Dismissal of executive directors: comparing principles of company law and labour law

BPS VAN ECK* and S LOMBARD**

1 *Introduction*

Two issues prompted the writing of this article. First, the two authors (one of whom works in the field of company law and the other in labour law) received separate enquiries from practitioners about the applicable legal principles when the services of an executive director[1] of a company are terminated. Essentially the questions concern the procedures prescribed in terms of the Companies Act[2] regarding the "removal" of a director and those prescribed in terms of the Labour Relations Act[3] that would apply to the "dismissal" of an executive director.[4]

Without referring to one another, section 220 of the Companies Act and a number of provisions of the Labour Relations Act[5] lay down different rules regarding the termination of services of a director and the termination of services of an employee. Practical questions that arise when a director's services are terminated, are for example whether the provisions of the Companies Act and the Labour Relations Act are similar, and if not, whether the procedures in

* Professor, Department of Mercantile Law, University of Pretoria.
** Senior lecturer, Department of Mercantile Law, University of Pretoria.

[1] The mere fact that a person holds the office of director does not automatically imply an employment relationship with the company. In this respect, two categories of directors are normally distinguished. Executive directors are actively involved in managing the affairs of the company and normally stand in an employment relationship with the company. Non executive directors are not necessarily employees of the company and are not involved in the day to day running of the company. Although the Companies Act 61 of 1973 itself makes no distinction between the two types of directors, these labels evolved in practice and have been recognised by the supreme court of appeal in *Howard v Herrigel* 1991 2 SA 660 A 678. Ch 4 par 7 of the *King Report on Corporate Governance for South Africa II* defines an executive director as "[a]n individual involved in the day to day management and/or in the full time salaried employment of the company and/or any of its subsidiaries", while a non executive director is defined as "[a]n individual not involved in the day to day management and not a full time salaried employee of the company or of its subsidiaries". It must be kept in mind that this contribution deals exclusively with the removal of executive directors, as principles of labour law regarding the dismissal of employees would only come into play once there is an employment relationship with the company.

[2] Act 61 of 1973 (the Companies Act).

[3] Act 66 of 1995 (the LRA).

[4] Whereas the Companies Act refers to the "removal" of a director, the LRA refers to the term "dismissal" of an employee in the labour law context. In this contribution, the term "removal" is used when discussing applicable company law principles, while the term "dismissal" is used when discussing labour law.

[5] S 188(1) of the LRA provides that there must be a fair reason for dismissal and it must be effected in accordance with a fair procedure. See also the "Code of good practice: dismissal" contained in sch 8 to the LRA that provides guidelines regarding procedures that have to be followed when dismissing an employee.

 [ISSN 0257–7717]

terms of the Labour Relations Act or the Companies Act should be followed consequentially, or whether they should be combined. Apart from different procedural requirements prescribed in terms of the mentioned acts, a further problem may present itself in relation to the grounds for dismissal prescribed in terms of the Labour Relations Act.[6] What would the consequences be if an executive director were removed from office in terms of section 220 of the Companies Act, while there are insufficient grounds for dismissal in terms of the Labour Relations Act?[7] A last question in this respect relates to the remedies upon which a dismissed executive director could rely. In terms of labour-law principles reinstatement might be considered the appropriate remedy,[8] whereas principles of company law, especially with reference to section 220, would seem to afford shareholders an absolute opportunity to get rid of a director, leaving a dismissed executive director with no other remedy but the possibility of a claim for compensation or damages.[9]

Second, recent insolvency law reforms (principally at the insistence of the labour movement)[10] provide a clear indication of the ability of labour law to influence other areas of the law.[11] A case in point would be the recent amendment to the insolvency law principle that provided for the automatic termination of contracts of employment upon sequestration of the employer. It now provides that such contracts of employment are merely suspended.[12] This raises the question as to what extent labour law will influence the future development of other areas of the law such as company law.[13]

In an attempt to answer the questions mentioned above, this contribution briefly compares the underlying philosophies of labour law and company

[6] s 188(1) of the LRA.

[7] Preis "Prevention of the statutory removal of directors" 1983 *MB* 110 mentions that shareholders might decide to get rid of a director for being "lazy, incompetent or simply obnoxious".

[8] See par 5.4.

[9] See par 4.3.

[10] See Harris "The impact of South African labour law on insolvency practice in South Africa" paper delivered at the International Bar Association Conference 20 25 Oct 2002. On 2 Aug 1999 COSATU gave notice in terms of s 77(1)(b) of the LRA that it intended to commence protest action to achieve amongst other things that " the insolvency laws must be amended to alleviate the adverse effects of liquidations upon workers and their financial security".

[11] A trilogy of amendments, namely amendments to the Insolvency Act 24 of 1936 (as amended by Act 33 of 2002), the LRA (as amended by Act 12 of 2002) and the Basic Conditions of Employment Act 75 of 1997 (the BCEA) (as amended by Act 11 of 2002), have been introduced that will endeavour to address some of the existing problems encountered where labour law and insolvency law overlap. In this regard, see: Whitear Nel "The effect of insolvency on a contract of employment" 2000 21 *ILJ* 845l; Evans "New developments in insolvency and contracts of employment" 2000 *SAMLJ* 408; Anderson "Unravelling the proposed amendments to the Insolvency Act" 2001 22 *ILJ* 868; Van Eck and Boraine "Voluntary winding up of a company and 'dismissals' in terms of the Labour Relations Act" 2002 *THRHR* 610. Most of these problems can be traced back to the inherent difference between the underlying philosophies of insolvency law and labour law. To a large extent this can be attributed to the fact that the Insolvency Act is now well over 60 years old whilst labour law is a much more modern and progressive branch of the law. See Van Eck and Boraine 2002 *THRHR* 610 in this regard.

[12] s 38 of the Insolvency Act. Another example of the improvement of employees' rights is to be found in s 98A, in terms of which employee claims have been moved up in the order of statutory preferences.

[13] Since company law is about to be reviewed, the removal of directors is a matter that may well be reviewed during this process. See *eg*, "Corporate law faces a state overhaul" *Business Day* (2002 08 13).

law.[14] This is followed by a general discussion of the legal relationship between a director and his or her company;[15] company law principles that apply when a director is removed from office;[16] and the procedures prescribed in terms of labour law when an executive director is dismissed.[17] Thereafter, company law and labour-law principles are compared and practical suggestions regarding the removal and/or dismissal of a director are made.[18] This is followed by a number of concluding remarks.[19]

2 *Comparing the philosophies underlying labour law and company law*

Originally, the law relating to employment was primarily regulated by the common-law principles of the law of contract. Based on the premise of freedom of contract, the parties to the contract of employment were free to reach agreement on aspects such as hours of work, duties of the respective parties and termination by means of written notice or on grounds of breach of contract. Even if the provisions of a contract of employment were to place oppressive stipulations on an employee, that would not have been sufficient to justify a civil court to declare the agreement *contra bonos mores* if freely entered into by the parties.[20] In terms of common-law principles a contract of employment could legitimately be terminated by merely adhering to the contractually agreed upon notice period, notwithstanding the reason or motive for termination.[21] Provided that the provisions of the contract were met, an employer would be permitted to suspend or dismiss an employee in almost any manner.[22] It has been stated that the common law is largely blind to the inequality in status and bargaining power between employers and their employees[23] for the simple reason that an employee needs a job and wages more than an employer needs the services of an employee.[24]

[14] As mentioned in n 11, the fact that problems exist where labour law and insolvency law overlap could be attributed to the fact that the underlying philosophies of these two areas of law are inherently different. An overview of the philosophy of labour law and company law could provide useful insights in a discussion on why principles of labour law and company law that are applicable to the same facts could provide different results.

[15] par 3.

[16] par 4.

[17] par 5. The discussion of the principles of company law and labour law applicable to the removal or dismissal of an executive director will be of a very general nature, in order to provide labour law specialists with some background on the workings of company law principles and to provide company law specialists with the same type of information in respect of labour law principles.

[18] par 6.

[19] par 7.

[20] *Paiges v Van Ryn Gold Mines Estates* 1920 AD 600 616.

[21] Neethling and Le Roux "Positiefregtelike erkenning van die reg op die verdienvermoe of 'the right to exercise a chosen calling' " 1987 8 *ILJ* 719 720.

[22] Pretorius "*Status quo* relief and the industrial court: The sacred cow tethered" 1983 4 *ILJ* 167 171.

[23] (n 22).

[24] Brassey, Cameron, Cheadle and Olivier *The New Labour Law* (1987) 6. However, sometimes the employee may be in a strong individual bargaining position *vis à vis* the employer. Such a person is described by Kahn Freund *Labour and the Law* (1983) 17 to include "a high powered managerial employee with unique experience, a top rank scientist, or even a highly skilled craftsman whom the employer cannot easily replace". Directors of companies could also easily fall within this category.

Although modern labour law still views the employment relationship to be based on a freely concluded contract, it is one of the main functions of modern labour law to create a balance in the disparity in status and bargaining power between employers and employees. This is done through the protection of the rights of the weaker party. Labour law has eroded common-law principles through the establishment of a so-called "floor of rights" for employees.[25] This includes provisions in relation to limitations on the employer's unbridled discretion as to whom it wants to appoint to a position,[26] the setting of minimum conditions of employment[27] and by prescribing protective requirements that have to be adhered to when an employer contemplates dismissing an employee.[28]

Problems arise when the different philosophies of company law and labour law find application to the same set of facts. Drafters of legislation (who may be specialists in one branch of the law) are often not equipped to reconcile the underlying differences in philosophy between different branches of the law where they overlap. Whereas labour law seeks to promote job security and continuity of employment and is clearly concerned with the interests of the employees of a company, company law is traditionally more concerned with the interests of the shareholders of the company.[29]

Support for this statement can be found in various principles and dogma of company law. Directors are, for example, required to act *bona fide* in the best interest of the company in terms of the common-law fiduciary duties that they owe to the company.[30] In defining the best interest of "the company" directors are traditionally entitled, even required, to focus mainly on the interests of the shareholders of the company.[31] Shareholders, acting collectively through the mechanism of the general meeting, are furthermore viewed as the only other organ of the company, apart from the board of directors.[32] The general meeting of shareholders can also ratify a breach of directors' duties to the

[25] Smit *Labour Law Implications on the Transfer of an Undertaking* (2001 thesis RAU) 7.

[26] S 6(1) of the Employment Equity Act 55 of 1998 prohibits unfair discrimination in any "employment policy or practice", which in turn includes the recruitment selection and appointment of employees. Ch III of the same act places a positive obligation on "designated employers" to implement affirmative action measures.

[27] The BCEA *inter alia* prescribes minimum and maximum conditions of employment in relation to hours of work, different types of leave and notice of termination of service. These provisions are principally aimed at the protection of the interests of vulnerable employees.

[28] Employees are, amongst other things, protected against unfair dismissal on grounds of misconduct, incapacity, incompetence and operational requirements. See s 185 197 of the LRA. Also see the "Code of good practice: dismissal" and the "Code of good practice on dismissal based on operational requirements" published in terms of s 203 of the LRA.

[29] As is clearly illustrated by cases such as *Parke v Daily News* [1962] 2 All ER 929; [1962] Ch 927.

[30] *Re Smith and Fawcett Ltd* [1942] Ch 304 CA 306.

[31] In *Greenhalgh v Arderne Cinemas* [1951] Ch 286 CA 291, the court was clear on the point that "the phrase 'the company as a whole' does not mean the company as a commercial entity as distinct from the corporators".

[32] According to Gower *Modern Principles of Company Law* (1997) 183, with reference to *Isle of Wight Railway v Tahourdin* (1883) 25 ChD 320 CA, the general meeting of members was regarded as the supreme organ of the company until the end of the 19th century, with the board of directors merely being an agent of the company subject to control of the company in general meeting.

company,[33] take action in case of a breach of these duties by the directors,[34] and exercise ultimate control over the board of directors in that they are statutorily vested with the power to remove directors from office.[35]

The reason for the dominant role played by the shareholders of the company can be traced back to the Victorian perception of the company in terms of which the company was regarded as the associated members more than anything else.[36] Directors were viewed as agents for their constituents — the company as the collective corporate membership.[37] It was thus generally accepted that the members should be entitled, through the separate legal person of the company, to institute action against the directors if they failed to comply with their duties to the company, or to condone breach of these duties. More importantly, it was also accepted that, should members be dissatisfied with the way in which the directors of the company performed the functions to which they were appointed, the members themselves were entitled to remove them from that particular office and appoint somebody else.[38]

The Victorian company has undergone a dramatic metamorphosis. Numerous concepts that are well known to the modern company — for example, large groups of companies and institutional investors — would be totally alien to the corporators of the nineteenth century. However, as Sealy rightly noted: ''The typical company has changed, but our perceived image of the notional company that the law exists to serve has not.''[39] For all intents and purposes one could therefore assume that traditional company-law dogma still stands with the shareholders being regarded as the primary group whose interests should be protected and advanced by the directors. Since the directors are appointed to further their interests, they are still viewed as the appropriate group to remove directors from office should they consider directors incapable of fulfilling their obligations in this respect, and are endowed with wide powers and almost unbridled discretion to do so.[40]

Within this context labour law with its constitutional backing could, however, become the catalyst in reforming company law[41] as it did with other branches of the law.

[33] *Bamford v Bamford* [1970] ChD 135 Ch.
[34] This common law principle is known as the ''rule in *Foss v Harbottle*'' (1843) 2 Hare 461.
[35] Gower (n 32) 188.
[36] Sealy ''Directors' 'wider' responsibilities problems conceptual, practical and procedural'' (1987) 13 *Monash University LR* 164 165.
[37] (n 36).
[38] Sealy (n 36) 165 puts it quite eloquently that it is ''they who have chosen him, warts and all; they who can remove him''.
[39] (n 36) 164.
[40] See discussion par 4 *infra*.
[41] This contribution focuses on a particular aspect of company law that could be influenced by labour law, namely the removal of directors from office. It must be noted, however, that proponents of the stakeholder model of the company, or those who propagate the social responsibility of companies, could apply the emphasis that is put on workers' rights, specifically with reference to its constitutional context, to further promote rights of all corporate employees. Issues that could be raised in this regard include employee representation on the board of directors and directors having to consider the interests of employees in discharging their duties to the company and not only those of shareholders. These particular issues, although definitely meriting discussion, fall outside the scope of this contribution.

3 *The legal relationship between a director and a company*

3.1 Contractual relationship with the company

From the outset it is important to note that, although directors derive some common rights and duties from simply holding the office of director in a company, the legal position in which company directors find themselves is not stereotyped. The specific rights and duties of a particular director have to be established with reference to the particular circumstances of each case.[42] For example, the mere fact that a person is appointed as director of a company does not automatically imply a contractual relationship with the company.[43]

It is important to keep sight of the fact that the company's constitution, consisting of the memorandum and articles of association,[44] is not regarded as a contract between the company and its directors.[45] In terms of section 65(2) of the Companies Act the provisions of the memorandum and articles are, however, deemed to be contractually binding between the company and its members and between the members *inter se*. A director is thus not in a position to rely on provisions of the articles of association as terms and conditions of a deemed contract with the company and will, in general, be powerless to prevent provisions of the articles (even those pertaining to the holding of office of director and the terms of office) being altered.[46] It goes without saying that the requirements for a valid amendment of the articles have to be complied with before a director's terms of office can be changed. An amendment of the articles by way of special resolution,[47] that is *bona fide* and in the best interest of the company, is unimpeachable.[48]

3.2 Employment relationship with the company

Whether or not a particular director is an employee of the company will have to be determined with reference to the facts of every case. The Labour Relations Act and other labour legislation generally apply to the employer-employee relationship, and all of its provisions can be ignored in relation to the removal of those directors who are not employees of a company. It is, however, not always clear-cut if a specific legal relationship can be classified as a contract of employment or not. In addressing this question the courts have reverted to

[42] For a comprehensive discussion on the legal position of directors and managing directors, see Cilliers and Benade *Corporate Law* (2000) par 9.06 9.08; Du Plessis *Maatskappyregtelike Grondslae van die Regsposisie van Direkteure en Besturende Direkteure* (1990 thesis UOVS); Naude *Die Regsposisie van die Maatskappydirekteur met Besondere Verwysing na die Interne Maatskappyverband* (1969 thesis Unisa).

[43] Cilliers and Benade (n 42) par 9.06; Naude (n 42) 66.

[44] Provisions pertaining to the office of director will normally be found in the articles of association, which regulate the internal affairs of the company.

[45] *De Villiers v Jacobsdal Saltworks* 1959 3 SA 873 (O) 877.

[46] It should, however, be noted that there are methods in terms of which a director can entrench his or her position in the company. See Beuthin "A director firmly in the saddle" 1969 *SALJ* 489; Du Plessis "Praktiese aspekte aangaande die ontslag van maatskappydirekteure" 1988 *De Rebus* 511; Hyman " 'Weighted' or 'loaded' votes in private companies" 1977 *SA Company LJ* D 5; Hyman " 'Weighted' votes again" 1977 *SA Company LJ* D 17; and Preis (n 7) for more detail on this aspect.

[47] As required in terms of s 62 of the Companies Act.

[48] See *Sammel v President Brand Gold Mining Co Ltd* 1969 3 SA 629 (A) 680 681; *Ex parte JR Starck & Co (Pty) Ltd* 1983 3 SA 41 (W) 43.

various tests to distinguish between the true contract of employment and other agreements entailing the provision of labour.[49] The most important of these are the control test,[50] the organisation test,[51] the multiple or dominant impression test[52] and the productive capacity test.[53] For purposes of determining whether labour-law principles are applicable or not, no distinction is drawn between part-time or permanent employees and it is trite that managerial employees will also be deemed to be employees.[54]

During 2002, a statutory presumption regarding who would be deemed to be employees and who not was introduced into labour legislation.[55] It is submitted that this presumption will only apply for the purposes of the Labour Relations Act and the Basic Conditions of Employment Act, but courts might be influenced by it when having to decide upon this issue for other purposes as well — such as the Companies Act and the Insolvency Act. From this statutory presumption it is clear that the legislature has sought to widen rather than restrict the definition of employee. Section 200A of the Labour Relations Act reads as follows:

> "200A. (1) Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:
> (a) the manner in which the person works is subject to the control or direction of another person;

[49] See Brassey "The nature of employment" (1990) 11 *ILJ* 889; Grogan *Workplace Law* (2003) 16 20; Van Jaarsveld and Van Eck *Principles of Labour Law* (2002) 57 66.

[50] This test is based on the element of control exercised by the employer over the employee. In *Colonial Mutual Life Assurance Society Ltd v Macdonald* 1931 AD 412 434, it was held that there can be no contract of employment where there is a total absence of the right of supervising and controlling the workman. See also *R v AMCA Services* 1959 4 SA 207 (A). Grogan (n 49) 17 points out that the courts initially applied this requirement rather strictly. However, the courts clearly have in mind that the employer must have the right to control in principle, but the fact that the employer does not exercise this right does not render the contract of employment something else.

[51] This test is based on the question whether a person forms part of the employer's organisation. Does the employee work inside the employer's organisation? Is the employee provided with an office and tools of trade? When the answers to the questions are positive it is indicative of the existence of a contract of employment. Although this test was accepted in *R v AMCA Services* (n 50), it was questioned in the subsequent *R v AMCA Services* 1962 4 SA 537 (A).

[52] The dominant impression test views the relationship as a whole and relies on various indications to determine whether or not the contract is a contract of employment. Under this test the courts will consider all the relevant facts including the contents of the agreement, the supply of capital goods, degree of supervision and control, method of payment, method of taxation and the right of the employer to discipline and dismiss. See *Ongevalle Kommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 4 SA 446 (A); *Borcherds v CW Pearce and J Sheward t/a Lubrite Distributors* 1993 14 *ILJ* 1262 (LAC); *Board of Executors Ltd v McCafferty* 1997 18 *ILJ* 949 (LAC); *SA Broadcasting Corporation v McKenzie* 1999 20 *ILJ* 585 (LAC); *AVBOB Mutual Assurance Society v Commission for Conciliation, Mediation and Arbitration, Bloemfontein* 2003 24 *ILJ* 535 (LC).

[53] This test involves the question whether the person is being paid for the end result of work (such as the building of a dam by a contractor) or placing productive capacity or services at the disposal of the employer (such as a secretary for doing general administrative work). See *Niselow v Liberty Life Association of Africa Ltd* 1998 19 *ILJ* 752 (SCA).

[54] In *Oak Industries SA (Pty) Ltd v John* 1987 4 SA 702 (N) it was held that a managing director of a company was in fact an employee on the grounds that the director was subject to instructions.

[55] See s 200A of the LRA and its equal in s 83A of the BCEA.

(b) the person's hours of work are subject to the control or direction of another person;
(c) in the case of a person who works for an organisation, the person forms part of that organisation;
(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
(e) the person is economically dependent on the other person for whom he or she works or renders services;
(f) the person is provided with tools of trade or work equipment by the other person; or
(g) the person only works for or renders services to one person.

(2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act.

(3) If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act, any of the contracting parties may approach the Commission for an advisory award on whether the persons involved in the arrangement are employees.

(4) NEDLAC must prepare and issue a Code of Good Practice that sets out guidelines for determining whether persons, including those who earn in excess of the amount determined in subsection (2) are employees.''

In terms of this presumption, ''regardless of the form of the contract'', if a person ''is economically dependent on the other person for whom he or she works or renders services'', the person will be deemed to be an employee until the contrary is proved. It should be noted that this presumption does not apply to people earning in excess of the amount of R115 572 as determined by the minister of labour in terms of section 6(3) of the Basic Conditions of Employment Act. From this it follows that this presumption will not apply to directors earning in excess of the mentioned amount. For those directors, the common-law tests developed by the courts will still find application in order to determine if a contract of employment has come in existence separately from the relationship between a director and a company established in terms of the company's constitution.

4 *Company law principles regarding the removal of directors*

4.1 Removing a director from office in terms of section 220 of the Companies Act

The principles regarding the removal of directors in terms of section 220 can be divided into three key elements, namely the special notice, the resolution and the right of the specific director to make representations. These principles apply to all directors irrespective of whether they have entered a contract of employment with the company or not.

In terms of section 220(2), a special notice shall be lodged with the company of any proposed resolution to remove a director from office in terms of this section. The Companies Act does not prescribe the content of the resolution and it need therefore not necessarily contain the allegations against the director and it could typically merely contain a proposal that the director will be removed from office. Upon receipt of such a notice, the company must deliver a copy thereof to the director concerned.

Section 186(3) of the Companies Act requires such a special notice to be given to the company ''not less than twenty-eight days before the meeting at which it is moved'', upon which the company is required to give its members

notice of the resolution not less than twenty-one days before the meeting. In terms of the proviso to subsection (3), should the meeting be called for a date twenty-eight days or less after the company has received the special notice, the special notice will be deemed to have been properly given.[56] Due to the fact that the resolution is not a special resolution, the required majority for removing a director from office is an ordinary majority of 50% plus 1.[57]

An important aspect of the process prescribed in terms of section 220 pertains to the director's right to be heard. Section 220 provides for various ways in which this right can be exercised. As a starting point a director is entitled to be heard on the proposed resolution at the meeting in terms of section 220(2). Apart from this, a director has the right to make representations in writing not exceeding reasonable length (once he or she has received notice of the proposed resolution) to the company and request that members be notified thereof in terms of section 220(3) prior to the meeting. The company is under obligation to state in the notice to members that such representations have been made[58] and must send a copy of the representations to every member of the company,[59] provided that the representations were received timeously. Should the representations not be sent as required in terms of section 220(3), the director may in terms of section 220(4) require that the representations be read at the meeting, without prejudice to his right to be heard orally.

From the prescribed process it is clear that the legislature envisages that some form of *audi alteram partem* should take place at a general meeting of members before the decision is taken to remove a director from his or her position. It remains to be seen, however, if compliance with section 220 would necessarily result in compliance with every employee's right to fair labour practices in terms of labour-law principles.

4.2 Power to remove a director in any other way

In terms of section 220(7), nothing in the statutory provision should be construed as "derogating from any power to remove a director which may exist apart from this section". Ample scope is thus left for a company to regulate the removal of directors in other ways.[60]

Section 220(7) has the effect of exempting a company from having to comply with statutory procedures such as those prescribed in section 220(2) and (3) should it be regulated in terms of its articles of association.[61]

[56] According to Meskin (ed) *Henochsberg on the Companies Act* at *http://www.butterworths.co.za/butterworthscommercial/lpext.dll?f templates&fn altmain h.htm* 423 the purpose of this is to prevent the directors nullifying the special notice by means of their selection of a date for the meeting.

[57] *Swerdlow v Cohen* 1977 3 SA 1050 (T).

[58] s 220(3)(a).

[59] s 220(3)(b).

[60] See Du Plessis *Ontslag van Maatskappydirekteure in die Suid Afrikaanse Reg* (1968 dissertation UOVS) 41 47 for other ways in which a director may be removed from office. This provision could play an important role in reconciling principles of company law and labour law. See par 6.5.

[61] See Cilliers and Benade (n 42) par 9.32 and authority there referred to.

4.3 Effect of a separate contract with the company

As was indicated above, a director, though not automatically involved in a contractual relationship based on the mere holding of the office of director, is free to conclude a separate contract with the company. Such a contract may regulate the terms and conditions of the holding of the office of director at length, and may, among other things, provide for the terms of office, remuneration and compensation in case of a breach of contract by the company.

Regarding the separate contract between the director and the company, it should be noted that its existence does not deprive the company of its right to remove the director from office. The company may do this by cancelling the contract on the basis of common-law principles should the director commit a breach that justifies cancellation[62] or in terms of section 220, even though the director is not in breach of contract. This can be gathered from s 220(1)(a) which provides for the right of a company to remove a director from office "notwithstanding anything in any agreement between it and any director".

If a company removes a director in terms of section 220 in the absence of breach that justifies cancellation, it may give rise to a claim for damages or compensation on the part of the director, since the company would have repudiated the contract. Section 220(7) specifically provides that nothing in the provision "shall be construed as depriving a person removed thereunder of compensation or damages which may be payable to him in respect of the termination of his appointment as director". A director could become entitled to compensation contractually provided for in case of a breach of the contract or, should no compensation be provided for, a director would have to prove damages sustained as a result of the removal from office. An example of this could be the amount of the director's remuneration which he or she would contractually have been entitled to.[63]

In terms of labour-law principles, an executive director would also be entitled to use statutory remedies before the labour courts or the Commission for Conciliation, Mediation and Arbitration[64] apart from the common-law damages mentioned above.[65] These statutory remedies include reinstatement and re-employment.[66]

[62] Meskin (n 56) 422.

[63] (n 56) 422.

[64] Hereafter "the labour forums". See par 5.4 for a discussion of the remedies provided for in terms of s 193 194 of the LRA.

[65] In *Fedlife Assurance Ltd Wolfaardt* 2001 22 *ILJ* 2407 (SCA), it was held that s 195 of the LRA bestows an additional remedy of compensation on employees over and above full performance of an employers contractual obligations.

[66] This is clearly contrary to the position as *per* s 220 of the Companies Act. S 220(1)(a), according to Du Plessis "Die nywerheidshof, werknemers en direkteure" 1988 *De Rebus* 119 121, has the effect that a director would not be entitled to claim specific performance of an agreement which would deprive the company of the right to remove the director from office. However, note the observation by Larkin "Distinctions and differences: a company lawyer looks at executive dismissals" 1986 7 *ILJ* 248 251 that company case law suggesting that any contractual remedy is restricted to damages was decided in the absence of the LRA. See par 5.4 and 6.3 *infra* for further discussion.

5 *Labour-law principles regarding the dismissal of employees*

5.1 The right not to be unfairly dismissed

The constitution provides that "everyone has the right to fair labour practices".[67] In *Fedlife Assurance Ltd v Wolfaardt* the supreme court of appeal held that the constitutional framework may have imported the right not to be unfairly dismissed into the common-law employment relationship even before the enactment of the Labour Relations Act of 1995.[68] However, the Labour Relations Act spells out the right not to be unfairly dismissed in greater detail than the constitution.[69] The Labour Relations Act stipulates that a dismissal is unfair if the employer is unable to prove that there was a fair reason (also referred to as substantive fairness) for dismissal and that the dismissal was effected in accordance with a fair procedure.[70] The Labour Relations Act recognizes misconduct, poor work performance, ill health or injury, and operational requirements as fair reasons for dismissal.[71] Before an employer terminates an employee's services on the grounds of the fault of the employee it is important to determine under which one of the recognised grounds the potential dismissal may fall.[72] The "Code of good practice: dismissal",[73] contained in schedule 8 to the Labour Relations Act, provides guidelines regarding the different procedures that go hand-in-hand with each one of the different grounds for dismissal.[74] Although there are substantial differences in process associated with the different grounds of dismissal, the different procedures mainly point to one central principle, namely that every employee is entitled to the observance of the *audi alteram partem* rule.

5.2 Misconduct, incompetence and incapacity

In the case of *misconduct*, disciplinary measures such as counselling and warnings should precede an employee's right to state a case during a disciplinary enquiry. This usually takes place before a neutral third party and the procedure

[67] s 23.
[68] (n 65) 2414.
[69] S 186 defines the "meaning of dismissal" and it includes: termination with or without notice; refusal to allow a person to resume work after returning from maternity leave; and constructive dismissal in so far as the employer made continued employment intolerable. S 187 defines automatic unfair dismissal and it includes dismissal on grounds of participation in a protected strike, pregnancy and unfair discrimination.
[70] s 188.
[71] s 188(1)(a).
[72] The LRA also prescribes procedures for so called "no fault" dismissals associated with the operational requirements of the employer. The interaction between dismissal based on operational requirements and section 220 of the Companies Act is not covered in this contribution.
[73] Hereafter the "Code of good practice".
[74] Although not elevating it to an absolute requirement, item 3(1) of the Code of good practice encourages the implementation of disciplinary codes for every workplace. Should a company have such a code, it is submitted that it should be adhered to in the case of the termination of an executive director's services.

is akin to an informal criminal trial.[75] Item 4(4) of the Code of good practice stipulates that, in exceptional circumstances, if the employer cannot reasonably be expected to comply with above-mentioned guidelines, the employer may dispense with the pre-dismissal procedures. Could it be argued that the adherence to the section 220 process in terms of the Companies Act, where an executive director states his or her case at a general meeting, constitutes such exceptional circumstances? It is submitted that it is doubtful whether the labour forums would accept such an argument. In the past, recognition has only been given to two broad categories of exceptional circumstances, namely the so-called ''crisis-zone'' cases and where the employee waives his or her right to the pre-dismissal hearing.[76] An example of the crisis-zone cases would be where the holding of a hearing endangers life or property of others.[77] The second category refers to the scenario where an employee has been invited to attend a disciplinary enquiry but the employee turns down the opportunity.[78]

Generally speaking, it is not appropriate to dismiss an employee on the grounds of misconduct for a first offence, except if it is serious and of such gravity that it makes the continued employment relationship intolerable.[79] Any person determining whether dismissal for misconduct is the appropriate penalty should consider whether a valid rule or standard was contravened, whether the employee was aware of the rule, whether the rule or standard had been applied consistently by the employer and whether dismissal is the appropriate sanction for the contravention of the rule or standard.[80]

Different procedures are prescribed when an employee's services are terminated on grounds of *poor work performance*. Generally, an employer should assess the work performance of an employee and the employee should be given training, guidance, counseling, advice and sufficient time to improve.[81] The employee should also be evaluated against objective employment standards. As is the case with misconduct, the employee should be given the opportunity to state a case in response to the allegations made against him or her and is entitled to be assisted by a trade union representative or fellow employee during the discussions.[82]

[75] In item 4(1) of the Code of good practice the following guidelines are provided: sufficient prior notice of the hearing should be given to the employee; the employee must be notified of the charges that will be investigated during the hearing; the employee must be granted the opportunity to state a case in response to allegations by giving verbal or written evidence; the employee must be granted the opportunity to call witnesses and to cross examine the employer's witnesses; an impartial presiding officer should make the decision, communicate the decision taken and preferably furnish the employee with written notification of that decision.

[76] Cameron ''The right to a hearing before dismissal'' 1988 9 *ILJ* 173 180.

[77] An example is to be found in *Lefu v Western Areas Gold Mining* 1985 6 *ILJ* 307 (IC) where 205 employees were dismissed without a hearing after nine people had been killed and 304 had been injured during incitement and participation in violence at the workplace.

[78] See *SACWU v Dyasi* 2001 7 BLLR 731 (LAC); Van Eck ''Latest developments regarding disciplinary enquiries'' 2002 *SAJLR* 24.

[79] item 3(4) of the Code of good practice. Examples of serious misconduct are gross dishonesty, wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer or fellow employees.

[80] item 7 of the Code of good practice; *Metro Cash and Carry Ltd v Tshehla* 1997 1 BLLR 35 (LAC).

[81] items 8(1)(e) and 9 of the Code of good practice.

[82] item 8(4) of the Code of good practice.

When an employee is prevented from rendering services due to *ill health or injury* yet another set of procedures are prescribed. The employer should investigate the nature and extent of the ill health or injury and consideration should be given to the duration of absence from the workplace.[83] An employee may not be dismissed on grounds of ill health or injury if the employer has not considered the following aspects: What was the cause of the injury or illness?[84] What is the extent to which the employee is unable to perform duties?[85] Were alternatives to termination considered or was the adaptation of the duties of the employee considered?[86] Was the employee afforded the opportunity to state a case and given the opportunity to be represented by a trade union representative or fellow employee? [87]

5.3 Executive employees and the right not to be unfairly dismissed

The fact that a person is given a title of manager, executive director or even managing director does not mean that such a person will be immune from the employer's prerogative to control and to discipline her or him.[88] Executive directors fall under control of the board of directors and the general meeting of member of the company. Labour forums have on a number of occasions rejected the notion that senior employees should be excluded from protection against unfair dismissal.[89] In *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon* the labour appeal court confirmed the principle that it "does not give the employer the license to dispense with the observance of the *audi alteram partem* rule" when a senior managerial employee is being dismissed.[90]

Although it is trite that they are entitled to be heard, the question has been posed whether senior managerial employees are entitled to the same standard of observance of the *audi alteram partem* rule as other employees.[91] Especially with reference to cases of inadequacy of performance, the argument has often been raised that executive employees should know what their required standard of work is and that a less stringent degree of procedural fairness can be adhered to when they are dismissed. In *Unilong Freight Distributors (Pty) Ltd v Muller* the supreme court of appeal held that, although a more flexible and lenient approach may be adopted to the practical application of the dismissal of senior managers, they should still at least be warned and be given the opportunity to improve prior to their dismissal.[92] From the above it is clear that executive directors may not be dismissed without following the correct procedures but

[83] item 10(1) of the Code of good practice.
[84] item 10(4) of the Code of good practice.
[85] item 11 of the Code of good practice.
[86] (n 85).
[87] item 10(2) of the Code of good practice.
[88] In *Lagger v Shell Auto Care (Pty) Ltd* 2001 22 *ILJ* 1371 (C), it was held that the managing director's important position did not remove him from the ambit of the terms and conditions of employment he had agreed upon and that the employer's disciplinary code applied to all of its employees. See also *Oak Industries (SA) (Pty) Ltd v John* (n 54).
[89] Le Roux and Van Niekerk *The South African Law of Unfair Dismissal* (1994) 76.
[90] 2000 21 *ILJ* 501 (LAC) 518G H.
[91] Olivier "The dismissal of executive employees" 1988 9 *ILJ* 519; *Stevenson v Sterns Jewellers (Pty) Ltd* 1986 7 *ILJ* 318 (IC). See also the minority decision of Conradie JA in *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon* (n 90) 518A I.
[92] 1998 19 *ILJ* 229 (SCA) 238A B.

that, depending on the facts of a particular case, the labour forums could tolerate a more flexible application of the procedures.

5.4 Consequences of unfair dismissal

The onus rests on the employer to prove that any dismissal was effected in accordance with a fair procedure and based on a fair reason.[93] Should an employer breach an employee's contract of employment, the employee would be entitled to a claim for common-law damages. Apart from this, and even under the common law, it has become clear that the courts also have the undisputed discretion to reinstate an employee.[94] With the enactment of the right not to be unfairly dismissed, specific statutory remedies were introduced by the Labour Relations Act. If the labour forums were to find that the dismissal of an executive director was unfair the employer company may be ordered to reinstate, re-employ or compensate the employee.[95] The Labour Relations Act makes no exception with regard to employees who are also directors of companies, and section 210 of the Labour Relations Act stipulates that the Labour Relations Act prevails over any other act, apart from the constitution, should it be in conflict with the Labour Relations Act.[96]

It should also be noted that the Labour Relations Act does not merely permit reinstatement and re-employment, but that these remedies have been elevated to the primary remedies. These remedies have to be awarded unless one of a number of factors is present such as that the employee does not wish to be reinstated of re-employed.[97] Section 194 of the Labour Relations Act places limits on the amount of compensation that may be awarded. The compensation awarded must be just and equitable but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of the dismissal.[98] In *Fedlife Insurance Ltd v Wolfaart* the supreme court of appeal observed that the right to claim compensation in terms of the Labour Relations Act does not deprive an employee from claiming common-law damages.[99] The court held that an order of compensation is in addition to and not a substitute for any other amount to which an employee is entitled in terms of any law or contract of employment.[100]

[93] s 192 of the LRA.
[94] See *NUTW v Stag Packings (Pty) Ltd* 1982 4 SA 151 (T); *Tshabalala v Minister of Health and Welfare* 1986 7 *ILJ* 168 (W).
[95] s 193(1).
[96] As counter argument, it could however be submitted that s 210 is only applicable to "matters dealt with in this Act" and that no reference is made to the removal of directors from office.
[97] s 193(2).
[98] S 194(3) limits compensation to the equivalent of 24 months' remuneration to an employee whose dismissal is "automatically unfair".
[99] (n 65).
[100] 2416E F. The court based its decision on s 195 of the LRA which makes it clear that an award for compensation is "in addition to and not a substitute for any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment".

6. *Comparing section 220 of the Companies Act and the right to fair labour practices*

6.1 Procedural fairness

To what extent does section 220 of the Companies Act comply with the right to fair labour practices as prescribed by the constitution and labour law? It is clear that section 220 primarily prescribes that a director must be afforded the opportunity to be heard prior to his or her removal from office. During the process in terms of section 220, a director first has the right to be informed of any proposed resolution of his or her removal in terms of subsection (2). Second, in terms of subsection (3), such a director may make written representations with respect to the proposed resolution and the company must provide members of the company with a copy of such representations if it does not exceed a reasonable length. Third, if a copy of the representations had been received too late or had not been sent to members because of the default of the company, the director may request that the representations be read out at the meeting in terms of subsection (4). The director finally has the right to be heard on the proposed resolution at the meeting in terms of subsections (2) and (4).[101] When comparing the process in terms of section 220 with the procedures provided for in terms of the Labour Relations Act, it is clear that the Companies Act does not provide for different procedures for different grounds of dismissal. For example, it does not prescribe that executive directors who render unsatisfactory services should be given a warning to improve, guidance, evaluation against objective employment standards and sufficient time to rectify the problems. With reference to misconduct, it makes no mention of corrective discipline to be applied. It is also doubtful if it is practically possible to conduct a fair disciplinary hearing in an open forum such as a members' meeting. Would it be possible for such a director to call witnesses, for them to be cross-examined and an impartial decision to be made? Will all members of the meeting bring out a vote to determine on a balance of probability whether the executive director was guilty and will they vote on the appropriate sanction? Would the whole meeting be coached on principles such as: dismissal is only appropriate if a rule was contravened; the director must have been aware of the rule; and dismissal must be the appropriate sanction for the contravention of the rule or standard?

6.2 Substantive fairness

Regarding substantive fairness, shareholders are statutorily endowed with the power to remove directors from office, for any reason and without being

[101] It would seem that the interests of the company and its members are protected, rather than those of the director as employee. S 220(5), for example, stipulates that on application by the company or a member, the court may order that the director's representations may not be sent to the members and it may not be read at the meeting if the process is being abused to secure needless publicity or that it may be defamatory in nature. S 220(6) further directs that the director may be ordered to pay the costs for the order even though the director may not have been a party to the application.

required to furnish any reasons for such removal.[102] It is clear that, whereas the Labour Relations Act reserves termination for serious grounds of dismissal, the Companies Act has no such requirement. A director could be removed from office in terms of section 220 for being "lazy, incompetent or simply obnoxious".[103] Although section 220 at first glance seems to provide for procedural fairness,[104] there can be no doubt that section 220 makes no provision for substantive fairness in relation to the removal of executive directors.

6.3 Importance of adhering to labour-law principles when dismissing executive directors

It is submitted that the importance of adhering to labour-law principles when dismissing an executive director from office cannot be over-emphasised. The reason for this relates to the remedies afforded to employees in cases of unfair dismissal. Whereas section 220(7) of the Companies Act only makes provision for claims for compensation or damages should an executive director's dismissal result in breach of contract on the part of the company, the Labour Relations Act provides for potential reinstatement and re-employment in the case of an unfair dismissal.

It is not a remote possibility that executive directors may be reinstated or re-employed subsequent to their unfair dismissal. This is clearly illustrated by cases such as *Whitcutt v Computer Diagnostics and Engineering (Pty) Ltd*[105] and *Brown v OK Industries (SA) (Pty) Ltd*[106] where the former industrial court ordered the reinstatement of unfairly dismissed directors. Members who want to ensure that they do indeed get rid of executive directors whom they regard as unfit for the office of director, would therefore be well advised to take care that they comply with relevant labour-law principles.

6.4 Constitutional principles

An executive director, as employee, is entitled to the constitutional right to fair labour practices.[107] It may be argued that this right only applies to the director in his or her capacity as employee and that it has no bearing on the holding of the office of director or the removal from office of director in terms of section 220. This argument only holds true when it is possible to draw a clear line between the various capacities of the executive director. The question may be raised, however, whether a person's capacity as director can logically be separated from his or her capacity as employee. Are the two relationships not so interlinked and closely related that the one cannot exist without the other?

[102] As was already indicated, the basis of this provision can be traced back to the time when shareholders were effectively regarded as the "owners" of the company. In modern times, however, especially in light of the emphasis put on workers' rights, they may be bound to adhere to principles of labour law when dismissing an employee of the company, albeit an executive director.
[103] Preis (n 7) 111.
[104] Closer analysis reveals that this is not the case. See discussion in par 6.1.
[105] 1987 8 *ILJ* 356 (IC).
[106] 1987 8 *ILJ* 510 (IC).
[107] As provided for in terms of s 23(1) of the constitution.

When an executive director, appointed as such in terms of a contract of employment, is removed from office in terms of section 220, the very essence of that director's contract of employment falls away. It would thus seem that the one cannot exist without the other.[108]

This submission has important consequences. If an executive director is for example removed from office in terms of section 220 for no other reason than being poorly dressed, it would not only result in common-law breach of contract and an unfair dismissal in terms of the Labour Relations Act, but would also infringe upon that individual's constitutional right to fair labour practices. From this it seems possible to draw the inference that the constitutional right to fair labour practices has an indirect influence on the removal from office of an executive director merely in terms of section 220.

It is also noteworthy that section 23(1) of the constitution does not limit the right to fair labour practices to "employees", but that this right is extended to "everyone". It is a well-accepted labour-law principle that the employment relationship extends beyond the existence of a contract of employment.[109] In terms of the Labour Relations Act employees would be entitled to seek relief in certain circumstances even after the contract of employment has been terminated in the common-law sense.[110] It would therefore be possible that a person, although strictly speaking no longer an employee, would still be entitled to the right to fair labour practices based on the continued existence of the employment relationship. This could have important implications for the holding of office and removal from office of executive directors.

6.5 Reconciling section 220 of the Companies Act with labour-law requirements for a fair dismissal

How should one then go about removing an executive director from office in terms of section 220 of the Companies Act, while simultaneously ensuring compliance with labour-law requirements of what would constitute a fair dismissal and the constitutional right to fair labour practices?[111] Two possibilities can be suggested in this regard.

The first option would be for the board of directors or the members themselves to evoke procedures as prescribed in terms of the Labour Relations Act and to follow this up with the section 220 procedure. Depending on the facts, the executive director could be given warnings for misconduct or poor work

[108] Du Plessis (n 66) 121 notes that s 220(7), which provides that a director who is removed from office would be entitled to compensation or damages "which may be payable to him in respect of the termination of his appointment as director *or of any appointment terminating with that of director*", could be indicative of the fact that the legislature envisaged the termination of another relationship, such as an employment relationship, with that of director.

[109] Grogan (n 49) 73.

[110] Grogan (n 49) 73. See also *National Automobile and Allied Workers Union v Borg Warner SA (Pty) Ltd* 1994 15 *ILJ* 509 (A) 515G J.

[111] Although there is no explicit statutory duty on the part of companies to follow labour law principles when removing an executive director from office, there may be a duty on the part of legal practitioners to advise their clients of the inherent risks involved when removing an executive director from office. An important point in his regard is the possibility that the executive director may be reinstated in his or her capacity as employee, and if it is held that the two capacities can not be divorced in the overriding employment relationship, even possibly in his or her official capacity as executive director.

performance, the opportunity to improve and a disciplinary enquiry by an independent chairperson. This could entail that the company follows its own disciplinary code, or, if does not have one, that it adheres to the guidelines contained in the Code of good practice. Based on the recommendation of the chairperson of the hearing, a resolution in terms of section 220 by the general meeting could put its stamp of approval on the decision reached by the chairperson of the enquiry. The section 220 process would be a mere formality in order to ensure that that removal from office is valid in terms of section 220.[112] This would also address the potential problem of a general meeting and the chairperson of a disciplinary enquiry coming to different conclusions.

A second possibility centres on the interpretation of section 220(7) of the Companies Act that makes provision for the possibility to devise a procedure in terms of which "the power to remove a director may exist apart from this section". As Du Plessis rightly notes, innumerable arrangements could be made in this regard.[113] Arrangements that are important for the purposes of this contribution are procedures included in the articles of association of a company and the delegation of the power to remove a director from office to a neutral third person such as a labour consultant, a labour lawyer, or the human resources division in large corporations.

If a company were to introduce such procedures the company would then not have to comply with the statutory requirements listed in section 220. A disciplinary procedure in accordance with the labour-law principles would then constitute both the dismissal and the removal from office of a director. Such a construction would entail that the dismissal of a director simply in terms of labour-law principles would be valid, without having to adhere to the procedure prescribed in terms of section 220. It would have the added benefit of combining section 220 and labour-law procedures into one process that would save time, money and effort that could be crucial when it becomes necessary to remove an executive director from office.

7 *Concluding remarks*

Company lawyers may bemoan the fact that principles of labour law are apparently eating away at core principles of company law.[114] However, discomfort on their part would seem to be of little significance in light of the fact that labour law enjoys constitutional backing.[115] This is further supported by section 210 of the Labour Relations Act that provides as follows: "If any

[112] In light of the decision in *Van Heerden and Medihelp* 2002 23 *ILJ* 835 (ARB), one could submit that it would be permissible for the general meeting to rubber stamp the finding of the chairperson to the enquiry, but not to consider new uncontested evidence and to come to a different conclusion. Cases such as *SALSTAFF on behalf of Brink and Portnet* 2002 23 *ILJ* 628 (BCA) and the minority decision in *BMW (SA) (Pty) Ltd v Van der Walt* 2002 21 *ILJ* 113 (LAC), although they do not directly relate to the power of the general meeting to remove a director from office, could serve as an indication that it would also not be deemed to be fair if the general meeting could overturn the decision of the chairperson of the enquiry and substitute its finding with its own.

[113] Du Plessis (n 46) 514.

[114] See *eg*, Du Plessis (n 66) who, in commenting on the cases mentioned par 6.3, stated: "Dit wil voorkom of die nywerheidshof nie voldoende waarde geheg het aan die unieke en eiesoorte statutêre en gemeenregtelike onderbou van die maatskappyereg nie."

[115] With reference to s 23(1) of the constitution.

conflict, relating to the matters dealt with in *this Act*, arises between *this Act* and the provisions of any other law save the Constitution or any Act expressly amending *this Act*, the provisions of *this Act* will prevail.'' This indicates that labour-law principles would have to be taken into consideration, and will enjoy preference, should the provisions of the Labour Relations Act and the Companies Act come into conflict in relation to the same set of facts.[116]

The permeating power of labour-law principles would interestingly enough seem to go a long way in emphasising the outdatedness of the Victorian perception of shareholders as ''owners'' of the company. The shareholders collectively are no more than an organ of the company — and their acts as such would be deemed to be the acts of the company. In the end it would all seem to come down to a realisation that a corporate employer who wishes to dismiss one of its employees, albeit a director, would be subject to the same conditions, requirements and statutory provisions as would apply in the case of any other employer.

Finally, it is submitted that the entrenchment of labour rights raises the prospect of the cross-pollination of the principles of labour law with those of company law and that this could have a far-reaching effect on the way the employment relationship of the executive director is approached in future.[117]

SAMEVATTING

ONTSLAG VAN UITVOERENDE DIREKTEURE: 'N VERGELYKING TUSSEN MAATSKAPPYEREG EN ARBEIDSREGBEGINSELS

Hierdie artikel ondersoek die bepalings van die Maatskappyewet en die Wet op Arbeidsverhou dinge wat verband hou met die ontslag van uitvoerende direkteure. Die verskille tussen maatskappyereg en arbeidsregbeginsels word uitgewys en daar word aanbeveel dat ag geslaan word op werknemers se grondwetlike reg op billike arbeidspraktyke tydens die ontslag van uitvoerende direkteure. Dit word ook aan die hand gedoen dat maatskappyereg deur arbeidsreg beinvloed word met betrekking tot die ontslag van uitvoerende direkteure uit die amp van direkteur.

[116] As counter argument, it could be submitted that s 210 is only applicable to ''matters dealt with in this Act'' and that no reference is made to the removal of directors from office.
[117] Grogan (n 49) 14.