

**“Business and Affairs:
The Widening of the Board of
Director’s Powers”**

by

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Summary

In Company Law there are two bodies or organs of the company that have the power to make decisions regarding the management of the company. These two bodies are the shareholders in the general meeting and the board of directors. The exact nature of the relationship between the directors and the company is not easily described. While directors have been said to be agents, trustees or even managers of a company, none of these fully describe the position with total accuracy. The nature of the position of the director is best described as being *sui generis*, and having similarities to each of those in certain circumstances. The Companies Act 71 of 2008 gives a new expanded definition of “director” which clarifies who is considered to be a director.

The Common Law initially considered the members in the general meeting, to be the company and any resolution by them was considered to be a corporate act. The constitutional documents of the company were considered to be a contract between them and the majority rule was enforced. The directors would have their power delegated to them. This position changed in 1906 after the case of *Automatic Self-cleansing Filter Syndicate Co Ltd v Cunningham* [1906] 2 Ch 34 (CA). Here the court held that there was a division of power, according to the constitutional documents, between the shareholders in the general meeting and the board of directors. The general meeting could not interfere with those powers of the board, except if they changed the articles of association by special resolution. The shareholders had residual and default powers and were the ultimate organ of the company.

The position of the board of directors in Companies Act 61 of 1973 was given in Article 59 of Table A. Here the board was given the power to manage the business of the company. It was found that this included the power to derive a profit and stop trading in certain circumstances but did not include the power to liquidate the company. The board’s powers, according to Article 59 of Table

A, were still subject to the shareholders in the general meeting. This showed that the shareholders still remained the ultimate power in the company.

The division of powers in Company Law has been drastically changed by Section 66(1) of the Companies Act 71 of 2008. The board of directors is now statutory empowered to manage not only the business of the company, but also the affairs. It was stated in the case of *Ex parte Russlyn Construction (Pty) Ltd* 1987 (1) SA 33 (D) that affairs had a wider meaning than business and could include the power to liquidate the company. Delpont states, with reference to Canadian Law, that the word “affairs” means the internal dealings of a company as well as the existence of the company.¹ The statutory empowerment of the board, and inclusion of the word “affairs” in section 66(1), changes the division of powers in the company. The board of directors now has original powers and is the ultimate power in the company being able to bring an end to the very existence of the company. The full effect of this change is one which will only be revealed in years to come as case law around this matter develops.

¹Delpont (2011) 66 - 67.

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Contents

Chapter 1: Introduction	7
Chapter 2: The Legal Position of Directors	10
2.1 Introduction.....	10
2.2 The Legal Position of Directors	10
2.2.1 Directors as Agents.....	11
2.2.2 Directors as Trustees.....	13
2.2.3 Directors as Managing Partners.....	15
2.2.4 <i>Sui generis</i> Status of Directors.....	16
2.3 The definition of a “director” under the Companies Act 71 of 2008	18
2.4 Conclusion.....	22
Chapter 3: The Common Law Position	23
3.1 Introduction.....	23
3.2 Brief Historical \Background: Case Law Prior to 1906.	23
3.3 The Organic Theories and the Organs of the Company	26
3.3.1 The External Organic Theory.	26
3.3.2 The Internal Organic Theory	27
3.3.3 The South African Decisions on the Internal Organic Theory.	33
3.4 Conclusion.....	35
Chapter 4 – Business and Affairs.....	37
4.1 Introduction.....	37
4.2 Position and Powers of Directors under the Companies Act 63 of 1973	37
4.3 Position and Powers of Directors under the Companies Act 71 of 2008	41
4.3.1 “Business and Affairs”	42
4.3.2 The Meaning of “Affairs” according to Canadian Law	44
4.3.3 Wording used in section 66 (1)	46
4.3.4 Supporting sections in the New Act.	47
4.4 Conclusion.....	51
Chapter 5: Conclusion	53
Bibliography	57
Books and Journal Articles	57
Cases	57
Legislation	59

Chapter 1: Introduction

In the modern economy the company, as a business entity, is the vehicle through which most business activity is conducted. The company has become even more prominent since the enactment of the Companies Act 71 of 2008 (“New Act”) in which Closed Corporations may no longer be registered. Company Law is a complex and distinct part of South African Law, with its own inner workings which are unique to it.

The company is a distinct juristic person existing in its own legal capacity. As such it cannot act for itself but does so through two bodies: these are the shareholders in the general meeting and the board of directors. The powers of the company have traditionally been specifically allocated to either of these bodies. The position has always been that the members in general meeting are vested with residual and default powers and can exercise all powers not delegated to the board of directors². Thus, in the case where there has been no allocation of power with a particular company, the members at a general meeting are vested with the power. The powers allocated to the different organs are absolute and cannot be usurped by the other.³

Directors generally derive their powers from the Companies Act, the Common Law, the Company’s Memorandum of Incorporation and resolutions passed by the shareholders in general meeting. Under the Companies Act 61 of 1973 (“Old Act”) directors were empowered to manage the business of the company. This was provided for in Article 59 of Table A of the Old Act. Under this regime the directors were given a general power to manage the business of the company, subject to the shareholders in the general meeting.

This position has been substantially changed by the New Act. In contrast to the Old Act, Section 66(1) of the New Act specifically confers the power to

²Van Dorsten (1999) 143.

³Delpont, (2011) 66.

manage the business and affairs of a company to its board of directors. Section 66(1) provides:

“The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company’s Memorandum of Incorporation provides otherwise.”

Under the New Act the board has had its management powers broadened. Under the New Act the board of directors is now statutorily empowered. The inclusion of the word “affairs” in Section 66(1) considerably broadens the board of directors powers.

It is well known that the wording used in statutes of utmost importance. Words are meticulously selected to convey the intention of the legislature as they promulgate new laws. The need for clarity and unambiguous wording is imperative as the implication of an incorrect word or even just a word used in an incorrectly way can have major implications on the governance of companies and citizens of the country.

In this paper it will be shown how the use of the word affairs in Section 66(1) has a major impact on South African Company Law as a whole and the division of powers in a company specifically. The effect of Section 66(1) will be considered. While the true extent of this broadening of the board’s power is yet to be seen, upon initial analysis, there seems to be a substantial change brought about. In considering the effect and extent of the change brought about by Section 66(1), this paper will firstly look at the legal relationship between directors and the company. The definition of a director according to section 1 of the New Act will then be briefly discussed.

Secondly the division of powers in the Common Law will be considered. In order to gain a proper understanding of this position numerous cases will be discussed. Thereafter the position of directors according to the Old Act will be considered. Finally the position of the New Act will be considered with specific reference to Section 66(1). To make a thorough assessment of Section 66(1) of South Africa’s New Company Act in terms of an international context,

Canadian Law will be considered. The effect of Section 66(1) will then be discussed with reference to supporting sections of the New Act.

In conducting the above study, historical method will be used in considering the position in the Common Law. A comparative style will be used to compare and contrast the positions of the Common Law, the Old Act and the New Act.

In order to conduct this study the following primary sources will be used:

- Companies Act 71 of 2008.
- Companies Act 61 of 1973.
- *Corporate Law* Cilliers & Benade *et al* (2000).
- Henochsburg on the Companies Act 71 of 2008.
- Blackman MS "Companies" *The Law of South Africa*, vol 4, part 2 (1996)
- *Hahlo's South African Company Law Through the Cases* Pretorius J T *et al* (1999).

All secondary sources can be found in the comprehensive bibliography at the end of the document.

Chapter 2: The Legal Position of Directors

2.1 Introduction

The company is a distinct juristic person existing in its own legal capacity. As such it cannot act for itself but does so through human agency being its representatives or organs.⁴ The two organs in a company are the shareholders in the general meeting and the board of directors. Importantly, it is the board of directors that are tasked with the day to day running of the company. The board of directors is made up of individual directors who must not be ineligible or disqualified to hold the position of director. A person is either elected to be a director by the shareholders⁵ or appointed in terms of section 66 of the New Act. While most directors will have the same functions and powers, there are differences in the type of directors as well as in their status. The exact nature of the relationship between the company and the directors is one which comprises diverging views.

An understanding of the position of an individual director is imperative to understanding the collective power of the board. In this chapter the legal position of the director in the company will be considered in order to gain an understanding of the nature of the relationship between the directors and the company. In addition to this, the different types of directors and their roles on the board will be discussed

2.2 The Legal Position of Directors

The exact nature of the relationship of a director towards the company has been considered in numerous cases over the years. While the nature of this relationship has been described differently in different situations, the following

⁴Cassim (2012) 383.

⁵S 68(1).

are the major categories that the legal position of a director *viz-a-viz* the company has been described as:

- (a) Agents
- (b) Trustees
- (c) Managing Partners
- (d) *Sui generis*

These different descriptions of the nature of the relationship will now be considered in more detail below.

2.2.1 Directors as Agents

The legal relationship between the directors and the company can be construed to be that of principle and agent. Cassim states that “a director, like an agent, acts for the benefit of some other person, that is, the company, and not for his or her own benefit, and when they contract on behalf of the company, they do not incur liability, unless they act outside their powers, or expressly or impliedly assume liability.”⁶ This view has been further reiterated by case law. In *Ferguson v Wilson*⁷, Cairns LJ said:

“What is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. Wherever an agent is liable those directors would be liable; where the liability would attach to the principal, and the principal only, the liability is the liability of the company.”

The view that the relationship between the board and the company is one of agency applies to the board as a whole and not to the directors individually.⁸ This does not prevent an individual director from being authorised to act alone. In *Robinson Randfontein Estates Gold Mining Co Ltd 1921 AD 168* where Solomon JA said⁹:

⁶*Supra* note 3 at 384.

⁷ [1866] 2 Ch App 77 at 89-90.

⁸ *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others 1981 (2) SA 173 (T)*

⁹ *Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 at 216 and 217-218.*

'It is true that the board of directors is the agent of the company to manage its affairs, and accordingly stands in a fiduciary relationship to it. But each individual director is not as such an agent of the company [...] He may, however, become an agent in more ways than one. Under the articles of association of the plaintiff company, as of most companies, the directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit, and upon such delegation to one or more of their number the director or directors in question would themselves become agents of the company in regard to the duties so entrusted to them.'

Although directors may be seen as being agents of the company, they are not agents in the strict sense of the word. Van Dorsten points out that the company itself cannot act and cannot, therefore, confer authority on the directors to act on its behalf.¹⁰ The authority of the directors to act on behalf of the company has traditionally been derived from the articles of association.¹¹ This authority is now derived from the new Companies Act itself. Thus the relationship between the directors and the company is not governed by an agreement for the letting and hiring of services, but by the Companies Act itself.¹²

Another aspect which detracts from the relationship between the company and the directors being that of principle and agent is that the powers and duties that directors owe to the company are greater than those normally given to agents. Directors both represent and manage the company and can incur criminal and civil liability in certain circumstances.¹³

This point is made even stronger in light of Section 66(1) of the new Companies Act. As it will be shown in chapter four of this paper, Section 66(1)

¹⁰*Supra* note 1 at 14.

¹¹This aspect pertaining to the source of directors powers will be discussed in detail in the next chapter, with the effect of the Companies Act 71 of 2008 being dealt with in detail in the chapter following that chapter.

¹²*Supra* note 9.

¹³*Supra* note 1 at 13.

confers original powers on directors. In light of the developments in the New Act, Cassim states the following:

“But under the Act the analogy of a director to an agent is not as strong as it may have been under the 1973 Act. Previously, a director did not enjoy original powers to act and, like an agent, his or her power to act arose from and was limited by the powers conferred on him or her. But s 66(1) of the Act now confers original powers and duties on directors. Thus the position of a director has changed considerably under the Act.”¹⁴

The above discussion illustrates that although the relationship between the directors and company have many aspects in common with the relationship of principle and agent, this description is not an exact reflection and indeed an ever widening reflection of the real legal nature of this relationship.

2.2.2 Directors as Trustees

Due to the special relationship that directors have towards the company and the fiduciary duties that they owe to the company, the legal relationship between the directors and the company has often been compared to that of a trustee. This has come from the English Law’s trust concept. The similarities between the directors’ relationship with the company and that of a trustee and trust, have been referred to in many cases over the years. In *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407¹⁵ it was stated that:

“The position of a director is analogous to that of a trustee in that a director, like a trustee, stands in a fiduciary relationship to the company in the performance of his or her duties, and acts for the benefit of some other person, and not for his or her own benefit.”

The above dictum shows that the fiduciary duties that the director has towards the property of another is something that is shared by a trustee and the director. This is supported by the dictum in the *Selanfor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555¹⁶ where it is stated that, “as

¹⁴*Supra* note 3 at 384.

¹⁵[1925] Ch 407 at 426.

¹⁶[1968] 1 WLR 1555 at 1575.

in the case of a trustee, the property that is under the control of a director must be applied for the specific purposes of the company and for its benefit.”

In *Sibex Construction (SA) (Pty) Ltd and Another v Injectaseal CC and Others* 1988(2) SA 54 (T)¹⁷ Goldstone J stated that: ‘[T]here is high authority both in this country and in other countries where similar legal principles obtain for the proposition that a director of a company is a trustee for his company and that, a fiduciary relationship arises there from.’

One of the similarities (as well as a difference as will be shown below), between directors and trustees lies in the duties imposed upon directors and trustee with regard to the assets of the company. Directors have been held to be the trustees of assets that are under their control. In the *Re Forest of Dean Coal Mining Co* (1878) 10 Ch D 450¹⁸ case Jessel MR said: “Although directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control ...’

Although the comparison of the director company relationship and the trustee trust relationship is a good one, there are differences. Both the director and the trustee have fiduciary duties, however, the fiduciary duties of directors differ from those of actual trustees. This is because the trustee’s duty to be cautious and not to take business risks is not imposed on directors. The courts have also not applied the same strict standards of care and skill to directors as applied to trustees.¹⁹ In *Daniels t/as Deloitte Haskins & Sells v AWA Ltd*²⁰, New Zealand’s New South Wales Court of Appeal stated that:

“While the duty of a trustee is to exercise a degree of restraint and conservatism in investment judgments, the duty of a director may be to display entrepreneurial flair and accept commercial risks to produce a sufficient return on the capital invested.”

¹⁷1988(2) SA 54 (T) at 65.

¹⁸(1878) 10 ChD 450.

¹⁹*Supra* note 3 at 384.

²⁰(1995) 27 NSWLR 438 at 494.

While admitting that directors and trustees are very similar, Van Dorsten states that directors are not trustees in the strict legal sense. He makes the following comment regarding the difference between directors and trustees:²¹

“A trust is not created when directors are appointed and they do not occupy the office of trustee. The provisions of the Trust Property Control Act 57 of 1988 do not apply to directors; their statutory rights and duties stem from the Companies Act. The directors do not require the authority of the Master of the High Court to act as trustees. The directors do not become owners of the company's assets because the company, as a legal person, owns its assets in its own right. Unlike trustees, directors do not enter into contracts as principals but as representatives of the company. The duty of skill and care required of a trustee is generally more demanding than that required of a director.”

While it is clear that although there are similarities between directors and trustees, merely describing the nature of the relationship between the director and company as that of trustee and trust is inadequate. The differences between the two are too great.

2.2.3 Directors as Managing Partners

Another manner in which the legal position of directors has been described as, is that of a managing partner. This was put forth in the 1906 case of *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34, where it the following remark was made:

“I do not think it true to say that the directors are agents. I think it more nearly true to say that they are in the position of managing partners appointed to fill that post by a mutual arrangement between all the shareholders ...”²²

The reason that the position of directors is analogous to managing partners is that, like a managing partner, they are empowered to manage a business.²³

²¹ Supra note 1 at 14.

²² Supra *Cuninghame* at 45.

²³ Supra note 3 at 385.

However, although this analogy is to a certain degree accurate, it is not entirely correct, as directors are not strictly partners.

Firstly, directors are appointed either in terms of the Memorandum of Incorporation or by the shareholders. As a result there is no partnership agreement between the directors and or the company. In addition to the above, in contrast to managing partners, directors do not always have a financial interest in the business, and even where they do hold shares in the company they are not, as directors, jointly and severally liable for the company's debts.²⁴ Furthermore, there is a general rule that the directors do not have the right to share in the profits of the company.

Cassim mentions that the analogy of directors as managing partners is strong in the case of a personal liability company. He states that²⁵:

“where the directors and past directors are jointly and severally liable, together with the company, for the debts and liabilities of the company contracted during their periods of office. The analogy is also strong in the case of domestic companies or quasi-partnerships, ie companies that are very near to partnerships and which the courts have for certain purposes treated as if they were partnerships. But again, there are differences in that directors owe their duties to the company and not to their fellow directors; each director alone has no power to bind the other directors or the company unless authorized to do so, and the powers of the directors are limited by the restrictions in the Memorandum of Incorporation.”

From the above discussion it is clear that although directors share some similarities with managing partners, this is not an exact match with regard to the true relationship between the director and the company.

2.2.4 *Sui generis* Status of Directors

In the above paragraphs it has been shown that directors have been referred to as agents, trustees and managing partners. It is quite evident that the nature of their relationship towards the company and their legal status is at the

²⁴*Id.*

²⁵*Id.*

very least a unique one. The full extent of the rights, powers and duties of directors can only be established with reference to the Companies Act, the Common Law, the Memorandum of Incorporation and contracts concluded with their companies.²⁶

In *Cohen NO v Segal* 1970 (3) SA 702 (W) the court concisely summed up the legal relationship of directors as follows:

“Directors are from time to time spoken of as agents, trustees or managing partners of a company, but such expressions are not used as exhaustive of the powers and responsibilities of those persons, but only as indicating useful points of view from which they may for the moment and for the particular purpose be considered, points of view at which, for the moment, they seem to be falling within the category of the suggested kind. It is not meant that they belong to the category, but that it is useful for the purpose of the moment to observe that they fall, *pro tanto*, within the principles which govern that particular class.”²⁷

The position of the director was put as follows by Jessel MR in the *Forest of Dean* case²⁸:

“Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners; it does not much matter what you call them as long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and of all the other shareholders in it.”

From the above discussion directors can, quite clearly, not properly be categorised as either agents, trustees or managing partners. While elements of each of them are present, the position of a director is unique in terms of how it is viewed in law. The relationship of a director is best described as *sui generis*: it stands in a class of its own and cannot be determined by reference

²⁶ *Supra* note 1 at 16.

²⁷ *Cohen NO v Segal* 1970 (3) SA 702 (W) at 706.

²⁸ *Supra Re Forest of Dean*.

to a single legal relationship, but must be determined by reference to the facts of each case.²⁹

2.3 The definition of a “director” under the Companies Act 71 of 2008

The board of directors has the all important task of managing the company. Under the New Act the board has been given increased powers to manage the business and affairs, as is evident from Section 66(1). The decisions made by the directors not only affect the performance of the company, but also has an indirect impact on the shareholders. As a result of this there has been an increased responsibility placed on directors. This is evidenced by the King Report on Governance for South Africa 2009 and the King Code of Governance for South Africa 2009.³⁰ In addition to this, directors’ fiduciary duties owed to the company have been also been codified in the New Act under section 76. For these reasons the need to know who a director is has become more important not only for the shareholders and third parties, but also for the directors themselves.

The definition of a “director” is given in section 1 of the Act as, “a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated.” The definition does not attempt to define the word “director” as such, but merely assumes the ordinary meaning of the word and provides that a person who occupies the position of director is a director for reasons concerning the New Act regardless if he is described as a director or not.³¹ This definition will now be considered more closely as well as the different types of directors that are provided for by the New Act.

(a) ‘includes’

²⁹*Supra* note 3 at 386.

³⁰*Supra* note 3 at 375.

³¹Henochsburg on the Companies Act (1994) 22.

Having the word 'includes' in the definition of a 'director' points towards an inclusive and not exhaustive definition of a director, with the formalities not being imperative in establishing which persons are directors of a particular company.³² The considering the word 'director' the Act as a whole should be used to derive the meaning. From this we can see that the definition applies to all directors including those that have been formally appointed as directors as well as those who have not.

(b) 'occupying the position of a director'

The "position of director" according to Henochsburg means the following:

"the position which would be occupied by a person in whom in terms of the Memorandum of Incorporation of that company and the Act the ultimate powers of management of the company's affairs are vested to the exclusion of anyone else other than the shareholders in general meeting."³³

In *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236³⁴ the meaning of the phrases 'occupying the position of a director' and 'holds an office' were considered. It was found that 'occupying the position of a director' denotes one who acts in the position of a director, with or without lawful authority, while the phrase 'holds an office' denotes one who is the lawful holder of the office. From this we can see that by the use of the words 'occupying the position of a director', the New Act implies that a person who is not formally appointed as a director of a company may nevertheless be deemed to be a director if he or she occupies the position of a director, whether with or without lawful authority.³⁵

(c) 'by whatever name designated'

The inclusion of these words are very important in determining the intention of the legislature when it comes to who falls within the definition of a director and will, as a result, be subject to the numerous provisions in the New Act relating

³²*Supra* note 3 at 375 - 376.

³³*Supra* note 30.

³⁴*Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236.

³⁵*Supra* note 3 at 376.

to directors. By including “by whatever name designated” it is clear that certain persons are to be regarded as directors even though they may have a different title. The title is therefore not the determining factor but that “in relation to a particular company, a person who in fact occupies the position of a director of that company is a director of it, for the purposes of the Act, only if he has been appointed or at least purportedly appointed to that office by those in the company having the power of appointment of directors.”³⁶ It is therefore submitted that position and not title is the determining factor.

(d) ‘as contemplated in Section 66’

Section 66 of the Act recognises the following types of directors:

(i) Director appointed in terms of the Memorandum of Incorporation

According to section 66 (4)(a)(i) of the New Act a director may be appointed by any person who is named in, or determined in terms of, the Memorandum of Incorporation.

(ii) Ex officio director

According to section 66 (4) (ii), an *ex officio* director may be appointed by any person who is a director of a company as a consequence of holding some other office, title, designation or similar status. An *ex officio* director has all the powers and functions of any other director of the company except if they are restricted by the Memorandum of Incorporation. Section 66 (5)(b)(ii) also states that an *ex officio* director has all the duties and is subject to all the liabilities of any other director of the company. Just as with a normal director, the disqualification and ineligible provisions in terms of Section 69 of the Act also apply to *ex officio* directors

(iii) Alternative director

Section 66 (4)(a)(iii) provides that a company’s Memorandum of Incorporation may provide for the appointment or election of one or more persons as alternate directors of the company. An alternate director is defined in section 1

³⁶Supra note 30.

of the New Act as meaning 'a person elected or appointed to serve, as the occasion requires, as a member of the board of a company in substitution for a particular elected or appointed director of that company'. What is important from section 66 (4)(iii) is that an alternate director may only be appointed if the Memorandum of Incorporation allows for a director to nominate an alternate director to act on his behalf. The empowering provision in the Memorandum of Incorporation will also set out the extent of the powers that the alternate directors have. Alternate directors will in most cases be recognised as any other director in terms of the law. Cassim points out that alternate directors are recognised by the courts as independent directors in their own right and that they alone are responsible for their own actions after their appointment, they do not serve as agents of their appointers when serving as alternative directors.³⁷ An alternate director can cease to hold office in two ways, firstly when the director who appointed him or her ceases to be a director and secondly, when that director gives notice to the company secretary that he will no longer be represented by that alternate director.

(iv) a director elected by the shareholders

A director of a company can be elected by the shareholders, to serve as a director of the company for an indefinite term or for a term set out in the Memorandum of Incorporation.³⁸ Section 66(4)(b) of the New Act states that in the case of a profit company, other than a state-owned company, the Memorandum of Incorporation must make provision for the election by shareholders of 'at least' 50 per cent of the directors: and 50 per cent of any alternate directors. It is possible for a higher percentage of directors to be elected by the shareholders because of the use of the words 'at least'.³⁹ The fact that the 'at least' 50 per cent of the directors must be appointed by the shareholders, this section does not preclude the option of weighted votes being assigned to directors.⁴⁰

³⁷ *Supra* note 3 at 377.

³⁸ S 66 (4)(b) and s 68 (1).

³⁹ Henochsburg on the Companies Act (1994) 253.

⁴⁰ *Id.*.

2.4 Conclusion

In this chapter the nature of the relationship between the directors and the company was considered. It was shown that directors have been referred to as agents, trustees, and managing partners. While the relationship between the company and the directors has similarities to all the above, and is in certain circumstances akin to them, the relationship between the directors and the company is best described as *sui generis*. This means that although certain established principles regarding the aforementioned relationships can be applied to directors, the legal nature of the relationship between directors and the company is separate from all of them and, as such, its own rules and principles will apply to directors. These rules and principles will be found in the Common Law, Companies Act and the company's Memorandum of Incorporation.

These rules and principles apply to "directors" as mentioned in the New Act. Owing to the strict rules pertaining to directors' liability, it is imperative that those in the management of a company know whether they are regarded as directors in terms of the New Act. The definition of "directors" now applies to a wide range of people. As it was shown, the definition is inclusive and not exhaustive, with the formalities not being imperative certain persons are to be regarded as directors whether they are formally appointed or not. Even if a person is known by a different title the definition can apply to them.

With this insight into the nature of the relationship of directors and the company, and the meaning of a director, the division of powers in the company will now be considered. The Common Law position will be looked at first. Thereafter the position in the Old Companies Act and the New Act will be considered.

Chapter 3: The Common Law Position

3.1 Introduction

In this chapter the Common Law position of the division of powers in a company will be considered. This is not only to gain an understanding of the position prior to the New Companies Act, but also to understand the history of the modern rules and the reasoning behind those rules. To start with, a brief summary of the Common Law position will be given. Thereafter, the organs of a company and their respective powers and position within the company will be discussed. The powers of the directors within a company will be considered foremost, however, the powers of the shareholders in the general meeting according to the Common Law will also be considered briefly.

3.2 Brief historical background: Case Law prior to 1906

Company Law has been said to be a body of rules that has evolved from the application of the principles of partnership, agency and corporations.⁴¹ In one of the early English Law cases of *Attorney General v Davy*⁴² the court was of the view that the company was governed by democratic vote and majority rule had the final say on a matter. Any resolutions that were passed by a majority of the general meeting were seen as being a corporate act itself.⁴³ It was further held in the *Mayor, Constables & Co of Merchants of the Staple of England v Governor and Co of Bank of England*⁴⁴ case that the general meeting could be seen as the company's parliament as Wills J stated: "[the acts of a corporation are those of the major part of the corporators, corporately assembled. . . By 'corporately assembled' it is meant that the meeting shall be one held upon notice which gives every corporator the

⁴¹Cohen (1973) 90 SALJ 262.

⁴²(1741) 2 Atk 212, 26 ER 531.

⁴³*Supra* note 40.

⁴⁴(1888) 21 QBD 160 at 165.

opportunity of being present.” One of the aspects where the corporation and a partnership differed was in the rules pertaining to the voting rights. In this regard the majority vote would bind the rest of the incorporators. It is evident from early Case Law that the courts would view the corporation in a very similar light as the private partnership. With regard to the positions of the shareholders and the directors in the corporation prior to 1906, Cohen makes the following observations:

“The company was said to be under the control of the shareholders, who were the proprietors. The directors were regarded as being the governing body, which was subject to the superior decisions of the shareholders in general meeting. This applied regardless of any provisions in the articles of association to the contrary.”

What is interesting to note at this point is that the shareholders could pass resolutions in the corporation by majority vote. This meant that a simple majority of fifty per cent was all that was required to control and direct the company.

In 1843 the court in *Foss v Harbottle*⁴⁵ stated that “It was not, nor could it successfully be, argued that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the incorporators.” From this it is evident that should the rights of the company be infringed, then the company and not the individual shareholder has the right to institute action against any wrongdoer. In this situation, if an individual incorporator wants the rights of the company to be protected and enforced, the matter must first be referred to the general meeting of shareholders, who can then decide by majority vote whether or not to institute an action.⁴⁶ It is quite clear from the above that at the root of the decision in the *Harbottle* case is the principle of majority rule by the general meeting.⁴⁷ The court held further that,

“[I]t is only necessary to refer to the clauses of the Act to show that, whilst the supreme governing body, the proprietors at a special

⁴⁵(1843) 2 Hare 461; 67 ER 189 at 490.

⁴⁶*Supra* note 40 at 263.

⁴⁷*Supra* note 40 at 263.

general meeting assembled, retain the power of exercising the functions conferred upon them by the Act of Incorporation, it cannot be competent to individual corporators to sue in the manner proposed by the plaintiffs.”

The court was not prepared to intervene in the matter until the special general meeting had been assembled and tried to resolve the problem. Cohen then stated that, based on the above reasoning, “the court subsequently held that it could not approve of any action on the part of the directors which would prevent the shareholders from holding a general meeting, since that was the only way they could express their disapproval of the directors' actions”, hereby showing a reluctance of the court to intervene even when there was an express power placed by the constitution of the company in the directors.⁴⁸

The next significant decision on the division of powers in the company came in the *Cunninghame* case.⁴⁹ Here the court took a fundamentally different approach to the division of power between the shareholders and the directors. It held that, upon an interpretation of the articles in question, which contained a directors' managing article, the powers of the company were divided between the board of directors and the company in a general meeting.⁵⁰ The court made it clear that where the board has been vested with certain powers in terms of the articles, the shareholders in the general meeting could not interfere with its exercise of those powers by simple majority. From the *Cunninghame* case there was, for the first time, a distinct split between the powers conferred on the board and those conferred on the shareholders at the general meeting and the right to exercise those powers.

The above brief discussion creates an important background in which to further consider the full extent of the division of powers at Common Law. In the paragraphs that follow the two organs of the company will be discussed and the organic theories will be considered with reference to Case Law.

⁴⁸ *Isle of Wright Railway Co v Tahourdin* (1883)25 ChD 320 (CA).

⁴⁹ *Supra* *Cunninghame* note 22.

⁵⁰ *Supra* note 46.

3.3 The Organic Theories and the Organs of the Company

A company can be viewed as a diarchy, having the shareholders in the general meeting and the board of directors as its governing organs.⁵¹ Traditionally, the articles of association of a company always provide for these two control and decision making bodies.⁵²

As it was shown above, prior to the decision in the 1906 *Cunninghame* case⁵³, it was generally accepted that a company was subject to the control of a simple majority of the shareholders in general meeting. In addition to this, from the *Isle of Wright Railway Co v Tahourdin*⁵⁴ the general meeting was considered to have control over the acts of the directors, who were regarded as being mere agents.¹

As stated above, it is generally accepted that the company has two governing organs (being the shareholders in the general meeting and the board of directors). This is known as the 'organic concept'. The crux of the organic concept is that when certain people or groups of people act to bring the company into legal relationships or to cater for corporate decision making or to express the company's will, then it is the company itself that acts.⁵⁵ Although there are different views on these and other theories, the two organic theories that will be discussed are the External and the Internal Organic Theory. While both of these are important in the context of the relationship between the directors and the company, the Internal Organic Theory will be discussed in greater detail for purposes of this paper.

3.3.1 The External Organic Theory.

The External Organic Theory is concerned with the company and its dealings with third parties. Cohen explains the theory as follows:

⁵¹Pretorius et al (1999) 207.

⁵²*Supra* note 40 at 264.

⁵³*Supra* *Cunninghame* note 22.

⁵⁴(1883)25 ChD 320 (CA).

⁵⁵*Supra* note 51.

“The external organic theory holds that certain officials or bodies of the company are not mere agents of the company, and that when they perform acts or make decisions on its behalf which affect third parties, it is in fact the company itself that is performing the acts and making the decisions. The human facilitators concerned are said to be organs of the company.”⁵⁶

When considering the External Organic Theory and who will be considered to be an organ of the company, the courts have found that there is not an exact list. In the *Tesco Supermarkets Ltd v Natrass*⁵⁷ case the following remark on the question was given:

“it is a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent.... Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company.”

It is well established that while the acts of the company's officials can be seen as those of the company, these acts must still be *intra vires* the company. The External Organic Theory has been received by the English Law and as such it is founded in the Common Law pertaining to companies and not upon the contractual nature of the articles of association.⁵⁸ It has also been received by the South African courts and accepted by the writers on Company Law,⁵⁹ although in some instances with hesitation as to its value.⁶⁰

3.3.2 The Internal Organic Theory

This position of the board of directors up to 1906 was that any decisions that were made by the board was subject to the superior decisions of the company in general meeting, which was the shareholders in the general meeting. Importantly, a simple majority was only needed to override a decision made by the directors. The control of the general meeting was present regardless of

⁵⁶ *Supra* note 50 at 265.

⁵⁷ [1971] 2 WLR 1166 (HL), [1972] 2 All ER 127 at 1176, 1177 of WLR, 131, 132 of All ER, per Lord Reid.

⁵⁸ *Supra* note 55.

⁵⁹ *Supra* note 50 at 9.

⁶⁰ *Supra* note 40 at 266.

any stipulation in the articles purporting to place powers in the hands of the board of directors.⁶¹The position prior to 1906 is summed up in Blackman as follows⁶²:

“It is usually said that until *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame*... the assumption was that the general meeting was the company, whereas the directors were merely its agents; and that the directors’ powers were thought to be conferred upon them by the members, in the same way as an agent’s powers are conferred upon him by his principal. From this (so the argument runs) it was deduced that directors are at all times subject to the control of the members, just as an agent is at all times subject to the control of his principal; and, because the general rule is that the general meeting acts by ordinary resolution, directors are subject to the control of the majority of the members. This theory is said to be found in *Isle of Wight Railway Co v Tahourdin* (1883) 25 ChD 320 (CA), a case which concerned a company established by a private Act and governed by the English Companies Clauses Consolidation Act of 1845. S 90 of that Act in fact provided that “the directors shall have the management and superintendence of the affairs of the company and that they may lawfully exercise all the powers of the company, . . . and the exercise of all such powers shall be subject also to the control and regulation of any general meeting specially convened for the purpose . . . ” Cotton LJ said (331–332) in an obiter dictum that a meeting of the members “undoubtedly” had “a power to direct and control the board in the management of the affairs of the company”. Thus it would seem clear that the learned judge was referring here to s 90 of the Companies Clauses Consolidation Act.

The next major shift in the approach taken by the courts was, as was stated above, in the decision given in the *Cunninghame* case. In this case the company had power under its Memorandum of Association to sell its undertaking to another company having similar objects, and by its articles of association the general management and control of the company were vested in the directors, subject to such regulations as might from time to time be

⁶¹*Supra* note 59.

⁶²Blackman (1996) 74 ftnt 2

made by extraordinary resolution, and, in particular, the directors were empowered to sell or otherwise deal with any property of the company on such terms as they might think fit. A resolution by a simple majority was passed at a general meeting of the company for the sale of the company's assets on certain terms to a new company formed for the purpose of acquiring them, and directing the directors to carry the sale into effect. The directors were of the opinion that a sale on those terms was not for the benefit of the company, declined to effect the sale.⁶³

The case has two aspects to it, namely (i) The principles stated and (ii) the view of the board's position.⁶⁴ With regard to the (i) above, the court held that:

- (a) The articles of association are a contract between the members of the company *inter se*. Therefore, if it is desired to alter the powers of the directors that must be done, not by a resolution carried by a majority at an ordinary meeting of the company, but by an extraordinary resolution⁶⁵;
- (b) until the resolution altering the articles has been passed by the requisite majority, “the mandate which must be obeyed is not that of the majority — it is that of the whole entity made up of all the shareholders. If the mandate of the directors is to be altered, it can only be under the machinery of the memorandum and articles themselves.”⁶⁶

From the above it is clear that the board of directors get their powers from the articles. The articles are by their nature contractual, being a contract amongst all of the shareholders. The result of this contract being that any alterations must be made by an “extraordinary resolution”. This is not a mere simple majority, but a special resolution consisting of a three fourths majority. The reason for this principle is for the protection of a minority of the shareholders.⁶⁷ The following portion from Cozens-Hardy L.J judgment is

⁶³*Supra Cunninghame* at 34.

⁶⁴*Supra* note 44 at 266.

⁶⁵*Supra Cunninghame* at 42 and 43.

⁶⁶*Supra Cunninghame* note 22 at 43.

⁶⁷*Supra Cunninghame* note 22 at 38.

particularly relevant in this respect of the boards position referred to above in (ii);

“That being so, if you once get clear of the view that the directors are mere agents of the company, I cannot see anything in principle to justify the contention that the directors are bound to comply with the votes or the resolutions of a simple majority at an ordinary meeting of the shareholders.”⁶⁸

It has been said that although the directors may be given exclusive powers in the articles to perform a certain function and the shareholders may not usurp those powers, it does not necessarily follow that once the directors are mentioned as being able to exercise a power, the shareholders are *ipso facto* excluded.⁶⁹

Cohen states that the above passage shows that the directors are more than mere agents of the company and that in principle there is nothing that makes the directors subject to the control of the shareholders in general meeting. While the powers of the directors flows from a contractual nature, their position and standing in the company is independent of the articles and the inherent nature of the board's position in the corporate structure is shown by the fact that the powers specifically entrusted to the board can not be usurped by the general meeting.⁷⁰

The decision in the *Cunninghame* case was initially followed in *Gramophone & Typewriter Ltd v Stanley*.⁷¹ Here the court stated that the directors “are not servants to obey directions given by the shareholders” and that “they are not agents appointed by and bound to serve the shareholders as their principles.”⁷² It was further said that the directors were people entrusted by the articles with the management of the business and that only an alteration of the

⁶⁸*Supra Cunninghame* note 22 at 45.

⁶⁹*Id.*

⁷⁰*Supra* note 40 at 267.

⁷¹*Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89 (CA).

⁷²*Supra Gramophone* at 105–106; 842

articles could remove them. The notional aspects were, however, not readily accepted.⁷³

In *Marshall's Valve Gear Co Ltd v Manning, Wardle & Co Ltd*⁷⁴ there was a company in which the powers of its directors were governed by article 55 in Schedule I to the Companies Act, 1862, which provided that:

“the business of the company shall be managed by the directors, who may ... exercise all such powers of the company as are not by the foregoing Act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting.”

The four directors of the company also had nearly all the shares, with one in particular holding a majority but not three-fourths. There was dispute as to who could institute an action on behalf of the company. The director holding a majority of the shares instituted proceedings, where after the other three brought a motion to withdraw the company from such proceedings. It was held that “under art. 55 the majority of the shareholders in the company at a general meeting have a right to control the action of the directors, as long as they do not affect to control it in a direction contrary to any of the provisions of the articles which bind the company.”⁷⁵ It was further held that because the articles in the *Cunninghame* case expressly provided that the board was entrusted with the entire management of the company's business, this construction placed upon the articles precluded the simple majority from overruling the directors.⁷⁶ The only proviso was that the shareholders could pass regulations by special resolution, which was not inconsistent with the articles. The directors' managing article (article 55 in Schedule I to the Companies Act, 1862) was said not to exclude the superior control of the board by the general meeting.

⁷³ *Supra* note 40 at 32.

⁷⁴ *Marshall's Valve Gear Co Ltd v Manning, Wardle & Co Ltd* [1909] 1 Ch267.

⁷⁵ *Supra Marshall's* at 274.

⁷⁶ *Supra Marshall's* at 273.

The court in *Salmon & Quinv Axtens Ltd*⁷⁷ applied the principle in *Cunninghame* case and held that “the resolutions of the company were inconsistent with the provisions of the articles and that the company ought to be refrained from acting upon them.”⁷⁸ The court showed its approval for the principle of the independence of directors from the control of the shareholders in the general meeting when it stated the following:

“The articles forming this contract, under which the business of the company shall be managed by the board, contain a most usual and proper requirement, because a business does require a head to look after it and a head that shall not be interfered with unnecessarily.”⁷⁹

The court then showed its approval for the decisions in *Cunninghame* and *Gramophone & Typewriter* when it stated that:

“Any other construction, I think, might be disastrous, because it might lead to an interference by a bare majority very inimical to the interests of the minority who had come into a company on the footing that the business should be managed by the board of directors.”⁸⁰

The next case which dealt with the division of powers was that of *John Shaw & Sons (Salford) Ltd v Peter Shaw & John Shaw*⁸¹. Here the principle was summed as follows:

“A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by the directors, certain other powers may be reserved to its shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which a general body of shareholders can control the exercise of the powers vested by the articles in the directors is by altering these articles or, if the opportunity arises under the articles, by refusing to re-elect directors of whose actions they disapprove. They

⁷⁷*Salmon & Quinv Axtens Ltd* [1909] 1 Ch 311 (CA), confirmed on appeal *sub nom Quin & Axtens Ltd v Salmon* [1909] AC 442 (HL).

⁷⁸*Supra Salmon* at 312.

⁷⁹*Supra Salmon* at 319.

⁸⁰*Supra Salmon* at 319 and 320.

⁸¹*John Shaw & Sons (Salford) Ltd v Peter Shaw & John Shaw* [1935] 2 KB 113 (CA).

cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.”⁸²

In *Scott v Scott*⁸³ the interpretation of two articles in the articles of association were dealt with. The court stated that the payment of an interim dividend was an “exclusive power” of the directors which was stated in the “most express terms”. The issue of whether the general meeting could direct that loans be paid to shareholders out of the funds of the company was considered by the court. The management of the business of the company was held to be exclusively placed in the hands of the directors and this was held to include the management of the finance of the business. Any resolution of the shareholders that directed the directors to make loans was therefore an attempt to usurp the directors' functions.⁸⁴ Lord Clauson gave the following opinion on the matter stating that “the professional view as to the control of the company in general meeting over the actions of directors has, over a period of years, undoubtedly varied.”⁸⁵

3.3.3 The South African Decisions on the Internal Organic Theory.

Although there are numerous cases from the English Law on the division of powers in the company, the amount of decision from the South African courts are much smaller. There is a lack of South African decisions on this area of the law. These will be considered briefly below.

The first is the *Wessels & Smith v Vanugo Construction (Pty) Ltd*⁸⁶. Here the court in an *obiter dictum* referred to *Scott v Scott* and said:

“Mr. Beck referred me to art. 71 of the respondent’s articles of association which provides that the business of the respondents shall be managed by the directors and which corresponds in terms with art. 83 in Table A of the First Schedule to the Act. It has been decided that

⁸²*Supra John Shaw* at 134.

⁸³*Scott v Scott* [1943] 1 All ER 582.

⁸⁴*Supra* note 40 at 269.

⁸⁵*Supra Scott* at 585.

⁸⁶*Wessels & Smith v Vanugo Construction (Pty) Ltd* 1964 (1) SA 635 (0), per Erasmus J at 637.

in the light of an article such as this the entire management of the company rests solely in the hands of the directors, and accordingly any resolution by the company in a general meeting purporting to interfere with this management is invalid.”

In the *Cape United Sick Fund Society v Forrest*⁸⁷ case the English judgments were considered in the dissenting judgments of Reynolds J A. The majority held that the powers of the corporation as between its organs were determined by the constitution of the company alone.⁸⁸ Steyn J A held in a dissenting judgment that, “It has not been seriously contested that the scope of the functions of the numerous organs of this society is determined, primarily if not exclusively, by its written constitution.”⁸⁹

The next case to deal with the aspect of the division of powers in the company was that of *Gohlke & Schneider v Westies Minerale (Edms) Bpk and Another*.⁹⁰ This case dealt with the appointment of directors in certain circumstances. The articles of the respective company allowed the directors to appoint directors in the case of any casual vacancy and the shareholders in the general meeting to appoint directors to only fill vacancies caused by retirement or removal of directors. In this case the latter situation did not arise. Here Trollip JA held the following:

“I agree however with Mr. Coetzee that the members must have inherent or implied general power to appoint directors to fill other vacancies caused, for example, by resignation, death, incapacity, or disqualification. Usually, as a matter of practice, they would exercise that power by ordinary resolution at a general meeting. But the articles neither require that nor prohibit the power from being exercised by their unanimous assent achieved otherwise than at such a meeting. After all, the holding of a general meeting is only the formal machinery for securing the assent of members or the required majority of them,

⁸⁷ *Cape United Sick Fund Society v Forrest* 1956 (4) SA 519 (AD).

⁸⁸ *Supra* note 40 at 271.

⁸⁹ *Supra Cape United* at 533.

⁹⁰ *Gohlke & Schneider v Westies Minerale (Edms) Bpk and Another* 1970 (2) SA 685 (A).

and, if the assent of all the members is otherwise obtained, why should that not be just as effective?”⁹¹

The above decision is not in line with the English cases given above. Here the court looked at the interpretation of a single part of the articles of association. The court did not consider which organ in the company had been given the sole power in the above situation.⁹² Cohen states that the balance of South African legal opinion is in favour of the English decisions, but that the decision given in *Gohlke & Schneider's* case has left the South African law in an unsettled state and that clarity needs to be given.

3.4 Conclusion

The Common Law position of the division of powers in the company has developed over many years. Initially, the position at the general meeting was that the company and the directors were considered merely its agents with all their powers thought to be conferred upon them by the members. This changed to the situation where although the members in the general meeting were the supreme organ of the company, the directors did have certain powers. Both these organs, however, obtained their powers from the company's constitutional documents. The articles of association were viewed as a contract between all the shareholders of the company. Under this position any powers that the directors had in terms of the company's constitutional documents were exercisable exclusively by the directors. A proper construction of the articles was therefore always necessary in order to establish where the power lay in companies in certain situations. There were still certain inherent powers that retained by the general meeting.

Cohen summarises the position at Common Law as follows:⁹³

- “(i) Where powers have been vested (i) by the articles in the board of directors or reserved for the shareholders in general meeting, then only that organ in which those powers have been vested can exercise them.

⁹¹*Supra Gohlke* at 693.

⁹²*Supra* note 40 at 271.

⁹³*Supra* note 40 at 270.

- (ii) The directors are not 'mere agents' of the company and the shareholders may not instruct them in the exercise of their powers.

- (iii) Where the directors' managing article appears, the general meeting cannot give directions to the directors as to how the company's affairs are to be managed, nor can the shareholders overrule any decision of the board in the conduct of the company's business, even as regards matters not expressly 'delegated' to them by the articles.”

Chapter 4 – Business and Affairs

4.1 Introduction

As it was stated in the introduction to this paper, directors derive their powers from the Common Law, the Companies Act and the Memorandum of Incorporation. The Common Law position was discussed in the previous chapter. The New Act specifically states that the Common Law will still apply to companies except in specific situations where it has expressly been replaced by the New Act. Therefore many of the Common Law principles still apply to Company Law.

In this chapter we will consider the position and powers of directors according to the Companies Act 63 of 1973 as well the current position in the Companies Act 71 of 2008 and the changes that this brings to the Common Law and Company Law as a whole. In order to understand the effect of the changes made to our (South African) law in the international context, a comparison will be made to Canadian Law. This is due to the similarities in our legal systems and the relatively late adoption of progressive constitutions in the respective countries.

4.2 Position and Powers of Directors under the Companies Act 63 of 1973

Under the Old Act the empowering document for the board was the articles of association. In terms of the articles, the directors were empowered to manage the business of the company. Article 59 of Table A of the Old Act set the default position of the directors' powers as follows:

“The business of the company shall be managed by the directors who may pay all expenses incurred in promoting and incorporating the company, and may exercise all such powers of the company as are not by the Act or by these articles, required to be exercised by the company in general meeting, subject to these articles, to the provisions of the Act, and to such regulations, not inconsistent with the

aforesaid articles or provisions, as may be prescribed by the company in general meeting, but no regulation prescribed by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been prescribed.”

A similar managing article was article 60 of Table B. From the outset, it is clear that Article 59 empowers the directors to manage the business of the company and gives the directors all powers which are not expressly bestowed on the shareholders in a general meeting. While similar provision existed under the Companies Act 46 of 1926 in the form of Schedule 1 Table A article 83, the position of the directors was still slightly ambiguous and determined mostly by the Common Law. Article 59 of Table A clears up any ambiguity left by the Companies Act 46 of 1926 and clearly states that the directors “may exercise all such powers of the company as are not by the Act or by these articles, required to be exercised by the company in general meeting”. Therefore the position is that the general power afforded to the directors to manage the business of the company is subject to the control of the shareholders in the general meeting. Although Article 59 of table A set out the powers of the directors, this was not a statutory empowerment and it was only under the articles of association that the directors gained their powers.

Directors are given, under the Old Act, the power to manage the business of the company. A proper understanding of the words “manage” and “business” is imperative in determining and understanding the extent of these powers.⁹⁴It is pointed out in Henochsberg⁹⁵ that the main questions surrounding a managing article in the form of Article 59 of table A (and also that of article 60 of table B) of the Old Act was whether the article;

“empowers the directors to apply for the winding-up of a company without approval of the company in general meeting, and whether that the power accorded to the directors to ‘manage’ the company ‘embraces also a power to liquidate the company, on the basis that management of a company’s affairs, on the ordinary meaning of the

⁹⁴It should be noted at this point that under article 59, reference is only made to the company’s “business” and not the company’s “affairs”, as is the position under s 66 of the New Act.

⁹⁵*Supra* note 30 247.

word 'management', includes dealing with *any* aspect of its affairs, including the matter of whether or not it ought to continue its operations at all, not least in a situation where it is trading in insolvent circumstances”

The meaning of the directors' power to manage the business of a company was considered by Didcott J, in *Ex parte Russlyn Construction (Pty) Ltd*⁹⁶ where he stated:

“The question is not whether the article limits the powers otherwise given to the directors, whether the article takes from them a power to see to the company's liquidation which but for that would be theirs. It is whether the article gives them that power *au fond*. The article does nothing of the sort, I believe, unless the power is encompassed by the one indeed given, the one of management. And, in my book, such is not the case. In suggesting that it is, the passage attaches the wrong label to the power of management. It is not a power to manage the company's 'affairs'. . . As for the power to stop the company's trading activities or other operations, I shall suppose that the directors have it. They probably do. It seems to be inherent in the power to manage the business. In dire circumstances it may even amount to a duty. To call a halt to the company's operations is, however, one thing. It is a far cry from that to the fundamentally different and much more drastic course of putting an end to the company itself”.

Here the court looked at the where the power to manage included the power to bring an end to the company or liquidate it. This power the court said was not one to manage the affairs, but only the business and was therefore not included. In the *Ex Parte Screen Media Ltd* case⁹⁷ Leveson J considered the meaning of the concept of “management” in the following dictum:

“In the present case the relevant article as to the powers of the directors is not set out in the papers. I shall assume that the article in force is similar to Article 59 of Table A, as the present is a public company, viz:

⁹⁶*Ex parte Russlyn Construction (Pty) Ltd* 1987 (1) SA 33 (D) at 36 -37.

⁹⁷*Ex Parte Screen Media Ltd* 1991 (3) SA 462 (W) at 463.

‘The business of the company shall be managed by the directors, who ... may exercise all such powers of the company as are not by the Act or by these articles required to be exercised by the company in general meeting ‘

I understand the concept of management to deal primarily with the direction and control of a company's business with a view to producing profits from its assets. A decision to liquidate a company, in my opinion, does not fall within the ambit of that concept. Of course, losses may be incurred in the course of managing the business, but essentially management postulates the continuation in existence of the business, whereas liquidation totally exterminates the company.”

From the above cases we can see that directors in managing the company's business must do so in order to derive a profit from its assets. The question of whether this power included the power to liquidate the company was answered in the negative in both the *Russlyn* and the *Screen Media* cases. The court in *Russlyn* referred specifically to the word “affairs” in this regard. While the Old Act does empower the directors to manage the business of the company and to use any powers necessary to perform this function, except for those powers given to the company in the general meeting. This power is still in terms of the articles of association and not the Act itself. The power is also specifically limited by the use of the word “business” only. Due to the limited meaning given to the word “business” the directors would only have those powers to act or pass resolutions provided for in the articles of association or that had to do with the “deriving of a profit” or “to stop the company's trading activities or other operations” in times where it would be in the company's best interests. This means that any decisions as to the “life and death” of the company, which would be effected by means of liquidation, are not within the boards power. Under the Old Act the director's powers were also limited to those which were expressly conferred on the board of directors.

The use of the wording “may exercise all such powers of the company as are not by the Act or by these articles, required to be exercised by the company in general meeting” is important as it shows that the company, and ultimate

control of the company, lies with the shareholders in the general meeting. This, in conjunction with the fact that under the Old Act directors are only empowered in terms of the articles of association and not the Old Act itself to manage only the business, shows that the residual and default powers in the company lies with the shareholders in the general meeting under the Old Act. Under the Old Act the shareholders in the general meeting the ultimate organ in the company. The practical implication of this is that the power to make any decision in the company will be held by the shareholders in the general meeting and only when certain functions were exclusively given to the directors in terms of the articles of association will the board have the power to act on the matter, this aspect will be dealt with further in the next section.

4.3 Position and Powers of Directors under the Companies Act 71 of 2008

Under the Old Act the Common Law principles discussed above still applied to directors. The position has now been fundamentally changed under the New Act with the provision of section 66 (1). This section provides the following:

“The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company’s Memorandum of Incorporation provides otherwise.”

From this section it is clear to see that the board of directors must manage not only the business of the company but also its affairs. Furthermore, it has the authority to exercise all the powers of the company and can perform any function. These broad powers given to the board are limited only by a provision to the contrary in the Act or in the Memorandum of Incorporation. At first glance this section seems very similar to Article 59 of Table A of the Old Act. However on a closer look there are some small changes that have big implications to the division of powers in the company and specifically to the powers of the board. Firstly, the board can now manage not only the business of the company but also its “affairs”. This clearly broadens the scope of the board’s powers. Secondly, the board may exercise all powers of the company

as well as perform any functions of the company. The wording “perform any of the functions of the company” is something which was not included under Article 59 of Table A in the Old Act. Another aspect that shows the boards increased power and that it is not subject to the general meeting is that the phrase, “may exercise all such powers of the company as are not by the Act or by these articles, required to be exercised by the company in general meeting” which is taken from Article 59 of Table A of the Old Act, is not included in wording of Section 66 (1). These aspects will be dealt with in more detail below. Furthermore, the position in Canadian Law will be considered with specific reference to the meaning of the word “affairs”. There are also supporting sections for the broadening of the board’s powers in the New Act. These will also be given to show the intention of the legislature.

4.3.1 “Business and Affairs”

Under the Old Act the directors were only empowered to manage the business of the company. This was in terms of the articles of association given by Article 59 of Table A of the Old Act. The New Act in terms of section 66 (1) now not only statutorily empowers the directors, but it also broadens their powers to include management of the company’s “affairs”. Before the exact scope and meaning of affairs is considered it must be pointed out from the outset that the because of the inclusion of s 66 in the New Act, the powers of the board are now allocated according to statute.⁹⁸ This statutory allocation of power has the important consequence that the directors’ powers are now original and not delegated.⁹⁹ Cassim makes the following statement in this regard, he states that:

“This provision is highly significant in that, for the first time in our Companies Act, the board of directors has been given a legal duty and responsibility to manage the affairs of a company. Previously, under the Companies Act 61 of 1973, the board of directors did not enjoy original powers to manage the company’s business, with the result that the power to manage the company’s affairs had to be delegated to the

⁹⁸Mongalo (2010) 259.

⁹⁹*Supra* note 30 at 248.

board of directors by the members in the general meeting or by the constitution of the company.”

The position under the Old Act was that the division and allocation of powers was only given in terms of the articles of association. Under the Old Act the board of was an organ of the company and the directors were only deemed to be agents of the company and thus could be said to be mere functionaries. With the introduction of Section 66(1) and the statutory empowerment, directors now have original powers allocated by statute under the New Act. It can be argued that the board is now more than an organ of the company and can be seen as being the company itself. This aspect will be dealt with under the sub-paragraph 4.3.3 below.

With regard to the meaning of the words “business” and “affairs”, Delpport¹⁰⁰ states the following: “It is accepted that the ‘business’ refers to the dealings between the company and outsiders, and that ‘affairs’ is a much wider term that encompasses the internal relationships as well as the existence of the company.”

The only case law on the matter is that of *Ex Parte Russlyn Construction*.¹⁰¹ Although the dictum was referred to above, it will be given again here for the sake of relevance. In this matter Didcott J stated the following when considering Article 59 of Table A of the Old Act and the scope of the board’s powers;

“The question is not whether the article limits the powers otherwise given to the directors, whether the article takes from them a power to see to the company’s liquidation which but for that would be theirs. It is whether the article gives them that power *au fond*. The article does nothing of the sort, I believe, unless the power is encompassed by the one indeed given, the one of management. And, in my book, such is not the case. In suggesting that it is, the passage attaches the wrong label to the power of management. It is not a power to manage the company’s ‘affairs’. Nowhere does the article refer to the ‘affairs’ of the

¹⁰⁰Delpport (2011) 66 - 67.

¹⁰¹*Supra* note 95.

company. The word is not used. Perhaps a power to manage all the 'affairs' of the company would be wider, were it given, than the power to manage the company's business alone. But it is not given. As for the power to stop the company's trading activities or other operations, I shall suppose that the directors have it. They probably do. It seems to be inherent in the power to manage the business. In dire circumstances it may even amount to a duty. To call a halt to the company's operations is, however, one thing. It is a far cry from that to the fundamentally different and much more drastic course of putting an end to the company itself."¹⁰²

This dictum clearly makes a distinction between the powers entrusted to directors by the use of the words "business" and "affairs". The meaning given to "affairs" in the above passage is in line with that of Delpont above and gives the directors broader powers. These powers are not only in relation to the company's dealings with outside parties and its standing in a business community, but it also gives the directors power of the internal dealings of the company. According to Delpont's statement, this will include the power to bring an end to the existence of the corporation (in order to escape liability in this regard the directors would only be able to do this in special circumstances which would satisfy their duties in terms of Section 76). It is stated in Henochsberg that although the dictum in the *Russlyn* case was referring to the effect of Article 59 of Table A of the Old Act, that the interpretation given to the use of the word "affairs" in that case should also be applied to the use of the word "affairs" given in section 66 of the New Act.¹⁰³

4.3.2 The Meaning of "Affairs" according to Canadian Law

In order to gain a better understanding of the meaning of the word affairs, the Canadian legal system will be considered with specific reference to the meaning attached to "affairs" and the scope of directors' powers. The Canadian legal system, like our legal system, has its roots in the English Law. Canada's Constitution Act, 1982 was only proclaimed law on April 17, 1982. This relatively recent development in their legal system is comparable to the situation in South Africa with the adoption of our new Constitution coming only

¹⁰² *Supra* note 95 at 36–37.

¹⁰³ *Supra* note 30 at 248.

in 1996. The similarities between our legal system and the Canadian legal system make it not only a relevant comparison, but an appropriate one.

In terms of the Canada Business Corporations Act the directors are empowered to manage the business and affairs of the corporation. This is provided for in section 102 (1) which states: “Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.” From this section it is clear that this power is subject to unanimous shareholder agreement. This is very similar to Section 66 (1) of the Companies Act, where the directors are empowered to manage the business and affairs of the company subject to the Memorandum of Incorporation.

According to the (Canada Business Corporations Act section 2(1)) *Ontario Business Corporations Act* RSO 1990, c B16 “affairs” means: “the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate; (“affaires internes”).”¹⁰⁴ Welling sums up this definition and states that, “the term ‘affairs’ means the internal relationships among directors, officers, and shareholders of the corporation, as opposed to the business dealings between the corporation and outsiders.”¹⁰⁵

It is clear that the Canadian position regarding directors powers as set out in the Canada Business Corporation Act and the position in the new Companies Act are very similar if not the same. In order to derive any meaningful benefit from this comparison, commentary on the position of directors in Canadian Law needs to be considered. Welling gives the position as follows¹⁰⁶:

“The statutory source of the directors’ power and obligation distinguishes Canada’s corporate law from the English Law concepts that influenced judicial thinking under earlier Canadian statutes.

¹⁰⁴ <http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90b16_e.htm> (Accessed October 2012)

¹⁰⁵Welling (1991) 314.

¹⁰⁶*Supra* at 315.

. . . The directors' power is original, not delegated: as such, it is not subject to controls by the shareholders, except as specified in the applicable statute. [Fn 63: This was not the case in English Company Law where the directors' power extended only so far as the terms by which it was delegated usually in the company's articles. In English-model statutes the original power lies with the shareholders . . .] Because original power lies with the directors and not the shareholders, there is no basis for shareholders to either extend the scope of the directors' power or to forgive the directors for having breached their statutory duties."

The above statement unequivocally states that directors' powers are original and not delegated as a result of their powers arising from statute. Since the directors are now statutorily empowered, and with the use of the word "affairs" in defining the scope of their powers, the shareholders can now not extend the scope of the directors' powers, as well as not being able to ratify any acts which concern "the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate" or any other acts for that matter. Such internal acts would include decisions as to the "life or death" of the corporation. This is in line with the dictum given in the *Russlyn* case.

4.3.3 Wording used in section 66 (1)

Another aspect that shows the board's increased power and the fact that it is not subject to the general meeting is the exclusion of the following phrase from the wording of Section 66 (1); "may exercise all such powers of the company as are not by the Act or by these articles, required to be exercised by the company in general meeting". This phrase was used in Article 59 of Table A of the Old Act. The inclusion of this phrase under the Old Act was that there were certain powers that were "required to exercised by shareholders in the general meeting. This shows that default and residual powers lay with the shareholders in the general meeting and that the directors could only exercise the powers that were given to them in the articles. The effect of excluding the above phrase is that now the shareholders are not given inherent powers which the directors can not exercise. The board now can exercise all powers

of the company. This is further evidence of the legislature’s intention to make the board the ultimate power in the company.

Under Section 66(1) the board may exercise all powers of the company as well as perform any functions of the company. The wording “perform any of the functions of the company” is something which was not included under Article 59 of Table A in the Old Act. This is yet an additional empowering provision which increases the board’s powers.

4.3.4 Supporting sections in the New Act.

As it has been stated above, directors now derive their powers from statute. This is according to Section 66(1) of the New Act. This now makes the board the ultimate organ of the company. In addition to the board being the ultimate organ of the company, the board also has increased powers to deal with internal matters by the wording of Section 66(1) which includes the word “affairs”. The implication of this is that when ever the new “Act states that ‘the company can...’ the organ that can act for the company will be the Board”.¹⁰⁷ There are numerous sections in the New Act where the wording used will support this conclusion. Some of these sections will be provided below and the effect of the section will be discussed.

The first two sections that show the intention of the legislature are that of Section 44(2) and Section 45(2) of the New Act. The relevant portions of these sections are given below.¹⁰⁸

Section 44(2): “Except to the extent that the Memorandum of Incorporation of a company provides otherwise, *the board may authorise the company* to provide financial assistance.... to any person for the purpose of, or in connection with, the subscription of any option, or any securities...”

Section 45(2): “Except to the extent that the Memorandum of Incorporation of a company provides otherwise, *the board may authorise the company* to provide direct or indirect financial assistance to a director or prescribed officer of the company...”

¹⁰⁷ *Supra* note 1 at 67.

¹⁰⁸ Italics my emphasis.

Both of these sections deal with the provision of financial assistance. Whereas Section 44 deals with financial assistance for the subscription of shares, Section 45 deals with financial assistance to a director or prescribed officer or persons related to them. Both of these sections state that the “board may authorise the company”. At Common Law and under the Old Act the position was always that the board would propose and the shareholders would authorise. This is clearly not the position under the New Act and it seems that the roles have now been reversed. The board is now in position where they authorise the company to provide financial assistance to directors or prescribed officers or for the subscription of shares.

The next section, which supports the argument that under the New Act the board is the ultimate organ of the company and that when the Act refers to the company it is referring to the board as the organ that can act on the company’s behalf, is Section 129. This relevant part of this Section is as follows:

“129 Company resolution to begin business rescue proceedings.—

(1) Subject to subsection (2) (a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that—

- (a) the company is financially distressed; and
- (b) there appears to be a reasonable prospect of rescuing the company.”

The short title refers to a “company resolution” to begin business rescue proceedings. Subsection (1) then directly afterwards states that “the board of a company may resolve that...”. The only conclusion that can be drawn from this is that the Act, when referring to a “company resolution”, is in fact referring to a “board resolution”. Therefore when the board resolves to perform or refrain from a certain act, it is indeed the company that has resolved to perform or refrain from that act. This is in line with the arguments above.

Section 20 of the New Act is another section which requires further consideration. Section 20 concerns the validity of company actions. Subsection 2 provides the following:

“If a company’s Memorandum of Incorporation limits, restricts or qualifies the purposes, powers or activities of that company, or limits the authority of the directors to perform an act on behalf of the company, the shareholders, by special resolution, may ratify any action by the company or the directors that is inconsistent with any such limit, restriction or qualification, subject to subsection (3).”

At first glance Section 20(2) seems to support the position of the board as under the Old Act due to the shareholders power to ratify any action by the company or the directors. This must, however, be examined more closely. Firstly, the only time that the power to ratify actions by the company arises, is when the company’s Memorandum of Incorporation limits the already existing authority of the directors. Secondly, the wording used also shows the intention of the legislature. By providing that the shareholders may ratify any action “by the company or the directors” this points to the company and the directors being separate to the shareholders. The effect of the use of this wording is that it is the directors who have the ultimate power in the company and that only in limited circumstances (where the directors’ authority has been limited) may the shareholders ratify an action. Thus when the Act states that ‘the company’ can act, it is in fact the board that will have the power to act.¹⁰⁹

A further section which supports the view that the directors are the ultimate organ of the company is that of Section 114. This section deals with proposals for schemes of arrangements. Section 114(1) states that,

“Unless it is in liquidation or in the course of business rescue proceedings in terms of Chapter 6, the *board of a company may propose* and, subject to subsection (4) and approval in terms of this Part, implement any arrangement between the company and holders of any class of its securities.”¹¹⁰

¹⁰⁹ *Supra note 2 at 67 fn22.*

¹¹⁰ *Italics my emphasis.*

Traditionally it is the board who propose and the shareholders who approve. Under this section it is only the board that may propose a scheme of arrangement. Section 114 makes no provision for the shareholders to propose such a scheme. Furthermore, it is only the board that can propose and implement the scheme. The shareholders do not have a part to play in this process.

Under the New Act the board of directors has been given further powers that were reserved for the shareholders in the general meeting under the Old Act. This increased power is subject to the company's Memorandum of Incorporation. However should there be nothing to the contrary contained in the Memorandum of Incorporation then the default powers are as provided for in Section 36(3). This Section states that: "Except to the extent that a company's Memorandum of Incorporation provides otherwise, the company's board may—

- (a) increase or decrease the number of authorised shares of any class of shares;
- (b) reclassify any classified shares that have been authorised but not issued;
- (c) classify any unclassified shares that have been authorised as contemplated in subsection (1) (c), but are not issued; or
- (d) determine the preferences, rights, limitations or other terms of shares in a class contemplated in subsection (1) (d)."

In addition to this the New Act and also provides the directors with the power to apply for the winding up of the company. This power was traditionally only allocated to the shareholders in the general meeting. Section 81(1)(d) deals with the winding-up of solvent companies by court order. It provides the following:

"A court may order a solvent company to be wound up if—

- (d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that—
 - (i) the directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and—
 - (aa) irreparable injury to the company is resulting, or may result, from the deadlock; or
 - (bb) the company’s business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;”

Section 68 (3) is a further section which gives the directors additional powers.¹¹¹ This Section provides for the board, subject to the Memorandum of Incorporation, to appoint a director to fill on a temporary basis until the vacancy has been filled. Such a director will have all of the powers, functions and duties of a director.

These are just some of the additional powers allocated to the board by the New Act. These additional powers add strength to the arguments given above that the board is now the ultimate organ, or has the ultimate power, in the company.

4.4 Conclusion

In this chapter the position of the board of directors and the powers conferred on them was considered according to the Old Act and the New Act. Under the Old Act the directors had powers bestowed upon them according to the Articles of Association. The general empowering provision was contained in Article 59 of Table A. According to this article, the directors could manage the

¹¹¹ Sections 68(3): Unless the Memorandum of Incorporation of a profit company provides otherwise, the board may appoint a person who satisfies the requirements for election as a director to fill any vacancy and serve as a director of the company on a temporary basis until the vacancy has been filled by election in terms of subsection (2), and during that period any person so appointed has all of the powers, functions and duties, and is subject to all of the liabilities, of any other director of the company.

business of the company and were given all powers which are not expressly bestowed on the shareholders in a general meeting. Under the New Act the directors gained original powers from Section 66(1). This statutory empowerment entitles the board to manage the “business and affairs” of the company, as opposed to the articles empowering the board to manage the “business” of the company under the Old Act. The meaning of “manage the business” was considered and it was found that this power did not include the power to liquidate the company, but included the power to make decisions in order to derive a profit and in certain circumstances to stop trading activities should it be in the best interests of the company. In Canadian Law the meaning of management of the “affairs” of the company was found to be all the internal dealings of the company which would include the actual existence of the company. Since this power was statutorily conferred, this gave the directors original and ultimate power of the company. The interpretation of “affairs” in the *Russlyn* case was also that in managing the “affairs” the directors had a much broader power than to just manage the “business” of the company and could thus liquidate the company. While not interpreting “affairs” in Section 66(1), Henochsburg states that this dictum is correct and should be followed when interpreting Section 66(1). From this we can see that under the Old Act the board had certain powers which were conferred on them exclusively. The inherent powers of the company, however, lay with the shareholders in the general meeting. The effect of Section 66(1) is that the board now has original powers. These powers have been broadened by the use of the word “affairs”, and as such the board is now also the ultimate organ in the company. One could go as far as to say that when the board acts, it is the company itself that acts. The sections of the New Act discussed above reiterate this position and show the intention of the legislature to elevate the position of the board from the Old Act to its position under the New Act.

Chapter 5: Conclusion

The board of directors play one of the biggest roles in a company. Due to this important role a proper understanding of their relationship with the company and the powers that they possess in running the company is imperative. These two aspects are elements that have evolved over time as Company Law itself has evolved. The legal status of directors was discussed in chapter two of this paper. Although directors have many similarities to agents, trustees and managing partners, it was found that the directors have a *sui generis* legal standing towards the company. While this provided insight into the nature of the relationship between a director and the company, the question of who is considered to be a director according to the New Act needed to be answered. The definition of “director” was considered under the New Act and it was found that this definition had a wide application to include those who are or are not formally appointed and pretend directors. The wide reaching definition is welcomed as it will afford the shareholders added protection against persons acting on behalf of the company, but who are not “directors” by title.

To fully understand the current position of the powers that the board possesses, a look at this particular aspect in Company Law history is required. The division of powers in a company at Common Law was therefore considered. The Common Law position of the division of powers in the company has developed over many years. Initially the position was that the shareholders in the general meeting were the company itself and that the directors were considered to be the agents of the company, with all their powers thought to be conferred upon them by the members. This changed to the situation where, although the members in the general meeting were the supreme organ of the company, the directors did have certain powers and were then considered to be an organ of the company and not mere agents. Both these organs, however, obtained their powers from the company’s constitutional documents. Here the Articles of Association were viewed as being a contract between all the shareholders of the company. Under this

position any powers that the directors had in terms of the company's constitutional documents were exercisable exclusively by the directors and the general meeting could not interfere with those specific powers. A proper construction of the articles was therefore always necessary to establish where the power lay in a company in different situations.

However, under this regime the shareholders still held residual powers. This meant that where the directors failed to act, or where they were at a deadlock, the shareholders had the power to act within the powers given exclusively to the board. The shareholders could also remove the directors by passing an ordinary resolution at a general meeting. Should the directors not act in accordance with the will of the shareholders, then the shareholders had the added protection of being able to remove the directors in question by simple majority. This is a protective measure that has been retained in the New Act.

Although many of the Common Law rules remained, the adoption of the Old Act brought about some changes and also clarified many issues. The position of the board of directors and the powers conferred on them was considered according to the Old Act and the New Act. Under the Old Act the directors had the powers given to them according to the Articles of Association. The general empowering provision was contained in Article 59 of Table A. According to this article the directors could manage the business of the company. This gave the directors the power of management of the business. Furthermore, the directors were given all powers which are not expressly bestowed on the shareholders in a general meeting. The board of directors powers were still subject to the general meeting. Therefore, the directors did not enjoy original powers, with the shareholders in the general meeting still being the ultimate power in a company.

Under the New Act the directors gained original powers as a result of statutory empowerment in the form of Section 66(1). This statutory empowerment entitled the board to manage the "business and affairs" of the company, as opposed the articles empowering the board to manage the "business" of the company under the Old Act. The in considering the meaning of "manage the business" it was found to include the power to make decisions in order to

derive a profit and in certain circumstances to stop trading activities should it be in the best interests of the company, but that the power to liquidate the company was not included. As it was stated in the introduction, the use of a single word in an Act can have far reaching implications in the application of the law. The use of “affairs” in Section 66(1) is such a word. To understand the implication of the use of the word “affairs” in Section 66(1), Canadian Law is considered as this word in that legal system in empowering the directors. In Canadian Law the meaning of management of the “affairs” of the company was found to be all the internal dealings of the company which would include decisions regarding the actual existence of the company. This is opposed to the “business” the company being its dealings with third parties. The interpretation of “affairs” in the *Russlyn* case meant that in managing the “affairs” of the company the directors had a much broader power than to just manage the “business” of the company. Now the board’s powers included the power to liquidate the company. While not interpreting “affairs” in the context of Section 66(1), Henochsburg states that this dictum is correct and should be followed when interpreting Section 66(1). From this we can see that under the Old Act the board had certain powers but that the inherent powers of the company lay with the shareholders in the general meeting.

The effect of the Section 66(1) is that the board now has original powers as well as being the ultimate organ of the company by the use of just one word - “affairs”. One could even go as far as to say that when the board acts, it is the company itself that acts. The sections of the New Act discussed above reiterate this position and show the intention of the legislature to elevate the position of the board from the Old Act to its position under the New Act.

It must be kept in mind that although the position of the board has been drastically altered by the provision of Section 66(1), in conjunction with other sections in the New Act, this position is still subject to the Memorandum of Incorporation and the New Act. While it has been shown that the New Act has many sections which support the contentions made as to the board’s position, there are sections in the New Act that can be interpreted to either support the board’s ultimate power conferred by Section 66(1) or to limit this power. The Memorandum of Incorporation on the other hand, can contain provisions that

expressly limit the board's powers as set out in Section 66(1). Should this be the case then the Memorandum of Incorporation will have to be interpreted to ascertain the extent of the board's powers. The company will then have to have the letters "RF" (ring-fenced) after its name to indicate the changes made to the Memorandum of Incorporation.¹¹² Another way in which the shareholders are protected is by the fact that the directors can be removed by an ordinary resolution regardless of any provision in the Memorandum of Incorporation or the Act.¹¹³

The powers of the board have been drastically changed from what they were in the early Common Law cases; a complete reversal of the balance of power has occurred. While the increased statutory empowerment of the directors is welcomed, for the directors to run the company unhindered by trivialities, the increased power is also a concern in the sense that directors can now direct the company or even end it without the shareholders' input. The New Act has, however, included the ability to change the default position of the balance of power by including such provisions in the Memorandum of Incorporation and has retained the ability of the shareholders to dismiss directors by ordinary resolution. While this may be sufficient for now, the judiciary will play an important role in the interpretation of the current position in years to come. While shareholders protection is important, the ability of the board to perform its functions without being frustrated is also a key factor that will need to be borne in mind when interpreting these provisions.

¹¹² Section 15(2)(a)(iii) and s 15(2)(b)-(d).

¹¹³ S 71(1).

Bibliography

Books and Journal Articles

Blackman MS (1996) "Companies" *The Law of South Africa*, vol 4, part 2, 73-81.

Cassim FHI (ed) (2011) *Contemporary Company Law* Claremont: Juta and Co

Cilliers HS, Benade ML, Henning JJ, Du Plessis JJ, Delpont PA, De Koker L, and Pretorius JT (2000) *Cilliers & Benade Corporate Law 3rd ed* Durban: Butterworths.

Cohen C J "The Distribution of Powers in a Company as a Matter of Law" (1973) 90 South African Law Journal 262

Delpont PA (2011) *The New Companies Act Manual 2nd ed* Durban: LexisNexis

Katz MM (2010) "Governance under the Companies Act 71 of 2008: Flexibility is the keyword" *Acta Juridica* 262

Kunst J, Delpont PA and Vorster Q (1994) *Henochsburg on the Companies Act* Durban: LexisNexis.

Mongalo TH (ed) (2010) *Modern Company Law for a Competitive South African Economy* Claremont: Juta and Co

Pretorius J T et al (1999) *Hahlo's South African Company Law Through the Cases 6th ed* Kenwyn: Juta & Co, Ltd

Van Dorsten J L (1999) *The Law of Company Directors in South Africa 2nd ed* Constantia: Meridian Press CC

Welling BL (1991) *Corporate Law in Canada 3rd ed* Vancouver: Butterworths.

Cases

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

Attorney General v Davy (1741) 2 Atk 212, 26 ER 531

Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame [1906] 2 Ch 34

Cape United Sick Fund Society v Forrest 1956 (4) SA 519 (AD).

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

Corporate Affairs Commission v Drysdale (1978) 141 CLR 236

Daniels t/as Deloitte Haskins & Sells v AWA Ltd (1995) 27 NSWLR 438

Ex parte Russlyn Construction (Pty) Ltd 1987 (1) SA 33 (D)

Ex Parte Screen Media Ltd 1991 (3) SA 462 (W)

Ferguson v Wilson [1866] 2 Ch App 77

Foss v Harbottle (1843) 2 Hare 461; 67 ER 189

French Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association 1931 AD 60

Gohlke & Schneider v Westies Minerale (Edms) Bpk and Another 1970 (2) SA 685 (A).

Gramophone & Typewriter Ltd v Stanley [1908] 2 KB 89 (CA)

Isle of Wright Railway Co v Tahourdin (1883)25 ChD 320 (CA)

John Shaw & Sons (Salford) Ltd v Peter Shaw & John Shaw [1935] 2 KB 113 (CA)

Marshall's Valve Gear Co Ltd v Manning, Wardle & Co Ltd [1909] 1 Ch 267

Mayor, Constables & Co of Merchants of the Staple of England v Governor and Co of Bank of England (1888) 21 QBD 160

Mulkana Corp NL (in liq) v Bank of New South Wales (1983) 8 ACLR 278 SC (NSW)

Re City Equitable Fire Insurance Co Ltd [1925] Ch 407 at 426

Re Forest of Dean Coal Mining Co (1878) 10 ChD 450

Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168

Salmon & Quin v Axtens Ltd [1909] 1 Ch 311 (CA)

Scott v Scott [1943] 1 All ER 582.

Selanfor United Rubber Estates Ltd v Cradock (No 3) [1968] 1 WLR 1555 at 1575

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

Tesco Supermarkets Ltd v Nattrass 1971] 2 WLR 1166 (HL), [1972] 2 All ER 127

Wessels & Smith v Vanugo Construction (Pty) Ltd 1964 (1) SA 635 (0)

Legislation

Canadian Business Corporations Act, R.S.O 1990

Companies Act, 61 of 1973

Companies Act, 71 of 2008