petroleum Ltd [1974] All ER 1126 (PC).*

[59] *Lord Wedderburn : "The Legal Development of Corporate Responsibility" (Corporate Governance and Directors' Liabilities : Hopt and Teubner (1985) 3.*

[60] *Above, p 1, n2.*

[61] *Schmitthoff above, p 9, n42.*

change has taken place in the concept of the company. The company is no longer regarded as an instrument of profit maximization managed for the sole benefit of its shareholders. It is generally recognised that the company as an economic unit consists of a combination of several interests, namely those of the shareholders as providers of capital, of the employees as providers of labour, of the creditors and of the public as such. The concept of the company as an instrument of economic capitalism has thus developed into one of the enterprise as an instrument of a new social order. The modern concept of enterprise is founded on the theory of social responsibility". It is submitted that this must be an acceptable view and it effectively deals with all the disciplines already mentioned[62] save that insofar as the South African lawyer is concerned, company law issues must be resolved.[63] Notwithstanding the views expressed by *Lord Wedderburn*, the onslaught of social responsibility in the field of labour relations is a factor which private capital in South Africa dare no longer ignore. Far from making demands for a *quid pro quo* as suggested by him, voluntary acceptance is inevitable. It is only the law that remains a stumbling block.

Of this extended dimension of the elements of a company in the social responsibility field, *Wedderburn*[64] remarks that:- "*Similarly, those ranked as exponents of non-profit "social obligations" often dilute their case by suggesting that in community service, philanthropic enterprises, or employee and environmental concerns, the corporation's acts would "produce long-term benefit for the firm and its stockholders" and "experiment with some relatively cost-free ways of meeting social norms*". This may well be arguable, but for

---

[62] *Above, p 10.*

[63] *Below, Chap. 4, p 39 et seq.*

[64] *Above, p 15, n59 at 10; Hepple p 6, n30 at 27.*

the labour lawyer the acceptance of some form of corporate responsibility unhampered and untrammelled by a *Hogg*[65] type company law approach to employees of the company, and, which will fit into an acceptable legal framework, is sufficient. The motive remains irrelevant. It also seems that it is established beyond doubt in American law[66] that current conditions require that corporations acknowledge and discharge social as well as private responsibilities.

Indeed, within the framework of the "new" South Africa it would seem obvious that the social responsibility dimensions of a company must accelerate in pace and accept that it will be compelled to assist in meeting the aspirations of the masses. This also will cause fundamental change to the character of a company but does not necessarily signal its untimely demise in the hands of a liquidator.

THE SOUTH AFRICAN EXPERIENCE

American multi-nationals operating in South Africa procured an extremely successful survival notwithstanding what at first appeared to be the impossible and outrageous demands of the Reverend Leon H. Sullivan in 1977. These compelled those companies to shed the blinkers of profit-maximization and direct considerable sums of money, which would otherwise have landed in their shareholders' pockets, towards social upliftment programmes. The most significant outcome of the Sullivan principles for the labour lawyer is that the companies affected displayed a far greater acquiesence and acceptance of fair collective bargaining when

---

[65] *Above, p 12, n49.*

[66] *A.P. Smith Manufacturing Company v Barlow (13 N.J. 145 (1953)); Above Unocal Corp. p 12, n51.*

it became institutionalised, than would have been the case had they not been compelled to subject themselves to the Sullivan Principles and audits by Arthur D. Little Inc. These companies had been exposed since 1977 and with the advent of Wiehahn[67] and the subsequent amendments to the Labour Relations Act,[68] they were perhaps better able to cope with labour unions. It is of interest to record the Reverend Sullivan who stated that:- *"They (the principles) provide the most comprehensive standards for enlightened corporate behaviour in South Africa. Furthermore the implementing programme of reporting and task groups of companies has proven to be the most effective corporate change agent in South Africa".*[69] Sullivan created a transition in the shape and interest of the companies affected to the extent that there could never be a return to outdated company law perceptions which were motivated entirely by profit making instincts.

This changing shape or interest of a company was also emphasised in the South African experience by the attitudes of employers towards disinvestment issues. The company law principle that a change in the shareholding of a company in no manner whatsoever effects its rights and obligations since it is a corporation and is distinct from the individuals who are its members,[70] remained amorphous throughout the debate on disinvestment demands. The only reported industrial court case dealing with disinvestment which this writer could trace, is that of *Pilkington Shatterprufe Safety Glass (Pty) Ltd and Another v Chemical Workers*

---

67 *The Complete Wiehahn Report (1982) Lex Patria Publishers.*

68 *Act 28 of 1956.*

69 *"Foreign Investment : Statements of Principals for U.S. firms in S.A." : The Independent Trade Union Guide '89 at 187.*

70 *Above, p 1, n7.*

Industrial Union.[71] Regrettably the judgment of the court is sterile since the member who delivered it allowed himself to become preoccupied in procedural issues rather than to decide whether disinvestment is a proper issue entitling a labour union to demand that it appears on the collective bargaining agenda. More startling, from a company law point of view, is that the court and counsel in *Pilkington* appear to have assumed that the disinvestment issue is a proper subject which could give rise to labour unrest and not a word is uttered about the immunity which company law could have offered the applicant in that case.[72] This phenomenon is endorsed by the fact that the majority of companies amongst the thirty-nine referred to in *Pilkington*, sought to resist a discussion with the trade union on disinvestment issues, not because they had a perfectly good legal reason at their disposal to avoid it, but because they chose to resort to the standard rhetoric of that time. The thrust of this was that shareholders had made it clear that their company had a commitment to the future of South Africa and their determination to continue to conduct business in this country. In consequence, any disinvestment discussions would be futile.[73] In the event these statements were in some instances untrue.

What could otherwise have resulted in a collision course between industrial relations practice and company law, distilled itself into power play between management and trade unions without any thought of recourse to company law. This can arguably be seen as a perception by the companies

---

[71] *1989 (10) ILJ 123 (IC).*

[72] *This statement may be an over simplification of the issues at stake. See below Nokés' case p62, n225, and Gower p1, n6 at 122.*

[73] *Largely unreported but see : "Shell to Fight Union Action on Disinvestment", The Argus, September 13, 1988.*

concerned that they had obligations to respond to the demands of the unions and not to seek recourse to company law so as to escape these.

CONCLUSION

It is submitted, that the conclusion to this chapter of the study is obvious. The interests of the majority of large companies in South Africa have changed perceptibly from those which were solely profit-maximised to entities which have at least, for the purposes of this article, an obligation towards their employees and that this change in perception seems to have been steered, to a large extent, by lawyers who had chosen not to seek asylum in the well tested principles of company law. The concept of the company as an instrument of economic capitalism has thus developed into one of the enterprise as an instrument of a new social order.[74]

It befits the conclusion of this chapter to quote the words of Innes C.J. in *O'Callaghan N.O. v Chaplin.*[75] *"It is the duty of a Court - especially of an appellate tribunal - so to administer a living system of law as to ensure - without the sacrifice of fundamental principles - that it shall adapt itself to the changing conditions of the time. And it may be necessary sometimes to modify, or even to discard, doctrines which have become outworn*". So too it seems clear that public policy will, in the new South Africa, insist that a radical change occurs in the image of South African companies so as to enable them to meet with the demands of the times. Finally, it is instructive to quote Holland[76] who in 1900 wrote as follows:- *"What then*

---

[74] *Schmitthoff above p 9, n42.*

[75] *1927 AD 310 at 327.*

[76] *T.E. Holland : The Elements of Jurisprudence 9ed (1900) Stevens & Sons Ltd at 76.*

is a 'legal right'? But first, what is a right generally? It is one man's capacity of influencing the acts of another, by means, not of his own strength, but of the opinion or the force of society". If this is accepted, *cadit quaestio* the future shape of South African companies.[77]

[77] ***Davies and Wedderburn above, p 10, n45 at 202.***

CHAPTER 3

SHAREHOLDERS AND EMPLOYEES

THE CONTRACT

Section 65(2)[78] of the South African Companies Act[79] creates a legal relationship of a contractual nature between a company and its members. In dealing with a similar section of the S.W.A. Companies Ordinance 19 of 1928, Trollip J.A. in *Gohlke and Schneider v Westies Minerale (Edms) Bpk*[80] explained the effect of the sub-section as follows: *"The company and its members are bound only to the same extent as if the articles had been signed by each member, that is, as if they had contracted in terms of the articles. The articles, therefore, merely have the same force as a contract between the company and each and every member as such to observe their provisions"*. In the decision of *Clark v Workman*,[81] Ross J. said that *"(it) is a contract of the most sacred character, and it is on the faith of it that each shareholder advances his money"*. It is interesting to observe that Drury[82] is of the view that companies are voluntary associations, in the sense that nobody can make you join one, and the hallmark of such associations, where a legal relationship exists between their members, is contract. Drury[83] also points out that the concept of a long term contractual relationship exactly fits the contract that underlies the workings of

---

78 *s 65(2) provides : "The memorandum and articles shall bind the company and the members thereof to the same extent as if they respectively had been signed by each member, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act".*

79 *Above, p 2, n14.*

80 *1970(2) SA 685 (A) 692F; PJJ. Olivier "Die Grondslag van Maatskappy - Gebondenheid aan die Akte van Oprigting en die Statute en in verband daarmee Rektifikasie" 1989 THRHR 409.*

81 *[1920] 1 I.R. 107 at 112.*

82 *R.R. Drury "The Relative Nature of a Shareholder's Right to Enforce the Company Contract" [1986] 45 CLJ 219.*

83 *Above, n82 at 222; Peter G. Xuereb : The Rights of Shareholders (1989) p 7.*

companies. The partners are bound up in the same enterprise and thus bound to "do business" with each other over a long period of time. This to some extent reflects upon the situation in the employment contract where the employer's ability to summarily dismiss employees has been dramatically diluted which also results in a relationship of longer duration.[84] Thus employees are likewise bound up in the same enterprise and bound to do business with the enterprise employer for lengthy periods. The company contract creates some controversy concerning a conflict between what one might call the "long-term relational view" which has been briefly discussed and the classical contract model. This has resulted in much commentary and debate[85] and has led to conflicting decisions by the courts[86] but this falls to be discussed elsewhere.[87] It is immediately conceded that the remedies arising out of the company contract are restricted to actions for interdicts, declarators and payment of liquidated sums such as may be due to a member in the form of an unpaid dividend,[88] but its basis remains contractual.

The point which ought now to be made is that in consideration of the payment to the company by a shareholder for his shares in such company, a contract is created which entitles the shareholder, inter alia, to participate in the profits derived by the company. Some form of analogy will be sought between the position of the shareholder, through the medium of his

---

[84] *Shezi v Consolidated Frame Cotton Corporation (1) (1984) 5 ILJ 3 (IC) at 12 H-I and 13A.*

[85] *Beattie v E & F Beattie Ltd [1938] 3 All ER 214; Gower : "The Contractual Effect of Articles of Association" (1958) MLR 401 states that the effect of the section dealing with the contract between a company and its members has long been one of the most baffling questions in company law.*

[86] *MacDougal v Gardiner [1875] 1 CH 13 (CA); Pender v Lushington [1877] 6 CH 70.*

[87] *Pennington above, p 1 n6 at 63; Gower, above p 1 n6 at 315.*

[88] *Gower above p 1 n6 at 316.*

company contract and the employee under the modern day employment contract. Like the shareholder, the employee also makes an important contribution to the company. It is the employee's productive labour that is contributed in return for his salary or wages in much the same fashion as the shareholder receives a dividend for his monetary contribution.

The contract of employment is also the subject of conflicting judicial pronouncements[89] accompanied by much commentary and debate.[90] The starting point of the South African common law contract of employment lies not in legislation, but in its categorisation as a species of lease: *locatio conductio operarum*.[91] It is a relationship at common law where a person voluntarily gives his personal services to another for a certain time for an ascertainable wage.[92] Notwithstanding enthusiastic campaigns by illustrious commentators such as Lord Wedderburn[93] to liberate labour law from the prison of common law concepts and institutions which arise from the contract of employment, the common law lies deep rooted and its impact will not lightly disappear. It remains an institution which lends itself

---

89 *R v Smit 1955 (1) SA 239(c); Perskor v Media Workers' Association of S.A. and Others (1991) 12 ILJ 86 (LAC); Media Workers Association of S.A. and Others v Perskor (1989) 10 ILJ 1062 (IC); MAN Truck and Bus (S.A.) (Pty) Ltd and United African Motor and Allied Workers' Union (1991) 12 ILJ 184 (arbitration) 185; R v Freun 1954 (1) SA 58 (T); S v Lyons Brooke Bond (Pty) Ltd 1981 (4) S.A. 445 (ZAD); Colonial Mutual Life Assurance Society v MacDonald 1931 AD 412.*

90 *Wedderburn above, p 1 n1; Martin Brassey : "The Nature of Employment" (1990)II ILJ 889 at 922 et seq; Dennis Davis "Refusing to Step Beyond the Confines of Contract : The Jurisprudence of Adv. Erasmus SC (1985)6 ILJ 425 at 431; Bob Hepple "Restructuring Employment Rights" [1986] 15 I.L.J. 69 at 71.*

91 *J.F. Coaker and D.T. Zeffert : Wille and Millin's Mercantile Law of South Africa 18ed (1984) 340; Schierhout v Minister of Justice 1926 AD 99 at 108; Hepple above p 6, n30; c.f. Bruno Veneziani "The Evolution of the Contract of Employment" - The Making of Labour Law in Europe (1986) at 54.*

92 *C. Norman-Scoble : Law of Master and Servant in South Africa - Butterworth & Co. (Africa) Ltd (1956).*

93 *David Howarth : The Autonomy of Labour Law : A Response to Professor Wedderburn. [1988]17 I.L.J. II.*

readily to the expression of lawyers' concepts and lawyers' understandings of the employment relationship.[94]

As the test of fairness developed by the industrial courts in South Africa[95] gains in momentum, there is a perceptible shift by the courts to steer the contract of employment towards a more substantial and lasting relationship between employer and employee. This spirit of fairness and justice[96] is succinctly expressed by John A.M. in *Media Workers' Association of S.A. and Others v Perskor*[97] who states: "*At common law a contract can be brought to an end by the employer's acceptance of the striker's repudiation of his contract, evidenced by his refusal, in concert with others, to fulfil his obligations to work. The question in labour law, however, is whether it is fair for the employer so to do*". It remains the common law contract to which John A.M. refers, but, in its extended dimension by the inclusion of fairness and justice. These concepts have caused it to expand to the extent that the common law contract is, in many instances, barely recognisable.[98] This notwithstanding, the relationship likewise retains its common law contractual flavour.

Ewing[99] comments that English decisions highlight some latent potential of the employment contract as a means of protecting job security. His

---

94 *M.R. Freedland : The Contract of Employment (1976) Clarendon Press Oxford 376.*

95 *National Union of Mineworkers above, p 6, n28.*

96 *Glazer above, p 5, n24.*

97 *Above, p 1, n1 at 1071 J et seq.*

98 *c.f. United African Motor and Allied Workers' Union and Others v Fodens (S.A.) (Pty) Ltd (1983)4 ILJ 212 (IC); Bruno Veneziani above, p 24, n91.*

99 *K.D. Ewing "Job Security and the Contract of Employment" [1989]18 I.L.J. 217.*

article is concerned to demonstrate the practical utility of contractual terms which not only impose procedural limits on the employer's power of dismissal,[100] but which also impose restrictions on the grounds for which an employee may be dismissed. Much of what Ewing suggests as assistance to English labour law to protect employees against summary dismissal is trite in South Africa. The law here has developed rapidly through the application of the unfair labour practice jurisdiction of the industrial court. This notwithstanding, he adequately demonstrates the point of the longer term employment relationship in Britain.[101] The courts in South Africa and elsewhere, are increasingly imposing limitations to the employer's rights to dismiss which affects the contract of employment but does not in its stead create some other artificial creature. Instead it inclines to the "long-term relational view" which the shareholder is said to enjoy with his company.

The common law rights which attach to contracts generally apply to the employment contract and an aggrieved party is entitled to the normal contractual remedies for relief.[102]

The picture which emerges clearly is that the company contract and the employment contract reveal a number of substantial points of affinity. A fundamental difference is that the company contract to which the shareholder becomes a party is created by legislation,[103] whereas the employment contract as developed by the courts, has as its basis the

---

[100] *c.f. Shezi v Consolidated Frame Cotton above, p 23, n84.*

[101] *M.S.M. Brassey et al : The New Labour Law (1987) 224 et seq.*

[102] *A.J. Kerr : The Principles of the Law of Contract 3ed (1980) 374 et seq.*

[103] *Above, p 22, n78.*

common law contract.[104] However, the *quid pro quo*, whether it be in the form of a dividend or in the form of wages, is derived from "contract" and the ability of the company (employer) to pay either will depend on the financial well-being of the company. Likewise the financial collapse of the company could spell socio-economic disaster for both shareholder and employee. Furthermore, most companies are wholly unable to conduct business without the presence of these most vital elements, namely, capital and labour and this is perhaps the most important feature when measuring the respective rights of shareholders and employees.

The employee is, in accordance with his contract with his company, compelled to tender his services in exchange for his wages subject to prevailing labour law governing such employment. This relationship, *inter alia*, includes concepts of fidelity and obedience.[105] The position of the shareholder is different. The courts have affirmatively held that shareholders owe no duty of care to the company or to other shareholders[106] and have traditionally defended the free exercise of the individual's right to vote. Thus the respective duties of shareholder and employee remain far removed from one another.

It is not suggested that this attempted analogy necessarily leads to any startling conclusions such as the equal status of an employee and a shareholder vis-a-vis the company (employer), but it is necessary to have some understanding of it. The comparison between the status of the shareholder and the employee within the company must of necessity be

---

[104] *Kerr above, p 26, n102.*

[105] *Allan Rycroft and Barney Jordaan : A Guide South African Labour Law. (1990) Juta at 34.*

[106] *Above, Multinational Gas, p 4, n22*

affected by fundamental change which is dealt with by *Schmitthoff*[107] and which, if acceptable, must have a profound impact on the company lawyer's vision not being confined only to the rights of shareholders. If the two constituencies both derive rights and obligations from and against the company by contract, ought there to exist such a marked disparity between protection afforded to the shareholder whilst the other extremely important actor, viz. the employee, is completely ignored by the company law?[108] Xuereb[109] comments upon what he sees as a major phenomenon which has shaped the current corporate scene. In his view there is the well documented shift of control from the "owners" (the shareholders) to management and the increase in minority control brought about by the wide dispersion of share ownership in large public companies. In the small private company the roles of shareholder, director, manager and employee often coincide in the same persons.[110] He makes the point that the particular interest which prevails in any set of circumstances is determined *ad hoc* on the basis of the company's overall continuing best interests. It seems that it may be correct in stating that no particular interest, be it employee or shareholder, is entitled to, or will, predominate always.[111]

---

[107] *Schmitthoff above, p 9, n42.*

[108] *c.f. Section 309 of the English Companies Act 1985.*

[109] *Xuereb above, p 22, n83 at 8.*

[110] *Lee v Lee's Air Farming [1960] 3 All ER 420; above Fisheries Development Corporation p 7, n36.*

[111] *Davies and Wedderburn above, p 10, n45; Peter G. Xuereb "The Juridification of Industrial Relations through Company Law Reform (1988) 51 MLR 156 at 159.*

SOME FORM OF EMPLOYMENT DEMOCRATISATION

Gower[112] in discussing industrial democracy concedes that the master and servant relationship of Victorian age is behind us and quotes Wedderburn with approval: *"Now, however, the time is past when our blood can be made to run cold at the thought of crossing the wires of company law and "master and servant" law"*. So it remains true that if the South African lawyer ignores the demands and aspirations of the workforce in the era of the new South Africa, he will find himself overtaken by events. Furthermore, if it is so that in a debate on the "interests" of a company, it is permissable, even only under limited circumstances, to include the employees of a company, then surely the employees ought to enjoy some form of participation in the operation of the company in addition to any impact the collective bargaining process may have. It is, for the purposes of this contribution, not suggested that participation should even remotely extend as far as the German system which seems to be the pinnacle of workers' democracy.[113] Means of achieving such participation within the context of the unique South African requirement will be attempted in an endeavour not to disturb company law too radically for fear that it will lead to outright rejection.

Two of the sections of the South African Companies Act to which reference was made earlier,[114] will be dealt with in an attempt to further such employee participation and so as not to unnecessarily shock company law

---

[112] *Gower above, p 1, n6 at 66 note 45.*

[113] *Professor Manfred Weiss: "The German Model of Workers' Participation : Some Lessons". (Trade Union Rights in the Single Market : B. Hepple and R. Trask) London ICTUR 1991 63.*

[114] *Above, p 3, nn15, 16 and 17.*

purists. The examination will be undertaken on the premise of the extended interests of the company as discussed.

The purpose of section 252[115] is to empower the court to come to the

---

[115] *Section 252 provides:-*

(1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may, subject to the provisions off sub-section (2), make an application to the Court for an order under this section.

(2) Where the act complained of relates to-

(a) any alteration of the memorandum of the company under section 55 or 56;

(b) any reduction of the capital of the company under section 83;

(c) any variation of rights in respect of shares of a company under section 102; or

(d) a conversion of a private company into a public company or of a public company into a private company under section 22,

an application to the Court under sub-section (1) shall be made within six weeks after the date of the passing of the relevant special resolution required in connection with the particular act concerned.

(3) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company's affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

(4) Where an order under this section makes any alteration or addition to the memorandum or articles of a company-

(a) the alteration or addition shall, subject to the provisions of paragraph (b), have effect as if it had been duly made by special resolution of the company; and

(b) the company shall, notwithstanding anything contained in t his Act, have no power, save as otherwise provided in the order, to make any alteration in or addition to its memorandum or articles which is inconsistent with the order, except with the leave of the Court.

(5) (a) A copy of any order made under this section which alters or adds to or grants leave to alter or add to the memorandum or articles of a company shall, within one month after the making

assistance of a member or members who complain of the conduct of a company's affairs. Sub-section 1 is of particular interest since it deals with matters which relate to being unfairly prejudicial, unjust or inequitable or that the company's affairs are being conducted in this manner. Preiss J. in dealing with section 252 in the Witwatersrand Local Division in one of the matters between *Donaldson Investments (Pty) Ltd and Others v Anglo-Transvaal Collieries Ltd*[116] states that in his view *"the applicant must establish a lack of probity or fair dealing, or a visible departure from the standards of fair dealing or a violation of the conditions of fair play on which every shareholder is entitled to rely"*. In view of the stance adopted in this dissertation on fairness issues, it is submitted that the standards of fair dealing to which the learned judge refers will be splendidly brought to the fore if the section allowed those conditions of fair play which he expects to be applied in respect of shareholders, to apply also to employees. Henochsberg[117] states that the purpose of the section is to empower the court to come to the assistance of a member or members of a company who legitimately complains or complain of any act or omission by the company or of the conduct of it's affairs. There seems to be no valid objection to the relief being extended to employees. It is submitted, that if sub-section 1 were to be amended to provide for the inclusion of similar rights to employees, this could have a profound effect on the employment relationship between companies and their employees because in accordance with sub-section 3, the court may make such order "as it thinks fit" in the circumstances. An amendment of this nature will provide for more

---

thereof, be lodged by the company in the form prescribed with the Registrar for registration.

(b) Any company which fails to comply with the provisions of paragraph (a), shall be guilty of an offence.

[116] *(1979) 3 SA 713 (W) at 722E.*

[117] *Philip M Meskin et al: Henochsberg on the Companies Act (4th Ed 1985) 397.*

protection than section 309 of the English Company's Act[118] grants to an employee since the employee will, in this event, be entitled to exercise his own right and not have to rely on some nebulous duty such as that imposed upon the English company director. It is submitted that an amendment of this nature will not have the effect of disturbing the foundations of company law - on the contrary, it will make a considerable contribution towards lessening the tensions between a company and its employees particularly if one anticipates a demand for some form of workers' democracy in the new South Africa.

If a company were to have violated the unfair labour practice provisions of the Labour Relations Act[119] it is conceivable that an aggrieved employee or employees could rely on the provisions of sub-section 3 of section 252 and the court could make an order bringing to an end "the matter complained of" on the basis of its order being just and equitable. Furthermore, it is suggested that where the company is conducting its affairs as described in sub-section 1, an employee could obtain rights in addition to those to which he may be entitled under existing law. The employee could also protect his rights in cases of unfairness which may be more extensive under the section than any rights he may enjoy in unfairness situations in labour law. Where the matter complained of is of a nature that will seriously impair the well-being of a company's employees or their relationship with the company, the situation could be prevented by the intervention of an employee or employees in terms of the section. The words *"to make such order as it thinks fit"* are of wide import[120] and it is

---

[118] *Below, p 41, n145.*

[119] *Section 1 of Labour Relations Act 28 of 1956.*

[120] *Bader v Weston 1967 (1) SA 134 (C) at 147F.*

suggested that circumstances could arise where intervention by an employee could be of little or no interest to a shareholder who is the sole recipient of the powers conferred by the section, yet have an important impact on an employee.[121]

A classic situation is that of the directors in *Cook v Deeks*.[122] Messrs. Cook and Hinds obtained for themselves a contract to the exclusion of the company of which they were directors. Although the case was, in the event, decided upon the basis of a breach of their fiduciary duties by Messrs. Cook and Hinds and an oppression of the minority vote of the plaintiff, if the circumstances were slightly different and the plaintiff did not object, the employees of the company in that case would have been denied the direct and indirect benefits arising out of a contract which belonged to the company. Had the employees enjoyed the rights which are allowed in section 252, their interests could have been enhanced by whatever order the court may have sought fit to make if the shareholders failed to take action. Such an order must be advantageous to the future prosperity of the company and thereby influence the long term relationship between the company and its employees. It is thus, submitted, that circumstances can and have arisen where to give an employee rights under the section, will be just and equitable and represent a tentative step towards employees' rightful participation in the operation of a company where their interests are at stake. Cook's case was discussed very much later by Vinelott J. in *Prudential Assurance Co. Ltd v Newman Industries Ltd*[123] and in his analysis of fraud, the learned judge rejects the notion of the unratifiable

---

[121] *Prudential Assurance Co Ltd v Newman Industries Ltd [1980] 2 ALL ER 841 at 862.*

[122] *Cook v Deeks [1916] 1 AC 554 (PC).*

[123] *Above, n 121 at 862.*

wrong which is important to the development of an argument to include employees within the context of section 252. For him the vital question is who can validly participate in a vote to ratify a breach of duty. His position is that those in breach of duty *qua* director cannot use their votes *qua* shareholder to condone their own wrongs. If this were to occur, the employee ought to have rights to enable him to act in accordance with the provisions of section 252 for the reasons advanced. There are, in all the circumstances, cogent reasons to extend the provisions of section 252 to include employees to share in the rights which members enjoy. These can never be abused by employees because the right to grant relief at all times vests in the court.

Section 344(h)[124] deals with one of the circumstances under which a court may order a company to be wound up. It was in dealing with a similar

---

[124] *Section 344 reads as follows:-*

A company may be wound up by the Court if:

(a) the company has by special resolution resolved that it be would be wound up by the Court;

(b) the company commenced business before the Registrar certified that it was entitled to commence business;

(c) the company has not commenced its business within a year from its incorporation, or has suspended its business for a whole year;

(d) in the case of a public company, the number of members has been reduced below seven;

(e) seventy-five per cent of the issued share capital of the company has been lost or has become useless for the business of the company;

(f) the company is unable to pay its debts as described in Section 345;

(g) in the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;

(h) it appears to the Court that it is just and equitable that the company should be wound up.

section in the English Companies Act that Lord Wilberforce in *Ebrahimi*[125] declared that behind a company or amongst it, there are individuals with rights, expectations and obligations and to determine these, it is submitted that the corporate veil must be lifted. The section is dealt with under the "Winding-up by the Court" provisions in the Companies Act and, *prima facie*, it would seem far fetched to suggest that an employee of a company be permitted to exercise such rights which otherwise lie within the sole domain of, *inter alia*, the shareholders of that company.

For the purpose of this dissertation the provisions of Section 111(g) of the now repealed Companies Act of 1926 and Section 344(h) are sufficiently similar. In a discussion of the former in *Moosa N.O. v Maujee Bhawan (Pty) Ltd and Another*,[126] Trollip J. (as he then was) deals with a winding-up application on the grounds that it is "*just and equitable*". He states that unlike the preceding paragraphs of section 111, the "*just and equitable*" paragraph *"postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding-up ..... In its terms and effect, therefore, sec. 111(g) confers upon the Court a very wide discretionary power, the only limitation arguably being that it had to be exercised judicially with due regard to the justice and equity of the competing interests of all concerned"*. (Own emphasis). Henochsberg[127] discusses the sub-section in some detail and directs the reader's attention to a number of aspects. An applicant must come to court with clean hands and a creditor may apply provided that if the creditor is not also a member, or entitled to be registered as a member, he must have a legitimate interest, *"e.g. if he alleges mismanagement, he*

---

[125] *Above, p 2, n11 at 587 et seq.*

[126] *1967 (3) SA 131 (T) at 136 G-H.*

[127] *Above, p 31, n117 at 587.*

must show that due to mismanagement the company will be reduced to insolvency so as to prejudice his prospects of being paid (Katsapas v Norvalspont Investments (Pty) Ltd 1969 (4) SA 403 (O) at 406)".[128] The rights of members and the circumstances under which the court will apply the "*just and equitable*" rule in a winding-up application, which in the main applies to "domestic" companies or "quasi partnerships", are adequately dealt with by Nestadt J. in *Erasmus v Pentamed Investments (Pty) Ltd*[129] and require no further comment for the purposes of this dissertation. What is of value is the reference by Trollip J. in *Moosa*[130] to the "*competing interests of all concerned*" in the course of applying justice and equity when applying the rule to winding-up situations. Two factors become prominent. The first is that where conduct by the directors or the members is fraudulent or otherwise wrongful, oppressive or unfair,[131] then the competing interests of all concerned must be considered. It can surely not be gainsaid that in circumstances as described, an employee does not have a very major interest in the manner in which the company is being conducted for his very existence depends on the company's affairs being properly managed. Secondly, if the company's affairs are being conducted in the manner as described and as a result it is forced into liquidation only after an extensive portion of its assets have been dissipated or disappear as a result of improper conduct on the part of directors or members, the employee ought to have the right as indeed does a creditor, to timeously intervene.[132] In discussing which persons and under what circumstances

---

[128] *Above, Henochsberg p 31, n117 at 588.*

[129] *Above, p 3, n15.*

[130] *Above, p 35, n126.*

[131] *Loch v John Blackwood Ltd (1924) AC 783 (PC) at 788.*

[132] *Sweet v Finbain 1984 (3) SA 441 (W) at 445 B-C.*

an application in terms of section 344 (h) may be brought, Henochsberg[133] confines comments to the rights of members and creditors and to circumstances when company's substratum has disappeared. This notwithstanding, the author states that these should not be regarded as closed categories and that the court's decision in an application under the sub-section remains unfettered. The learned judge in *Sweet v Finbain* relying upon the dictum of Lord Wilberforce in *Ebrahimi*,[134] also stated that there are individuals with rights, expectations and obligation, *inter se*, which are not necessarily submerged in the company structure. One such individual must surely be an employee for if a creditor is able to rely on section 444(h) to protect his debt, there is no reason in law or logic why an employee should not indulge in the same privilege so as to protect his vital interests. It seems that employees have been timid or reluctant in applying the provisions of this sub-section towards protecting their interests but this is no doubt due to a lack of knowledge of the internal workings of the company. The course which the collective bargaining process is following may well correct this disadvantage.[135]

CONCLUSION

A closer analysis of company legislation is not necessary for purposes of this dissertation since it has been sufficiently demonstrated that it need not become necessary for "*the blood to run cold*"[136] to provide for some form of participation by employees in the affairs of a company particularly where

---

[133] *Above, Henochsberg p 31, n117 at 587 et seq.*

[134] *Above, p 2, n11.*

[135] *National Union of Metal Workers of S.A. v Metkor Industries (Pty) Ltd (1990) II ILJ 1116 (IC).*

[136] *Above, Gower p 1, n6 at 66.*

their interests are at stake. These sections of the Companies Act of 1973 which have been dealt with are classical examples of the legislature lifting the corporate veil to ascertain what goes on "behind" a company.[137]

[137] *Above, Chap 1, p 3 et seq.*

CHAPTER 4

DIRECTORS' DUTIES AND EMPLOYEE INTERESTS

There exist difficulties which reveal themselves in the focus on the relationship between employer and employee which are clearly discernable in a movement away from the emphasis on policy in determining the substance or even the existence of a contract of employment. The demand is for a shift in the emphasis towards an appreciation that labour law must address the day to day problems of the employment relationship rather than concern itself with legal concepts and institutions.

"Law is a secondary form in human affairs, and especially in labour relations" - Kahn-Freund.[138] This distinguished author is of the view that if it is important to an understanding of labour law to accept the limitations of the common law,[139] it is equally important to realise the limitations as a whole in this area. The law governing labour relations is of paramount importance since it attempts to dictate the means whereby a large majority of people earn a living. Its purported purpose is to be a counterveiling force to counteract the inequality of bargaining power which is inherent in the employment relationship. The strengths and weaknesses of labour depend on factors outside the control of law and whilst the law does exercise a function it is secondary to the impact of the labour market in a supply and demand sense and which affects the social power on the workers' side to balance that of management. Lord Wedderburn[140] is of the view, even though it poses a problem, that labour law cannot be entirely independent from the remaining body of law and that it must have some contact with the "ordinary" law and "ordinary" courts. Wedderburn's

---

[138] *P. Davies and M. Freedland : Kahn-Freund, Labour and the Law (3rd Ed. 1983) Stevens & Co. at 13.*

[139] *In the words of Mr. Justice Pain "historically the law of contract has never come to terms with the reality or industrial life : [1981] 10 I.L.J. 137 at 143.*

[140] *Wedderburn : "Labour Law : From Here to Autonomy" [1987] 16 I.L.J. 1 at 2.*

view is perhaps more pragmatic than the ethereal views of Kahn-Freund but do not advance the problem sufficiently. However, Wedderburn does also seek autonomy for labour law from the common law and its judges, and, whilst this position is probably tenable within the precincts of a doctrinal framework for labour law, implementation presents problems which fall outside the scope of this dissertation.

The philosophies of two eminent commentators have been briefly stated to indicate the magnitude of the dilemma which faces a labour lawyer whose objective it may be to enhance the interests of the company employee without falling foul of existing common law principles which guide the conduct of a director in giving effect to his fiduciary duties towards his company.[141] In dealing with corporate governance, Wedderburn points out that the social responsibility of directors places them in a new land either helplessly lost or rulers of all they survey. It is his view that to deprive the directors of the goal of profit maximisation, is to leave them with "*an ambiguous amalgam*" of guides in carrying out their public trusteeship for the economic system as a whole.[142] It has already been indicated that this is not necessarily the case and the notion of extended duties, which include the welfare and interests of employees within the concept of the "*company's interests*", will be discussed.

It is true to say that whilst the use and importance of the corporate form has increased rapidly in most economies, company law has remained firmly fixed in the nineteenth century. In particular the controls placed upon the board of directors remain premised to the equation of the company with

---

[141] *Regal (Hastings) Ltd v Gulliver [1967] 2 A.C. 134n at 387-389; Robinson v Randfontein Estates Gold Mining Co. Ltd 1921 AD 168 at 177-178.*

[142] *Wedderburn above, p 15, n59 at 7-8.*

its shareholders. It is this equation which requires examination in the modern context of the employment relationship and, more particularly, its application within the "new" South Africa which heralds a change in perspectives and definition. The shape of a company and its "interests" have been dealt with in Chapter 2,[143] and this chapter will be devoted towards directors being permitted to act in such a manner that a company's interests may be steered towards including its employees' interests without exposing the directors to a breach of their fiduciary duties.

Prentice[144] presents an approach to the English law relating to a company's employees which appeals but is not entirely satisfactory. His views appropriately set the tone to that which is to follow and acts as an introduction to his comments upon what is now section 309 of the English Companies Act 1985.[145] Prentice describes the position of the law as it was in England prior to the enactment of section 309 and in doing so makes reference to the fact that employee interests could be taken into consideration by the directors of a company in making decisions and although the outcome was not always entirely satisfactory, it was not as antique as it was often represented. As the law in England stood, employee interests could be taken into account insofar as a decision in this

---

[143] *Above, p 9 et seq.*

[144] *Prentice above, p 12, n49 at 137.*

[145] *Section 309 of the English Companies Act reads as follows:*

(1) The matters to which the directors of a company are to have regard in the performance of their functions include the interests of the company's employees in general, as well as the interests of its members

2. Accordingly, the duty imposed by this section on the directors is owed by them to the company (and the company alone) and is enforceable in the same way as any other fiduciary duty owed to a company by its directors.

3. This section applies to shadow directors as it does to directors.

regard was designed to contribute towards the maximisation of the economic interest of the company. He cites the oft quoted dictum of Bowen L.J. : *'The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company. Charity has no business to sit at boards of directors qua charity. There is, however, a kind of charitable dealing which is for the interest of those who practise it, and to that extent and in that garb (I admit a not very philanthropic garb) charity may sit at the board, but for no other purpose".*[146] Prentice attempts to portray the realities of the situation in a softer hue but the fact remains that the "*cakes and ale*" referred to are permissable only insofar as that generosity redounds to the company's advantage.[147]

Some discussion has already ensued on *Buckley J's* views in *Hogg v Cramphorn*[148] as well as those in the earlier judgment of *Plowman J.* in *Parke v Daily News Ltd*[149] which followed *Hutton's* case.[150]

Whilst section 309[151] provides for directors' duties and employee interests, the English legislature realised that it was also necessary to deal with the issue of corporate capacity if the problems arising from the recognition of certain employee interests are to be adequately dealt with. It became necessary to affect a statutory reversal of *Parke v Daily News Ltd*[152] and

---

146 *Hutton v West Cork Railway Co. [1883] 23 Ch. 654 at 673.*

147 *c.f. D.D. Prentice - "A Company and its Employees : The Companies Act 1980. [1981] 10 I.L.J. 1.*

148 *Above, p 12, n49.*

149 *Above, p 11, n47.*

150 *Above, n146.*

151 *Above, p 41, n145.*

152 *Above p 11, n47.*

section 719 found itself in the English Companies Act of 1985.[153] (Section 74 of the 1980 Act).

Section 309 of the English Companies Act of 1985 was preceded by section 46 of the Companies Act of 1980 which also required directors to have "*a regard*" in the performance of their functions to the interests of the company employees. In dealing with section 46, Prentice[154] expresses the view that the legislation has mandated directors to perform some form of balancing act. He questions how these mandatory duties are to be enforced since the legislature failed to provide explicitly for proper enforcement. The outcome of enforcement, says Prentice, is "*as inscrutable as the smile*

---

[153] *Section 719 reads as follows:*

1. *The powers of a company include (if they would not otherwise do so apart from this section) power to make the following provision for the benefit of persons employed or formerly employed by the company or any of its subsidiaries, that is to say, provision in connection with the cessation or the transfer to any person of the whole or part of the undertaking of the company or that subsidiary.*

2. *The power conferred by sub-section (1) is exercisable notwithstanding that its exercise is not in the best interests of the company.*

3. *The power which a company may exercise by virtue only of sub-section (1) shall only be exercised by the company is sanctioned-*

   (a) in a case not falling within paragraph (b) or (c) below, by an ordinary resolution of the company, or

   (b) if so authorised by the memorandum or articles, a resolution of the directors, or

   (c) if the memorandum or articles require the exercise of the power to be sanctioned by a resolution of the company of some other description for which more than a simple majority of the members voting is necessary, with the sanction of a resolution of that description;

   and in any case after compliance with any other requirements of the memorandum or articles applicable to its exercise.

4. *Any payment which may be made by a company under this section may, if made before the commencement of any winding up of the company, be made out of profits of the company which are available for dividend.*

[154] *Above, p 12, n47 at 138.*

of the sphinx".[155] In dealing with the repealed section 74 of the Companies Act of 1980 and which has been replaced by section 719 of the current English company legislation, Prentice arrives at the conclusion that the narrow perception of the problem dealt with in *Parke v Daily News Ltd* has produced in section 719 a somewhat messy solution which does not rise to the occasion. Both these sections which purport to enhance the lot of the employees are lacking and inadequate to be of real benefit. However, the fact remains that notwithstanding their deficiencies, sections 309 and 719 of the English Companies Act represent a step, albeit a somewhat tenuous one, towards partly alleviating some of the problems where persons are employed by companies who desire to bestow some benefit or other upon employees.

The English law has been addressed in an attempt to furnish some background to the problems which have arisen in the courts and an effort on the part of the legislature to attempt some resolution. Since the South Africa Companies Act bears a strong resemblance to English company legislation and in cases where no guidance is found in our common law, our courts resort to draw from the experience of authoritative and persuasive judgments handed down by the English courts,[156] it is deemed expedient that the English experience be mentioned in a discussion on directors' duties towards their companies' employees.

In dealing with the interests and welfare of the employees of a company, the cardinal principle involved[157] is that directors have always been under

---

[155] *Above, p 12, n49 at 139.*

[156] *Emphy v Pacer Properties (Pty) Ltd. 1979(3)SA 363(D) at 367 - 368.*

[157] *Above, p 11, n47.*

a duty to exercise their company's powers for the purpose of realising its objects[158] and in the event of their being a breach of such duty, the act was *ultra vires* and void. Some means must, in consequence, be found which are acceptable in law governing principles regulating directors' duties so that they will not constitute a breach of duty on the part of directors to take into consideration the interests of employees in reaching decisions. It is suggested that the resolution to the problem may lie in applying the South African companies legislation read in conjunction with the English court's judgment in *Rolled Steel.*[159] It has already been argued that it seems to have been recognised and accepted that a company can no longer be regarded solely as a profit making entity and that it ought to be seen as an economic unit which consists of, inter alia, the shareholders as providers of capital and the employees as providers of labour.[160] The legislation, section 36 of the South African Companies Act,[161] and the judgment of Slade L.J. in *Rolled Steel*[162] must be carefully analysed to reach, what it is suggested, will be a response by company law which is capable of resolving the difficulties regarding employee interests and directors breaching their common law duties.

---

158 *Selangor United Rubber Estates Ltd v Cradock (a bankrupt) and Others (No. 3) [1968] 2 ALL ER 1073 at 1091.*

159 *Rolled Steel Products (Holdings) Ltd v British Steel Corp. and Others [1984] BCLC 466.*

160 *Above, Chap 2, p 9 et seq.*

161 *Section 36 reads as follows:*

No act of a company shall be void by reason only of the fact that the company was without capacity or power so to act or because the directors had no authority to perform that act on behalf of the company by reason only of the said fact and, except as between the company and its members or directors, or as between its members and its directors, nether the company nor any other person may in any legal proceedings assert or rely upon any such lack of capacity or power or authority.

162 *Above, n159.*

A company was in terms of common law incapable of functioning beyond its objects and such acts were, in consequence *ultra vires* and void because the company could not exist for a purpose beyond its capacity.[163] This is the *ultra vires* doctrine and it was on this basis that the courts in *Hogg*[164] and *Parke*[165] arrived at the conclusion that the acts of the directors in those cases were *ultra vires*. Section 36 neutralises only one cause of an act of the company being void namely, that the act was ultra vires the company and beyond its capacity as provided for in section 33. This portion of the section, therefore, applies equally to the company itself and to persons who are and persons who are not members or directors. For this reason Fredman is of the view that the *ultra vires* doctrine has been abolished without qualification.[166] He argues that it is not any limit to the company's capacity which has been abolished, but the rule that acts beyond that capacity are void. Oosthuizen, on the other hand, argues that the *ultra vires* rule has only been "*deels getemper*" by the section because it does not deal with other defective factors such as non-compliance with prescribed

---

[163] *Section 33 of the South African Companies Act No. 61 of 1973 reads as follows:*

1. *Any company formed in pursuance of section 32 shall have the capacity determined by the main object stated in its memorandum and there shall be included in its capacity unlimited objects ancillary to the said main object except such specific ancillary objects as are expressly excluded in its memorandum.*

2. *If the main business actually carried on at any time by a company referred to in sub-section (1) falls within the capacity of the company by virtue only off an object ancillary to the main object stated in its memorandum, such main business shall be deemed to be the main object of that company for the purposes of the said sub-section.*

3. *Notwithstanding anything contained in the memorandum of any existing company, the main business which it actually carries on at the commencement of this section, shall be deemed to be its main object.*

J.S. McLennan : "The Ultra Vires Doctrine and the Turquand Rule in Company Law - A Suggested Solution". (1979) 96 SALJ 329 at 335 et seq.

[164] *Above, p 12, n49.*

[165] *Above, p 11, n47.*

procedures or specific directions in the company's memorandum.[167] It seems that the legislature's intention is not only that the otherwise void act should not be void but should also be immune from any order of court purporting to avoid it or to declare its voidness.[168] There is thus some controversy surrounding the interpretation of the section[169] and McLennan is of the view that notwithstanding its deficiencies, the worst effects of the *ultra vires* doctrine have been removed.[170] He proceeds to state that if cases such as *Jon Beauforte*[171] and *Re Introductions*[172] were to arise again, the result in the South African courts would be different. To those must be added *In re David Payne & Co. Ltd.*[173] It is necessary to consider these cases because from the judgments it was deduced that a third party's knowledge of the directors' purpose determines whether a transaction is or is not *ultra vires*. These cases are also of importance since they are referred to by Blackman[174] in discussing the question of directors' exercising their powers for unauthorised business purposes. Blackman argues convincingly that the *ultra vires* doctrine has beaten a retreat of some magnitude because in accordance with the judgment in

---

[167] *M.J. Oosthuizen : "Aanpassing van die Verteenwoordigingsreg in Maatskappyverband" (1979) 4 TSAR 1 at 3.*

[168] *Henochsberg, above, p 31, n117 at 55.*

[169] *McLennan above, p 46, n163; S.J. Naude - "Company Contracts : The Effect of Section 36 of the New Act". (1974) 91 SALJ 315.*

[170] *McLennan above, n163 at 335.*

[171] *In re Jon Beauforte (London) Ltd. [1953] 1 ALL ER 634.*

[172] *Re Introductions Ltd. [1968] 2 ALL ER 1221.*

[173] *[1904] 2 Ch 608 (CA).*

[174] *M.S. Blackman : "Directors' Duties to Exercise their Powers for an Unauthorised Business Purpose". S.A. Merc LJ (1990) 2 at 1.*

Rolled Steel,[175] if a director's purpose was to further an unauthorised object, it no longer renders the transaction *ultra vires*. Furthermore, section 36[176] provides that no act of a company shall be void merely because it is *ultra vires*. Blackman states that, in consequence, after the introduction of section 36 and the judgment in *Rolled Steel*, the enforceability of a transaction entered into for an unauthorised purpose depends not on whether the transaction is *ultra vires* but on the effect, if any, that the director's breach of duty has on its validity.

In *Rolled Steel*, Slade L.J. asks the question:- *"Is a transaction which falls within the letter of the powers conferred on a company incorporated under the Companies Act, but is effected for a purpose not authorised by its memorandum of association, properly to be regarded as being beyond the corporate capacity of the company?"*[177] The learned judge then seeks to find the circumstances under which such a transaction is able to confer rights on a third person.

In *David Payne*[178] the borrowing was made for an illegitimate purpose so far as the borrowing company was concerned and that may well have given rise to certain rights as between the shareholders and the directors of the company, but it does not have an effect on the lending transaction and, therefore, the director's unauthorised purpose did not invalidate the loan. *In Re Introductions*[179] the company was incorporated for the purpose of

---

[175] *Above, p 45, n159.*

[176] *Above, p 45, n161.*

[177] *Above, Rolled Steel p 45, n159 at 500a.*

[178] *Above, p 47, n173.*

[179] *Above, p 47, n172.*

offering services and information to visitors to the United Kingdom but thereafter commenced a pig farming operation. It was for the purposes of the latter that the company borrowed money but since the lending bank was aware of the unauthorised business for which the money was lent, the court held that the transaction was void. So too *In Re Jon Beauforte*[180] the company, registered to carry on business as costumiers, etc., in fact carried on the business of manufacturing veneered panels. A sale was held void because the seller of supplies, in that case, was aware that the manufacture of panels was not authorised by the company's memorandum. In *Rolled Steel*, the Court of Appeal held that a transaction is not *ultra vires* in the sense of being beyond the company's capacity if *"on the true construction of the company's memorandum [it] is capable of being performed as reasonably incidental to the attainment or pursuit of [the company's] objects"*. According to Blackman[181] *"the test is an objective one and the directors' purposes are not relevant"*. In *Rolled Steel* Slade L.J. explained[182] that:- *"Strict logic might therefore appear to require that any act purported to be done by a company in purported exercise of powers ancillary to its objects conferred on it by its memorandum of association, whether express or implied (e.g. a power to borrow) would necessarily, and in every case, be beyond its capacity and therefore wholly void if such act was in fact performed for purposes other than those of its incorporation. However, the practical difficulties resulting from such a conclusion for persons dealing with a company carrying on a business authorised by its memorandum, would be intolerable"*. *Rolled Steel* accepts that whilst a transaction entered into for purposes not authorised by its memorandum is, as a matter of strict logic,

---

[180] *Above, p 47, n171.*

[181] *Above, p 47, n174 at 4.*

[182] *Above, p 45, n159 at 502 h-i.*

beyond the objects of the company, the interests of third parties must be protected and it is necessary to confine the *"operation of the ultra vires doctrine to the objectively determinable situation where the transaction is not capable of being performed as reasonably incidental to the attainment or pursuit of the company's objects".*[183] In circumstances such as appear *In Re David Payne*[184] and *Re Introductions Ltd,*[185] Blackman's explanation as to the reason why the transactions in those cases were held to be *intra vires* is simply that a company can escape liability if it is able to depend upon the third party's knowledge of the directors' purpose, but the company has that right not because the transaction is *ultra vires*, but because the third party knew, or ought to have known, that the directors' were acting in breach of a duty which they owed to their company. This, then, greatly reduces the ambit of the *ultra vires* doctrine because it is very seldom that, viewed objectively, a transaction is not reasonably capable of being entered into in pursuance of a company's objects.

Blackman[186] concludes that:- *"In short, where directors act to further a purpose not authorised by the objects clause of their company's memorandum, the transaction is not thereby rendered ultra vires. And where, in addition, the transaction is ultra vires because it is incapable of furthering the company's objects, it is not rendered void for this reason".* It is not necessary for the purposes of this dissertation to examine in any further detail the legal consequences of the directors' breach of duty to exercise the corporate power for the purposes of furthering their company's objects since most

---

[183] *Blackman, above, p 47, n174 at 4.*

[184] *Above, p 47, n173.*

[185] *Above, p 47, n172.*

[186] *Above, p 47, n174.*

transactions are capable of furthering many different kinds of business and in some cases, capable of furthering every kind of business.

If this reasoning is applied to the decisions in *Hogg*[187] and *Parke,*[188] the unfortunate employees in those cases may have found themselves in the favourable position which the directors of each company respectively sought to attain. The difficulty created by the law referred to earlier[189] is therefore, in South Africa, now capable of being removed. If one accepts the views of authors such as Schmitthoff,[190] then the demands of the disciples of economics, sociology, political science and the law have been adequately met to the extent that the lot of the employee has been radically enhanced since the director, in seeking to aid the employee, will, notwithstanding previous *ultra vires* views, now be able to do so without attracting censure.

Finally, some comments are required on the degree of skill which the law requires a company's directors to display and just how much can be expected of them.[191] In *Fisheries Development Corporation,*[192] Margo J. deals with the determination of negligence of a director. The learned judge arrives at the conclusion that it is necessary to have regard to the relevant aspect of a director's duty of care and skill which will depend on the nature

---

[187] *Above, p 12, n49.*

[188] *Above, p 11, n47.*

[189] *Above, p 16.*

[190] *Above, p 9, n42.*

[191] *For general commentary see Allan L. MacKenzie - "A Company Director's obligations of Care and Skill". Journal of Business Law (1982) 480.*

[192] *Above, p 7, n36 at 165.*

of the company's business and on any particular obligations assumed by or assigned by him. Reliance is placed on the well known English case of *In re City Equitable Fire Insurance Co.*[193] Attention will be directed towards the example of a director to whom is assigned the industrial relations activities of his company and its relationship with a trade union. Such director will have received his appointment by virtue of his training and expertise in that field and the question arises as to the extent of his liability in cases of recklessness (including fraud) and negligence. Recklessness is dealt with in section 424 of the Companies Act[194] and some discussion on negligence will ensue without dabbling in the question as to whether negligence could constitute recklessness. Negligence will be used in its delictual context, namely, conduct which falls short of the standard that the law demands of a person in particular circumstances.[195] It is a fact that in most instances the office of the industrial relations director of a company also represents a position of profit to the incumbent. It is suggested, with respect, that the tests as enunciated in *Re City Equitable*[196] are outmoded and cry out for revision. Company directors can no longer be regarded as amateurs and at least where they are endowed with professional skills, as in our example, they should be prepared to accept professional standards of care. If, in the course of exercising his duties, our industrial relations director makes a negligent misstatement which leads to industrial unrest and the company's employees suffer monetary losses, there seems to be no reason why he should not be liable for such loss under the Lex Aquilia.[197]

---

193 *[1925] Ch 407 at 427.*

194 *Above, p 3 n17.*

195 *P.Q.R. Boberg - "The Law of Delict" Vol 1 1984 at 258 et seq.*

196 *Above, n193.*

197 *Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A) at 830.*

Cilliers and Benade[198] are of the opinion that where a director is also an employee of the company or who is required in terms of his contract with the company to give his full attention to the company's affairs, he would be liable for damages suffered by the company as a result of a dereliction of duty which will include negligence.

Trebilcock,[199] dealing with the situation in Australia, states that vast sums of investors' money had been lost due, not so much to fraud on the part of directors, but that their companies failed due to management incompetence. He finds it puzzling that extensive civil litigation had not ensued as a result but suggests that the explanation for this fact is probably to be found in the law relating to the liability of directors. The socially destructive effect of company employees finding themselves unemployed because companies have failed, has already been emphasised.[200] It remains to be seen what relief, if any, lies at the door of an employee who finds himself in a socio-economic dilemma arising from his inability to work at the enterprise where he was employed because it was forced into liquidation due to negligence on the part of the directors. It is suggested that the present law on a director's liability, save for statutory provisions, does not represent any sort of assurance of protection to investors or employees and that the law is inadequate. The judicial formulations in English law,[201] which are followed in South Africa,[202] are by and large

---

198 *Cilliers Benade - "Company Law" 4th Ed (1982) at 335.*

199 *M.J. Trebilcock : "The Liability of Company Directors for Negligence". The Modern Law Review Vol 32 (1969) 499.*

200 *Above, p 27.*

201 *Above, Re City Equitable p 52, n193.*

202 *Above, Fisheries Development p 7, n36.*

unacceptable in the modern day operations of companies where directors are appointed for their particular skills and are also not unmindful of what that duty ought to be. The law also seems to fall short of giving effect to the standards demanded by current business men acting prudently to further the interests of their business concerns. There ought to be no difficulty in establishing the requirements of a "reasonable director" in the highly sophisticated operations of first world corporations and in the event of a specialist director, or any other director for that matter, failing the test, an action by employees for damages arising out of loss of employment ought to be entertained. Juridification will be briefly touched upon in the conclusion to this contribution[203] and it seems that the circumstances as described form an ideal basis for reform so as to allow the company's investors, employees and creditors some form of relief outside of the existing legislation.

---

[203] *Below, p 65 et seq.*

CHAPTER 5

TAKE-OVERS, MERGERS AND TRANSFERS

The acquisition of companies by means of take-overs, mergers or transfers is a frequent occurrence in modern industrialised life. The process of take-over of one company by another, or of amalgamation of one company with another, or of merger of one company into a group of companies, may take place in a variety of specific transactions.[204] However, the law of the individual employment contract has received scant attention in these circumstances and this is evidenced by the fact that as late as 1976, the House of Lords Select Committee on European Communities reported that British legislation *"affords adequate and comprehensive protection to employees"* without the need for new requirements applicable only to mergers. Hepple[205] suggests that these sanguine views are woefully incorrect and that the aim should be to confer substantive individual rights on employees. The overall aim ought to be the protection of employees by maintaining them in the legal position they would have enjoyed had no change of ownership by way of mergers and take-overs occurred.

Various problems for labour law and employees arise in the event of these occurrences:[206] What is the acquiring enterprise entitled or obliged to do insofar as the employees of the acquired concern are concerned? What is the legal position of the acquired enterprise employees and are they entitled to claim continued employment? What acquired rights are safeguarded in case employment continues? Is the employee obliged to perform work for the acquiring enterprise? Is the contract of employment capable of being transferred to the acquiring party? Has the acquiring

---

[204] *Above, Cilliers & Benade p 53, n198 at 435 et seq; Gower p 1, n6 at 682 et seq.*

[205] *Bob Hepple : "Workers' Rights in Mergers and Takeovers : The EEC Proposals. [1976] 5 I.L.J. 197.*

[206] *"Transfers of Undertakings" : Comparative Labour Law Journal Vol 7 1985 - 86 at 71; above, Hepple n214 at 201.*

enterprise the right to reject employees of the acquired enterprise? Changes in the employing enterprise and their effect upon existing employment contracts in the English system are well described by Freedland[207] who provides a background to the manner in which the questions referred to arise.

In the United States of America labour law allows for the greater majority of workers to be employed at will and, once an American employer decides to sell or to buy an enterprise, any collective agreement covering affected workers essentially evaporates, leaving both seller and buyer free to make whatever deal they desire.[208] There thus exists in America an absence of a duty to bargain over enterprise transfers and this probably arises from the adversarial character of American labour relations. This is the blunt reply by the American system to the questions posed. On the other hand, the EEC Directive 77/187 is designed to safeguard employees' rights in the event of a transfer of a business.[209] A combination of these regulations enacts the principle of automatic transfers of contracts of employment to the new employee and that dismissals in connection with the transfer are automatically unfair unless they are for economic, technical or organisational reasons. In South Africa these reasons are classified as *"operational requirements"* and, in the correct circumstances, may be applied to justify dismissal.[210] The EEC Directive, therefore, answers part of the questions in that the so-called acquired rights of the employee are assured

---

[207] *Above, p 25, n94.*

[208] *Duties to Employees Affected by a Transfer of the Enterprise : United States, Europe and Japan : Comparative Labour Law Journal Vol 9 1987 - 88 558 at 560 et seq.*

[209] *Hugh Collins : "Transfer of Undertakings and Insolvency" [1989] 18 I.L.J. 144; above p 61, n214 at 77; above n216 at 572.*

[210] *Brassey above, p 26, n101 at 89.*

to be protected since the rights and obligations of the transferor are transferred to the transferee. If the transfer should entail a substantial and detrimental change in the working conditions of an employee, the employment contract may be terminated and the employee may hold the transferor employer liable.

The British law is subject to the EEC Directive referred to and this is of consequence because the rights of employees in Britain under individual contracts are important and fairly well developed. A successor employer becomes potentially liable to employees under several statutes, including unfair dismissal and redundancy laws. It is recognised that the workers have property rights in their jobs and this is clearly the opposite of the American doctrine of employment-at-will. The effects of the British Transfer of Undertakings Regulations will be briefly discussed.[211] The regulations deal only with transfers and mergers of going concerns and sales are excluded. The exclusion presents no problem because, according to British law, the workforce is excluded from the sale of assets. Secondly, the contracts of employment are automatically assumed by the new employer. Thirdly, dismissal in connection with the transfer is unfair. In the fourth place a dismissal for *"operational reasons"*[212] may be fair. Finally, the employer must notify the union of the proposed transfer and its effects upon employees and must consult with the union on transfer effects. The British regulations go a long way towards answering some of the questions and it is suggested that the South African legislature may be well advised to consult these regulations with the view to avoiding future confrontation with trade unions.

---

[211] *Above p 56, n208 at 576.*

[212] *Above, p 56, n209.*

Within the South African context, the company lawyer may well respond to all the questions on the basis that a company is a corporation in the eyes of the law quite distinct from the individuals who are its members and, in consequence, a change in shareholding has no effect whatsoever on its obligations towards its employees.[213] This response may, however, be inadequate and not sufficient for the reasons described in greater detail by Gower[214] which are discussed further on.

Some brief reference has been made to indicate the deficiencies in the jurisdictions discussed and what emerges very clearly is that the South African labour scene cannot be compared with that of America and that the "employment-at-will" principle is a practical impossibility at this stage. On the other hand the glaring inadequacies of the situation in South Africa are demonstrated by reference to the system in Britain and it is against this background, limited as it may be, that the provisions of section 440 of the Companies Act will be discussed.

Section 440B of the Companies Act No. 64 of 1973[215] establishes a Securities Regulation Panel (the Panel) which body caused to be published in the Government Gazette *"The Securities Regulation Code on Take-overs and Mergers"*[216] (the Code). It came into operation on February 1, 1991. The Code is based to a large extent on the City Code on Take-overs and Mergers (the City Code) issued by the London Panel on Take-overs and

---

213 *CWIU and Others v Indian Ocean Fertilizer (1991) 12 ILJ 822 (IC).*

214 *Below, Gower p 62, n226.*

215 *Section 440B(1) reads as follows:*

1. There is hereby established a body corporate to be known as the Securities Panel.

216 *GN R29 January 18, 1991.*

Mergers[217]. The object of the Code is to ensure fair and equal treatment of all holders of relevant securities in relation to *"affected transactions"*,[218] that is, transactions whereby control is obtained or increased. Conspicuous in the discussion is the total absence of any reference whatsoever to that other (apart from the holders of relevant securities) vital element which, in the normal course of events, contributes so handsomely towards the success of an undertaking - the employee. Indeed, the bodies entitled to nominate persons to serve on the Panel in accordance with sub-section 3 of section 440B,[219] are so far removed from the interests of employees that one arrives at the inescapable conclusion that labour was not even

---

[217] *Above, Pennington p 1, n6 at 997 et seq.*

[218] *In accordance with the provisions of Section 400A of the Companies Act of 1973:-*

"affected transaction" means any transaction or scheme, whatever form it may take, pursuant to which, taking into account any shares held before such transaction or scheme, control of any company (excluding a close corporation) vests in -

(a) any person; or
(b) two or more persons acting in concert,

whom control did not vest prior to such transaction or scheme.

[219] *Section 440B (3) reads as follows:-*

Each of the following bodies, associations and institutions shall be entitled to nominate one person, and in the case of the Johannesburg Stock Exchange three persons, to serve on the panel, namely -

(a) the Johannesburg Stock Exchange;
(b) the South African Federated Chamber of Industries;
(c) the Association of Chambers of Commerce and Industry of South Africa;
(d) the Afrikaanse Handelsinstituut;
(e) the Clearing Bankers Association of South Africa;
(f) the Association of General Banks;
(g) the Merchant Bankers' Association;
(h) the Shareholders' Association of South Africa
(i) the Pensions Institute (of Southern Africa);
(j) the Chamber of Mines of South Africa;
(k) the Life Offices' Association of South Africa;
(l) the South African Institute of Chartered Accountants; and
(m) the Association of Law Societies of the Republic of South Africa.

considered. The bodies are mainly representatives of employers and financial institutions and one stands amazed at the short sighted approach of the Panel to have allowed for the inclusion amongst the bodies, in sub-section 3, of "the Shareholders Association of South Africa" yet no reference at all is made to a body such as "the Congress of South African Trade Unions" which is representative of a vast number of employées in South Africa. In this time when industrial relations between employers and employees are being nurtured by employers and the situation in the country is precariously balanced because of political intonations, it comes as a shock to labour lawyers that the views of employees have apparently not been consulted on issues which could affect their very existence. This is aggravated by the fact that the principles of the British system are readily available so that the legislature was in a position to draw on the experience of that country.

It has become fairly common practice in a transfer transaction to include some reference to the employees of the acquired company[220] but these seem to be no more than paternalistic gestures, save where the employees are consulted, and are otherwise of dubious legality on the basis of the *stipulatio alterii*. The panel relies upon the collective opinions of those professionally involved in the field of take-overs and mergers as to acceptable business standards and as to how *"fairness"* to holders of the relevant securities may be achieved. It would appear that the Panel either completely ignored or distanced itself from the realities of the factory floor and the persons who are equally as important as the shareholders in creating wealth within a company's venture.

---

[220] *National Union of Metalworkers of S.A. v Metkor Industries (Pty) Ltd (1990) II ILJ 1116 at 1117J-1118B.*

The provisions of section 440A(2)(a)(i)[221] create the classical climate, when reviewing an employment situation, to encourage labour lawyers to speedily refer to the judgment of Lord Denning in *DHN*[222] so as to extricate themselves from the jigsaw puzzle created by this legislation.[223]

It is not difficult to understand that the regulations created by the Panel were intended to introduce an orderly transfer for the benefit of the shareholders. The introduction of its secrecy provisions seeks to deter the scourge of capitalism, namely, insider trading which takes place in anticipation of such a transaction having being finalised. The secrecy aspect, of course, leads to problems between a company and its employees which are not very easy to solve since on the one hand a union demands disclosure and on the other the company is prohibited from doing so. Furthermore the Code enjoys the force of law[224] and whilst the functions of the Panel are laudable its net is not cast wide enough so as to include employees of the company involved in an *"affected transaction"*. The realities of the business life in South African reflect such a great deal of uncertainty and, it is suggested, that unless company legislation puts its

---

[221] *Section 440A(2)(a)(i) reads as follows:-*

For the purposes of sub-section (1):-

(a) the following persons shall be deemed to be action in concert with one another unless the contrary is established, namely:-

(i) a company, its holding company, subsidiaries, companies which are subsidiaries of its holding company and their subsidiaries, and companies of which such companies are associated companies, and for the purposes hereof ownership or control by a company of 20 percent or more of the equity share capital of another company shall constitute the latter company as the former company's associate; c.f. above, Multinational Gas p 4, n22.

[222] *Above, p 3, n19.*

[223] *Above, S.A. Allied Workers Union p 4, n20.*

[224] *Section 440I of the Companies Act.*

house in order it may be victim of more vigorous jolts than it may, in any event, otherwise receive.

This Chapter may suitably conclude by quoting the rhetoric of Lord Atkin when he declared:- *"I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve, and that this right of choice constituted the main difference between a servant and a serf".*[225] Gower[226] adds fuel to Lord Atkin's remarks by commenting upon the unreality of the situation when the master is a company. He argues that if one were to consider that the acquiring company, instead of acquiring the undertaking, might have bought the whole of the shares, changed the management, adopted new articles, amended the objects and the clauses of the memorandum, changed the nature of the business, increased the capital and caused the name to be altered. All this is possible and the employee would still have been bound to serve the company (employer) who in theory, but certainly not in fact, remains the same. This does, to an extent negate the comments previously made on disinvestment[227] issues but it fortifies the argument that in the interest of equity and fairness, the courts ought to lean more readily towards lifting the corporate veil in appropriate cases.[228]

---

[225] *Nokes v Doncaster Amalgamated Collieries [1940] AC 1014 at 1026*

[226] *Gower above, p 1, n6 at 122.*

[227] *Above, p 18 et seq.*

[228] *Above, p 5 et seq.*

CHAPTER 6
CONCLUSION

The comments made in this contribution are by no manner of means intended to be exhaustive of difficulties which labour law experiences when it interfaces with company law. Neither are they all original but they do represent a desire to afford a company lawyer a peep into the domain of the labour lawyer and perhaps have an understanding that the latter is compelled to deal with *"an ambiguous amalgam"* of principles not in the same sense as that referred to by Wedderburn,[229] but in the sense that the employment relationship does not deal with a contract relating to a commodity but is steered by an *"amalgam"* of, inter alia, common law, legislation, usage and international conventions. The reason for this is that it deals with people who no longer find themselves in a "Master and Servant" situation.[230] It represents, in its modern sophisticated form, complex factual circumstances which render any precise definition of the employment contract inadequate and extremely difficult. This is exacerbated by the impact of law, economics, sociology and political science[231] and it is most decidedly no longer the *locatio conductio operarum* of Roman Law legacy.[232]

This contribution has made it clear that means must be attained whereby one does not require convoluted arguments to convince that, in South Africa in any event, it must be in the interests of a company which wishes to prosper, that company law may no longer allow the interests and welfare of employees of companies to be completely ignored. The directors ought to be clothed with authority, in addition to that provided by English

---

[229] *Above, p 15, n59.*

[230] *C. Norman - Scoble : "Law of Master and Servant in South Africa" (1956) 1 et seq.*

[231] *Above, p 10.*

[232] *Boyd v Stuttaford & Co. 1910 AD 101 at 116.*

company law,[233] so that there may be no ambiguity in imposing a duty upon directors in order that the employees may be catered for at least to some extent the same as shareholders. This trend in legislation does not represent a task which is beyond the capabilities of a legislature with foresight and is ably demonstrated by the examples of the British Transfer of Undertakings Regulations.[234] The amendments to selected sections of the Companies Act such as those which are dealt with in Chapter 3 also support such a trend.[235] If this procedure is adopted, South African company legislation will become legitimized by its recognition of the welfare and interest of workers. This may become particularly important in the so-called transitional period which this country is currently experiencing and will create the awareness, which seems to be lacking, that the people will have some say in determining their destination. The stakes in this regard are high but the approach suggested may have the effect of lessening impacts on the social, political and economic future of the country. Lawyers cannot continue wearing blinkers in their application of laws which have become unsuited and are unable to cope with the realities of current corporate life. In any event, the indications of what may be expected are to be detected by the tide which is already manifesting itself - the African National Congress and the Congress of South African Trade Unions has declared war on the government on issues of economic importance triggered by the introduction of the law on Value Added Tax. The onslaught on company law through the medium of trade unions must also be imminent.

---

[233] *Above, p 41, n145.*

[234] *Above, p 57, n208 at 576.*

[235] *Above, Ch 3, p 22 et seq.*

It is interesting to note that the New Zealand Law Commission has taken the view that the Companies Act is not the appropriate vehicle for the imposition of general social reforms such as a requirement of workers' participation in management or the imposition of environmental goals on companies.[236] The Commission recognises that these goals must be addressed but suggests that these matters be pursued through specific legislation imposed upon all employers and business enterprises. This statement, with respect, avoids the issue insofar as company legislation in South Africa is concerned since urgent attention ought to be paid to the rights of employees which are so conspicuously absent.

During 1984 Professor Spiros Simitis, produced a work entitled *Zur Verrechtlichung der Arbeitsbeziehugen* and a condensed translated version appears in the Comparative Labour Law Journal of 1987.[237] This work, as the title indicates, is an examination of the juridification of industrial relations. Simitis correctly commenced his work by directing to the reader's attention that because of the impact of industrialisation, the legal framework of economic processes dictates that labour is no longer one of many marketed and marketable goods. Labour, therefore, distinguishes itself since the employment contract aims not to protect the rights of individuals; instead it ought to dictate binding requirements which have been specifically adapted to those particular characteristics of labour relations, to which all agreements concerning the supply of labour must conform. *"The more the juridification of labour relations is accentuated, the more labour law assumes its own distinct form".*[238] The law must replace

---

[236] *J.P.G. Lessing : "Company-law Reform in New Zealand" (1990) 2 SA Merc LJ 49.*

[237] *Comparative Labour Law Journal Vol 9 (1987-88) 93.*

[238] *Above, n237 at 94.*

the unilateral decision of the employer by an increasingly objective decision-making process. This applies equally to a situation where a company, by merger or take-over, in fact makes a unilateral decision affecting the future of its employees.

The views of Simitis in his work gave rise to articles by Clark[239] and Xuereb[240] respectively which may point in the direction which South African company law ought to travel.

In his introduction Clark quotes from Simitis who concludes that labour law is, as it were, the classic paradigm of juridification. Clark deals mainly with the views of Simitis and also offers some criticism. The legislature must increasingly intervene because it is necessary and legitimate to do so with the aim of steering economic and social developments in a direction which conforms with its broad political and social objectives, namely to limit and control social conflict. This is precisely the situation in which the present South African government finds itself and it ought now to realise that juridification is an inescapable consequence of industrialisation in that which it seeks to achieve, namely a democratic society. Simitis goes further. *"A study of the process and effects of juridification cannot simply concentrate on 'labour law' in the narrow sense, but must see labour law as part of a wider 'social law' convening the whole employment relationship. Only then is it possible to recognise the universality, and the real extent, of juridification".*[241] Notwithstanding the universality issue, Clark remarks that an interesting hypothesis is made by Simitis, namely, that the larger the

---

[239] *Jon Clark : "The Juridification of Industrial Relations : A Review Article" : [1985] 14 I.L.J. 69.*

[240] *Peter G. Xuereb : "The Juridification of Industrial Relations through Company Law Reform. Modern Law Review Vol 51 (1988) 156.*

[241] *Above, Clark n239 at 72.*

gap in time between the first impact of industrialisation and state intervention in industrial relations, the more likely it is that procedural rules will predominate as the main form of state intervention. This is surely the case in South Africa.

The premise correctly adopted by Xuereb for the introduction of juridification is the justifiability of the moral claim which employees in companies have to more equal treatment under the law with the shareholders. This thread may have been detected in some of the preceding chapters of this dissertation and it is based on the acceptance that the company is a going concern which is the pragmatic point of reference in daily managerial life and the focal point of stockholders' and employees' long-term interests.[242] Xuereb's theme is focused on his submission that the directors of a company must act on the basis of continuity. It is the continuing interests of shareholders and employees, which co-incide with the interests of the company as a commercial entity, which must be safeguarded at the cost of short term interests of either of these constituencies. This principle is pragmatic and difficult to fault because what is needed is a principle which enables directors to satisfy the present interests of the employees yet which allows these employees' interests to be subordinated to those of the present members but only where this is reasonably required or necessary in long-term shareholder and employee interests but not otherwise.[243] Thus closures and redundancies could only be justified if relevant decisions are taken in good faith on reasonable commercial grounds.[244] Xuereb relies, correctly it is

---

[242] *Above, Drury p 22, n82.*

[243] *Above, Xuereb p 66, n240 at 159.*

[244] *Above, p 26, n101.*

submitted, on the report of the *Savoy Hotel Investigation*[245] *"that directors should seek to balance short-term considerations affecting present shareholders against long-term considerations affecting future shareholders and thus conduct the company's business upon the footing that it would be continued as a going concern".*

Xuereb asks the question as to how his formulation will work in practice? It is well worth quoting the summary of his proposals.[246] *"It is submitted that the answer lies in the law's demanding that directors act in continuing interests of the hypothetical shareholder and hypothetical employee, balancing short-term interests against long-term interests so that short-term demands of either group will be met (e.g. dividends this year) provided these are compatible with long-term interests (continued earnings over coming years and a continuing reputation for taking employee interests into account)".* Xuereb acknowledges the difficulties attached to the implementation of his principles and that conflicts will arise but the response to this is a fair application of the principle by directors in exercising their duties. His conclusion as to the implementation of the principle is of particular interest to South African company and labour lawyers. If one assumes that a remedy ought to lie where there is a legitimate interest of the employee and which is worthy of protection, then company law ought to recognise, not necessarily that directors owe a duty to employees, but that the employees have a legitimate interest in enforcing the duty owed by directors to the company to act in the interests of the company as a whole. In essence this would allow the employee to bring a derivative action.[247]

---

[245] *(H.M.S.O. 1954).*

[246] *Above, p 66, n240 at 166.*

[247] *Above, Gower p 1, n6 at 647 et seq and Pennington above, p 1, n6 at 727 et seq.*

TABLE OF CASES

Page

A

B

C

Page

D

E

F

G

Page

H

I

K

L

M

Page

N

O

P

Page

R

S

Page

BIBLIOGRAPHY

A

Argus (The) September 13, 1988
Shell to Fight Union Action on Disinvestment

B

Blackman, M.S.
Directors' Duties to Exercise their Powers for an Unauthorised Business Purpose. S.A. MERC LJ (1990)2 1

Boberg, P.Q.R.
The Law of Delict - Vol 1 (1984) Juta

Brassey, Martin
The Nature of Employment (1990)11 ILJ 889

Brassey, M.S.M. et al
The New Labour Law. (1987) Butterworths

C

Carteaux, Patricia A.
Corporations - Shareholders Liability - Louisiana Adopts a Balancing Test for Piercing the Corporate Veil. (1984)58 Tulane Law Review 1089

Cilliers, H.A. and Benade, M.L.
Company Law. 4th Ed (1982) Butterworths

Clark, Jon
The Juridification of Industrial Relations : A Review Article. [1985] I.L.J. 69

Cmnd. 6706 (1977)

Cmnd. 5391, 5

Coaker, J.F. and Zeffert, D.T.
Wille and Millin's Mercantile Law of South Africa. 18ed (1984) Hortors

Collins, Hugh
Transfer of Undertakings and Insolvency. [1989] I.L.J. 144

C (Cont.)

Companies Act No. 61 of 1973

Comparative Labour Law Journal Vol 9 (1987 - 88) 558
Duties to Employees Affected by a Transfer of the Enterprise : United States, Europe and Japan

D

Davies, Paul and Freedland, Mark (Editors)
Kahn-Freund's Labour and the Law 3rd Ed (1983) Stevens & Sons, London

Davies, Paul and Wedderburn of Charlton
The Land of Democracy [1977]6 I.L.J. 197

Davis, Dennis
Refusing to Step Beyond the Confines of Contract : The Jurisprudence of Adv. Erasmus SC (1985)6 ILJ 425

Dawson : (1984) II NZULR 68

Domanski, Andrew
Piercing the Corporate Veil - A New Direction? (1986)103 SALJ 224

Drury, R.R.
The Relative Nature of a Shareholder's Right to Enforce the Company Contract [1986]45 CLJ 219

E

English Companies Act 1985

Ewing, K.D.
Job Security and the Contract of Employment [1989]18 I.L.J. 217

F

Fredman, M.G.
A Note on Section 36 of the Companies Act (1982)99 SALJ 283

Freedland, M.R.
The Contract of Employment (1976) Clarendon Press Oxford

G

Gower, L.G.B.
Gower's Principles of Modern Company Law 4th Ed (1979) Stevens and Sons, London

Gower, L.G.B.
The Contractual Effect of Articles of Association (1958) Modern Law Review 401

H

Hepple, Bob
Restructuring Employment Rights [1986]15 I.L.J. 69

Hepple, Bob
Worker's Rights in Mergers and Takeovers : The EEC Proposals [1976]5 I.L.J. 197

Hepple, Bob (Editor)
The Making of Labour Law in Europe. A Comparative Study of Nine Countries up to 1945. Mansell Publishing Ltd, London and New York

Hepple, B. and Trask, R. (Editors)
Trade Union Rights in the Single Market (1991) ICTUR, London

Holland, T.E.
The Elements of Jurisprudence 9th Ed (1900) Stevens and Sons, London

Hopt, Klaus J. and Teubner Gunther (Editors)
Corporate Governance and Directors' Liabilities (1985) Walter de Gruyter Berlin - New York

Howarth, David
The Autonomy of Labour Law. A Response to Professor Wedderburn [1988]17 I.L.J. II

K

Kahn-Freund, Sir Otto
Industrial Democracy [1977]6 I.L.J. 65

Kerr, A.J.
The Principles of the Law of Contract 3rd Ed (1980) Butterworths

L

Labour Relations Act No. 28 of 1956

Lessing, J.P.G.
Company-Law Reform in New Zealand SA MERC LJ (1990)2 49

M

MacKenzie, Allan M.
A Company Director's Obligations of Care and Skill Journal of Business Law (1982) 480

McLennan, J.S.
The Ultra Vires Doctrine and the Turquand Rule in Company Law - A Suggested Solution (1979)96 SALJ 329

Meskin, Philip M. (Editor)
Henochsberg on the Companies Act 4th Ed (1985) Butterworths

N

Naude, S.J.
Company Contracts : The Effect of Section 36 of the New Act (1974)91 SALJ 315

O

Olivier, P.J.J.
Die Grondslag van Maatskappy-Gebondenheid aan die Akte van Oprigting en die Statute en in Verband Daarmee Rektifikasie (1989) THRHR 409

Oosthuizen, M.J.
Aanpassing van die Verteenwoordigingsreg in Maatskappyverband (1979) TSAR 1

P

Pain, The Hon. Mr. Justice Peter
Contract and Contact [1981]10 I.L.J. 137

P (Cont)

Pennington, Robert R.
Company Law 5th Ed (1985) Butterworths, London

Prentice, Daniel D.
Companies Act 1980 (1980) Butterworths, London

R

Rajak, Harry
A Source Book of Company Law (1989) Jordans, London

Rycroft, Allan and Jordaan, Barney
A Guide to South African Labour law (1990) Juta

S

Savoy Hotel Investigation (H.M.S.O. 1954)

Scoble, C. Norman
Law of Master and Servant in South Africa (1956) Butterworths

Schmitthoff, Clive M.
Commercial Law in a Changing Economic Climate 2nd Ed (1981) Sweet and Maxwell, London

T

Transfer of Undertakings
Comparative Labour Law Vol 7 (1985 - 86) 71

Trebilcock, M.J.
The Liability of Company Directors for Negligence Modern Law Review Vol 32 (1969) 499

V

Veneziani, Bruno
The Evolution of the Contract of Employment. Bob Hepple (Editor) : The Making of Labour Law in Europe. A Comparative Study of Nine Countries up to 1945 Mansell Publishing Co., London and New York

W

Wedderburn, Lord
Labour Law : From Here to Autonomy?

Weiss, Professor Manfred
The German Model of Workers' Participation : Some Lessons - (Trade Union Rights in the Single Market) Editors B. Hepple and R. Trask (1991) London ICTUR 63

X

Xuereb, Peter G.
The Juridification of Industrial Relations Through Company Law Reform Modern Law Review Vol 51 (1988) 156