Legal Implications relating to being "Entitled to Serve" as a Director: A South African–Australian Perspective

N Kilian*

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Author

Neels Kilian

Affiliation

North-West University
South Africa

Email Neels.Kilian@nwu.ac.za

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Abstract

This article focusses on an Australian piece of legislation and interesting case law, as well as on how the Federal Court of Australia has applied Australia's *Corporations Act,* 2001 to characterise a person as a *de facto* director – that is, as a professed director whose appointment as such was defective. In this regard, the decisions of that Court will, as envisaged in the *Constitution of the Republic of South Africa,* 1996 constitute persuasive authority. The Australian decision to be discussed in this article is significant in that the South African *Companies Act* 71 of 2008 does not contain substantively similar provisions to those of Australia's *Corporations Act* 2001. For example, section 66(7) of South Africa's *Companies Act,* 2008 contains the phrase "entitled to serve" as a director. This article explains the legal implications relevant to that expression, including whether it imposes a statutory condition precedent. This article also considers the validity of decisions taken by a person who is not "entitled to serve" as a director.

Keywords

De facto director; *De jure* director; director liability; board of directors; decisions of the board of directors; contractual condition; entitled to serve; written authority; estoppel.

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1 Introduction

Significant changes to the *Companies Act* 71 of 2008 were made by excluding relevant sections of the *Companies Act* 61 of 1973. Accordingly, before we focus on those sections not incorporated in the 2008 Act, the following unreported matter explains the present problem relevant to *de facto* directors. The facts of *Octavia Matshidiso Matloa v Multichoice South Africa*[1] were simple and may be summarised as follows. Octavia was approached by Multichoice to serve as a director/chair the audit committee. On 8 August 2018, after completing ten different interviews, Octavia received a written invitation to serve on the board of directors of Multichoice and to be officially appointed by the annual general meeting of shareholders on 30 August 2018 as required by the memorandum of incorporation of Multichoice in terms of section 61(8)(b) of the 2008 Act. At this meeting her appointment to proceed as a director was not confirmed by the shareholders. Nevertheless, despite not being appointed/approved as a director, Octavia attended board meetings and cast votes either to support or to reject business decisions for at least nine months. Subsequently, on 9 April 2019, Octavia received a letter confirming her termination as a director. The memorandum of incorporation of Multichoice specifically referred to the purposes of the annual general meeting of shareholders, *inter alia* the confirmation of appointed directors. In this regard Octavia appeared to external persons of the company as a *de jure* director; in other words, Octavia appeared to be duly appointed. Accordingly, Multichoice communicated the termination of her position as director to the Companies Intellectual Property Commission (CIPC), which noted the termination as one of resignation, as CIPC has no tick-box to note "*de facto* appointed directors". The CIPC record allows only for the recording of "removal as a director" and or "resignation as a director". The director continued to attend board meetings and to cast votes until 9 April without complying with the memorandum of incorporation of Multichoice. Under what circumstances

* Neels Kilian. MA (Regensburg) LLM (UP) LLD (UFS). Senior lecturer at the faculty of law, North-West University, South Africa. Former research fellow, Deakin University (Australia), and the Free State University (South Africa). E-mail: corneliuskilian@hotmail.com. https://orcid.org/0000-0002-2890-9350. I would like to thank Professor Stephen Bottomley (Australian National University) for his comments on paragraph 8 of this article. I would also like to thank the PA and Alize Malan Memorial Trust for its grants. In brief, PA Malan was the co-founder of Naspers Ltd, Santam Ltd and Sanlam Ltd. The opinions and/or views in this article are those of the researcher and do not reflect the views and or opinions of the above persons. I accept full responsibility for any inaccuracies.

1 *Octavia Matshidiso Matloa v Multichoice South Africa* (Gauteng Division) (unreported) case number 40731/2019 of 6 February 2020. The CIPC was the third respondent in this matter. The author acted as co-counsel for the applicant.

would the votes cast be valid? Or would those board meetings be valid in terms of the *Companies Act,* 2008?

In addition, a dispute arose as to whether the appointment could be terminated by Multichoice on 9 April 2019, bearing in mind the fact that the appointment was defective.[2] To answer these questions, this article refers to an Australian case and to how the Federal Court of Australia applied the *Corporations Act,* 2001, where a *de facto* director acted as if he were a *de jure* director.[3] In this regard, the decision of the Federal Court,[4] as envisaged in the South African Constitution, constitutes persuasive authority as regards the acknowledgement of the validity of votes and/or board meetings.[5] A real concern is the fact that the *Companies Act,* 2008 does not contain a section similar to those contained in the Australian *Corporations Act,* 2001, the South African *Companies Act* 61 of 1973, the *Companies Act* 46 of 1926 or the *Companies Act* 31 of 1909.[6] It seems that "entitled to serve" could be understood as a statutory condition to rely on the importance of a *de jure* director only. In this regard, one is left wondering what constitutes "entitled to serve"?

In its original meaning, a person could not act as a *de facto* director unless he or she had been appointed as a *de jure* director.[7] The first part of this

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2 The High Court granted an order that the appointment had lapsed automatically on 30 August 2018, implying the existence of a *de facto* director – from 8 August until 30 August. The Court was not asked to investigate whether the board decisions or votes cast after 30 August were either valid or invalid. The application was initially opposed by Multichoice, and later the respondent decided not to oppose the application pertaining to the termination letter sent on 9 April 2019. The CIPC received an order from the Court to amend its systems to enable it to take note of *de facto* directors (appointments that lapse automatically).

3 Baxt 2012 *ABLR* 209; Atkin and Cheilyk 2015 *Inhouse Counsel* 41. It is possible to be both a shadow and a *de facto* director, although there is a difference in the law. In this regard, see *Buzzle Operations Pty (Ltd) (In Liq) v Apple Computer Australia Pty (Ltd)* [2010] NSWSC 233, 236. A shadow director, for example, is an executive/shareholder of a company that supersedes the board in business decisions and the implementation of business decisions; Blackman 1993 *SALJ* 473; see in general Smith 1978 *MLR* 147. A shareholder can complain to the company or take a derivative action concerning any irregularity in the conduct of the company, e.g. the improper appointment of directors; also see in general Tomasic, Bottomley and McQueen *Corporations Law in Australia* 230. Here the authors discuss the doctrine of constructive notice in relation to apparent authority. It is also germane from a South African perspective, explaining the common law to a certain extent; and *Francis v Sharp* 2004 3 SA 230 (C) 243 for an explanation of a *de facto* director.

4 *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 56.

5 See in general s 66(7) of the *Companies Act* 71 of 2008.

6 The *Companies Act* 61 of 1973, for example s 214, and the *Corporations Act*, 2001, s 201M are similar, since both regulate the validity of actions/decisions of directors who were appointed defectively.

7 No authority exists in South Africa; but this argument is considered in the main text.

article focusses on "entitled to serve" in relation to decisions taken at board meetings. In addition, the first part will also consider transactions concluded with third parties on behalf of the company and whether those transactions are valid.[8] The purpose of this article is not to analyse in depth previous South African (or Australian) decisions pertaining to transactions concluded with third persons on behalf of the company (and the implications of the so-called *Turquand* rule or indoor management rule) or the validity of board decisions or votes cast of the company as a result of estoppel.[9] This, then, provides an opportunity in this article to explore the definition of a director as defined in the Australian *Corporations Act,* 2001 and the previous South African *Companies Acts* to rely on a suitable interpretation of directors and to encourage the existence of *de facto* directors in the 2008 Act.[10] On the other hand, a real concern is that there is no section in the 2008 Act similar to section 214 of the 1973 Act, and the 2008 Act would seem to encourage an interpretation, especially those who transact with a *de facto* director, not to recognise those transactions as being valid and/or enforceable.

2 Brief general background to the appointment of directors in South African company law

The appointment of directors is generally regulated by applicable legislation, for example the 2008 Act or the 1973 Act. In this regard we will briefly note the process of appointing a director in terms of the *Companies Acts* of 1973 and 2008. In the 1973 Act the signatories to the company's constitution were members of the first board of directors – that is, they were the founders of

8 *Dowjee Co Ltd* v *Waja* 1929 TPD 66, 68. This case confirms the appointment of *de facto* directors; Blackman 1993 *SALJ* 473. Where a director acted without authority, the company can claim damages from the director or set the transaction aside; Atkin and Cheilyk 2015 *Inhouse Counsel* 43.

9 Locke 2002 *SA Merc LJ* 420; Cassim and Cassim 2017 *SALJ* 639; Blackman 1993 *SALJ* 473; *Royal British Bank v Turquand* (1856) 6 E&B327, 119 ER 886; *Volkskas Beleggings Korporasie Bpk v Oranje Benefit Society* 1978 1 SA 45 (A); Delport *New Entrepreneurial Law* 105, 295; Cassim *et al Contemporary Company Law* 181-184; Van der Linde 2015 *TSAR* 833; McLennan 1979 *SALJ* 329; Mulligan 1960 *SALJ* 332; Montrose 1934 *LQR* 224; Nock 1967 *MLR* 705; *Burstein v Yale* 1958 1 SA 768 (W); Baxter 1976 *JBL* 323; *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189. Concerning irregularities in the appointment of directors, only the company should in principle complain about these and in principle rectify them; Kerr *Law of Agency* 92; *Northside Developments Pty Ltd v Registrar General* [1990] 170 CLR 146, 160 Mason J for an explanation of the indoor management rule (*Turquand* rule) and relevant explanation of agency principles; see *Story v Advance Bank* (1993) 31 NSWLR 722 relevant to s 128 and 129 of the *Corporations Act*, 2001 with reference to the *Turquand* rule or indoor management rule; Ramsay, Stapledon and Fong 1999 *JBFLP* 38; and Seely *Protection Afforded to Third Parties* 14, 28.

10 See *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 56.

the company.[11] The signatories to the constitution could have the power to appoint the first board of directors[12] and the constitution might in this regard provide for a maximum number of directors to be appointed by the signatories. In addition, the recommendation of a director or the recommendation to appoint a director was also subject to section 210. In terms of this section, a unilateral director appointment by, for instance, the board of directors was not valid unless the general meeting of shareholders had approved the recommendation.[13] A director recommendation that was not approved by such a meeting rendered the appointment defective.[14] In this regard, a director who had been nominated to act as such without the necessary approval of the general meeting or otherwise was simply referred to as a *de facto* director in terms of the law. This process for appointing directors was reasonably simple to understand and uncomplicated to follow in practice.[15] Although an appointment could be defective in the law, the actions of such a director were still valid as if the appointment were one of *de jure* in terms of section 214 of the 1973 Act.[16]

In the *Companies Act* 2008 the process to appoint a *de jure* director is fairly complicated, because the Act makes use of alternative phrases or alternative provisions for the appointment of a director. Therefore, the first incorporators may serve as the first board of directors unless the memorandum of incorporation provides otherwise as an alternative provision.[17] In addition, section 66(4)(a)(i) states that the first appointment of directors may be carried out by a single person who has been nominated for this task in the memorandum of incorporation for them to serve as directors.[18] Besides the latter, it is also possible that directors - to replace the incorporators - could also be elected by persons other than a single person. It is not clear who the persons are, since this could refer to either shareholders (in a general meeting) or incorporators, because both categories of persons may cast votes for director appointments. In addition,

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11 Sections 208(2) and 209 of the *Companies Act* 61 of 1973 (the 1973 Act). In Australia, signatories are known as initial directors; in other words, persons who have consented to act as the first board of directors.

12 Section 210(2) of the 1973 Act.

13 See in general ss 210G and 201H of the *Corporations Act*, 2001 where the general meeting of shareholders can appoint a director or where the board of directors can appoint an additional director to the board.

14 Section 210(2) of the 1973 Act.

15 *Francis v Sharp* 2004 3 SA 230 (C) 243, where the Court explained the meaning of *de facto*.

16 See para 3 of this article.

17 Section 66(2)(b) of the *Companies Act* 71 of 2008 (the 2008 Act) requires that there be three directors for public companies.

18 Cassim *et al, Contemporary Company Law* 441-443.

the appointment of directors is further explained by section 68(3). In this section, the board of directors or shareholders (at a general meeting) may also appoint a single person to serve as a director "who satisfies the requirements of election" to fill any vacancy on the board as a temporary director, unless the memorandum of incorporation provides otherwise. It is also not a requirement that such a person must be elected by the annual general meeting of shareholders unless the memorandum of incorporation requires otherwise.[19]

Should a director's appointment be contrary to the provisions of the 2008 Act, the appointment is defective. In the 2008 Act there is no section similar to section 214 of the 1973 Act.[20] This lack of a section similar to section 214 raises the question as to whether a *de facto* director could still exist in South African law. In brief, section 214 states that the decisions of defectively appointed directors are valid irrespective of a defect in their appointment; for example, where no written permission was obtained from the director to act as such in future.[21] In the 2008 Act it would appear that section 66(1) could also provide for a similar section 214 provision by regulating defective appointments and the validity of *de facto* directors' actions/decisions in the memorandum of incorporation.[22] If the memorandum is silent in this regard, one may argue that the 2008 Act does not make provision for valid decisions or actions by directors appointed defectively, and the problem is whether such directors could still exist in the law.[23] Beside the last point, to entitle the person to serve as a *de jure* director in the 2008 Act the director must also confirm his or her appointment in writing and submit the confirmation to the company.[24] For the reasons stated above, it is possible to pose the question: can a *de facto* director still exist in South African law in the

19 Section 68(3) of the 2008 Act.

20 The 2008 Act, s 66(11) stipulates: "Any failure by a company at any time to have the minimum number of directors required by this *Act* or the company's Memorandum of Incorporation, does not limit or negate the authority of the board, or invalidate anything done by the board or the company." See Pitt and Tobin 2018 *ARITA Journal* 28, 29.

21 Section 211(1-4) of the 1973 Act. The founder (or other director appointments), and the director must present or submit written permission to act as such to the company. However, s 214 states that even if no written permission was obtained, the acts of the director remain valid.

22 In the 1973 Act, article 83 of Table A and article 82 of Table B contain provisions similar to s 214.

23 Section 66(6) states that the appointment of a director is void if the appointment contravenes the principles of s 69 of the 2008 Act, i.e. the appointment of a disqualified director or ineligible director.

24 Section 66(7) of the 2008 Act.

absence of a section similar to section 214 in the 2008 Act?[25] Before this question is answered, it is important to focus on the following pertinent sections of the various *Companies Acts* to explain the general history pertaining to South African directors.

3 A brief history of relevant legislation in South Africa defining directors

3.1 The Companies Act 31 of 1909

Section 2 defines a director as follows: "… shall include any person *occupying* the position of director or alternate director of a company, by whatever name he may be called."[26]

While section 72 is relevant to defective appointments: "The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification."[27]

Section 72 is very clear that the decisions taken by a director who has been appointed defectively are valid.[28] In this regard the 1909 Act clearly states that the decisions of such a director remain valid, irrespective of sections 70(2) and 71(3).[29] To a certain extent, section 72 explains the term "occupy" in terms of the position of a director in section 2. In other words, whoever

25 Section 211(4) of the 1973 Act states clearly that if written permission were not obtained by the company, the appointment of the director remains valid. The 2008 Act has no sections that are similar to ss 211(4) and 214.

26 Emphasis added. This Act was relevant to the Transvaal, one of the four provinces of the Union of South Africa; Collier 2001 *C&SLJ* 340, 341.

27 See as an example, *Dawson* v *African Consolidated Land & Trading Co* [1898] 1 Ch 6 (CA).

28 See in general, *British Asbestos Co Ltd* v *Boyd* [1903] 2 Ch 439, 444; *Dey v Goldfields Building Finance & Trust Corporation Ltd* 1927 WLD 180,195-196 concerning ignorance about a defective appointment.

29 Section 70(2) of the *Companies Act* 31 of 1909 (the 1909 Act) states: "On the application for registration of the memorandum and articles of a company the applicant shall deliver to the Registrar a list of the persons who have consented to be directors of the company, and if this list contains the name of any person who has not so consented the applicant, and every person who knowingly and wilfully authorized or permitted the insertion in the list of the name of a person who has not so consented, shall be liable to a fine not exceeding fifty pounds" and s 71(3) states: "If after the expiration of the said period or shorter time any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding five pounds for every day between the expiration of the said period or shorter time and the last day on which it is proved that he acted as a director"; see in general *Channel Collieries Trust Ltd* v *Dover St Margaret's & Martin Mill Light Railway Co* [1914] 2 Ch 506 (CA) 511-512, in relation to honesty or good faith when appointing directors.

the person is who occupies the position of a director, his or her actions are valid.[30] It is clear that section 2 and section 72 should be considered in order to understand the legal consequences of a *de facto* director.

3.2 The Companies Act 46 of 1926

Section 229 regulates the definition of director as follows: "… Includes any person occupying the position of director or alternate director of a company, by whatever name he may be called."[31]

While section 69 states: "The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification."[32]

From the above too it is clear that the acts committed by a director who has been appointed defectively are valid. To a certain extent the above is similar to the provisions of the 1909 Act.[33]

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30 We were unable to support our opinion with case law relevant to the 1909 Act.

31 Emphasis added.

32 *Marrok Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd* 1975 3 SA 403(A) 411-413. Here the Appeal Court considered s 69 of the *Companies Act* 46 of 1926 pertaining to defective director appointments. The appellant argued that s 69 requires an actual appointment and in this case it was argued that no appointment of directors was ever made. For this reason s 69 was not applicable. The Appeal Court referred to the following statement by Lord Simonds in *Morris* v *Kanssen* [1946] AC 459 (HL) 471: "There is, as it appears to me, a vital distinction between (a) an appointment in which there is a defect or, in other words, a defective appointment, and (b) no appointment at all. In the first case, it is implied that some act is done which purports to be an appointment but is by reason of some defect inadequate for the purpose; in the second case, there is no defect; there is no act at all." Trollip J held that a *bona fide* actual appointment was made, although the correct procedure for the appointment was never followed. In this case, blank share transfer forms were signed by the nominee directors or first directors of the company and the actual appointment or voting for directors at the first shareholders meeting was therefore performed by persons who were not actual shareholders. If an incorrect procedure was followed, a derivative action could be initiated by a shareholder to ratify or to enforce the correct procedure pertaining to director appointments. In this regard, see Smith 1978 *MLR* 149; *Dowjee Co Ltd v Waja* 1929 TPD 66 66, where a quorum consisted of two directors. In this case a meeting was conducted by a single majority shareholder, and he appointed himself as director of the company. The Court held that there was no quorum as required by regulation 60 of Table A of the *Companies Act* 31 of 1909 and the appointment was invalid. In regulation 112 of Table A of the 1909 Act, a similar provision exists to that of s 72.

33 See in general, *R v Mall* 1959 4 SA 607 (N), where the Court considered the validity of acts committed by a *de facto* director.

3.3 The Companies Act 61 of 1973

The 1973 Act defines a director in section 1 as follows: "… Includes any person occupying the position of director or alternate director of a company, by whatever name he may be designated."[34] Whereas section 214 regulates the acts committed as a result of a defective appointment: "The acts of a director of a company shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification."[35]

In the above one can observe the similarity of the various sections of legislation pertinent to defective appointments. Interestingly, there is no similar section 214 in the 2008 Act regarding defective appointments. In this Act a director becomes entitled to serve as such if he or she complies with section 66(7).[36] Section 66(7) of the 2008 Act states as follows:[37]

> A person becomes entitled to serve as a director of a company when that person -
>
> (a) has been appointed or elected in accordance with this Part, or holds an office, title, designation or similar status entitling that person to be an ex officio director of the company…; and
>
> (b) has delivered to the company a written consent to serve as its director.

In the above it appears that a *de facto* director cannot exist as such because a director is "entitled to serve" only once he or she provides the company with written consent, for instance. Is this phrase a condition in South African law? In other words, if no consent has been delivered or a person has not been elected, the person is not – strictly speaking – entitled to serve as a director on behalf of the company. Or is it possible to argue that the actions or business decisions of such a person on behalf of the company are still valid? In *Private Security Regulatory Authority v Commission for Conciliation Mediation and Arbitration* the Labour Court had to decide

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34 Emphasis added.

35 Meskin *Henochsberg* 407-408. Section 214 of the 1973 Act protects innocent persons who act in good faith when dealing with a company and where they believe that the directors of the company have been appointed. Article 83 of Table A and article 82 of Table B contain provisions similar to s 214. Even if Table A or B has no provisions similar to s 214, s 214 remains part of statutory regulation. In the 2008 Act the memorandum of incorporation could contain a similar provision to s 214. It should be noted that s 214 of the 1973 Act required some form of appointment and an irregularity occurred in that appointment. If there were no appointment, s 214 would have had no application to the directors; see *Marrok Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd* 1975 3 SA 403 (A) 412, where this Court considered whether it was necessary to rely on s 214 in the event of no director appointments.

36 See in general, note 25.

37 Emphasis added.

whether a director's appointment could be based on a statutory condition, that is, section 14(4)(c) of the *Private Security Industry Regulation Act* 56 of 2001, which provides that all persons, including directors, working for a security company must undergo a security clearance check.[38] Should the person or director fail the clearance test or not be subjected to the test, for example by not giving the necessary permission or for some other reason, the contract of employment will be terminated through the operation of the law. The Court stated, perhaps obiter, the following pertaining to a statutory condition:[39]

> I find that a condition [section 14(4)(c)] existed and that the non-fulfilment of that condition could have resulted in a termination [of the contract] by operation of law … .

Whether the condition is suspensive or resolutive falls outside the scope of this article. It is therefore possible that in future a South African Court could be focussing on the written permission or appointment to be entitled to serve as a director, and it is possible to argue that should the condition not be met, the person will not be entitled to serve as a director of the company. On the other hand, it is also possible to focus on section 1 of the 2008 Act, which defines a director as follows:[40]

> … means 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.

Besides the above-mentioned section, which will be discussed later in this article, there are clearly other examples of conditions in the 2008 Act, for example, share qualifications.[41] Section 69(7)(c) states that if the minimum

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38 *Private Security Regulatory Authority v Commission for Conciliation Mediation and Arbitration* 2012 33 ILJ 961 (LC) paras 15, 21, 37.

39 *Private Security Regulatory Authority v Commission for Conciliation Mediation and Arbitration* 2012 33 ILJ 961 (LC) paras 53, 57, 58. My inclusion. A condition in this case could either be resolutive or suspensive. A suspensive condition suspends the rights and duties until the condition is met, while a resolutive condition entails a valid contract. Should the condition not be met, the contract will be "destroyed" retrospectively. The Court held at para 57 that to differentiate between a suspensive and a resolutive condition is not relevant to this matter because in any event the director cannot have a contract of employment if the statutory condition was not met. The Court also held at para 58 that the legal question in labour law concerning an unfair dismissal should be based on the unwillingness to reinstate the director rather than focussing on a statutory condition to avoid the reinstatement of the director.

40 Emphasis added. For the meaning of "occupy" see *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236, 255. The word includes lawful as well as unlawful appointments.

41 Section 69(6)(a) of the 2008 Act; see, in general, Coetzee and Van Tonder 2014 *Obiter* 286, 288, 289, 290. The authors discussed the circumstances under which a director is subject to a fiduciary duty; Van der Linde 2015 *TSAR* 833. In general, the

share qualifications are not met in the memorandum, then that person is ineligible to act as a director.[42] Generally, a time period is stipulated within which a director must obtain the shares. If this qualification/condition has not been met, the director is simply an ineligible director and must vacate his or her office immediately. Section 66(5)(a) specifies the following:

> … may not serve or continue to serve as an ex officio director of a company, despite holding the relevant office, title, designation or similar status, if that person is or becomes ineligible or disqualified in terms of section 69.

What is the legal position in the 2008 Act if the memorandum contains neither a clause relevant to defective appointments nor a clause to validate the actions of a defective appointment, yet a person acts as a director? Or, in other words, the question arises as to whether the decisions of the person acting as director are valid or invalid when, for instance, the requirement for written consent was not met.

4 Valid or invalid acts/decisions

If a director (who was appointed defectively) or company fails to comply with the provisions of section 66(7) of the *Companies Act* 2008, the CIPC may issue a compliance notice in the prescribed form to either the company or the director, stating that the Commission reasonably believes that section 66(7) has been contravened.[43] A compliance notice may require either the company or the director to comply with section 66(7) or to reverse any board decision or vote cast vote by the director or to rectify those actions.[44] In this regard, the director and the decisions or votes cast by such a director could be valid when complying with a compliance notice as regulated by section 171(2).[45] Once the requirements of section 66(7) are met, the Commission

consequences of the *ultra vires* doctrine are discussed from a legislative perspective, not from a common law perspective. The 1973 Act also regulates share qualification in s 211(1)(b). The appointment of a director who is unable to obtain the share qualification remains valid due to s 211(4).

42 Cassim *et al Contemporary Company Law* 30.

43 Section 171(1) of the 2008 Act; also see Smith 1978 *MLR* 148, where the author discusses the fact that in principle no problems should arise if the shareholder prevents an irregularity in advance. The board of directors cannot ratify a future breach; it is able to condone only past irregularities.

44 See in general, Blackman 1993 *SALJ* 473-476; Markovic 2007 *C&SLJ* 101. For a detailed discussion of what a *de facto* director is: Lash 2018 https://legalvision.com.au/what-is-a-de-facto-director/.

45 A compliance notice may require the person to whom it is addressed to – "(a) cease, correct or reverse any action in contravention of this Act; (b) take any action required by this Act; (c) restore assets or their value to a company or any other person; (d) provide a community service, in the case of a notice issued by the Commission; or (e) take any other steps reasonably related to the contravention and designed to rectify its effect." Cassim *et al Contemporary Company Law* 751.

will issue a compliance certificate. Should the company or director fail to comply with the compliance notice, an administrative fine will be applicable only if the Commission applies for such an order in a Court of law.[46] The above requirements may be initiated only by a complainant, i.e. a shareholder.[47] The Commission may also refer the matter to the Companies Tribunal for consideration. On the other hand, the Commission will approach the Tribunal only if it considers that non-compliance would be resolved more expeditiously.[48] Accordingly, provided no complaints were received or no investigations were conducted, what will happen to those board decisions or votes cast by a director who was appointed defectively?[49]

5 No complaints received

The appointment of a director contrary to section 66(6) constitutes a nullity if, at the time of appointment, that person is ineligible or disqualified.[50] The 2008 Act cannot be read to state that a director appointed defectively is ineligible to act as such in the event of non-compliance with section 66(7); the Act questions when a person is entitled to serve as a director. On the other hand, one may also pose the question as to why the legislature did not promulgate a provision similar to that of section 214 of the 1973 Act. The answer is unclear and for this reason the *Companies Bill* 2007 may provide an answer.[51] In the *Companies Bill,* 2007 a director is defined in section 1 as a member of the board of a company, as contemplated in section 84 of the Bill.[52] A director is disqualified from acting as such if he or she has not given his or her consent to act as a director, as regulated in section 89(5)(b) of the 2007 Bill. In the Bill consent to act was a statutory obligation and should a director have neglected to give his or her consent to the company, he or she would be automatically disqualified as a director; in other words, he or she would be ineligible. In this regard a section similar to section 214 was therefore not required in the 2007 Bill, since a *de facto*

46 Section 175(1) of the 2008 Act.

47 Section 24(5) of the 2008 Act requires a company to keep director records, e.g. the date of appointment of a director, and also to be pertinent to the appointment of temporary directors. A temporary director appointed by the board has all the powers, functions and duties of any other director of the company. The maintaining of director records could be part of s 172 which is relevant to compliance notices.

48 Section 169(1)(b) of the 2008 Act; see in general Van der Linde 2015 *TSAR* 833 and 843. This deals with the effect of non-compliance relevant to third parties.

49 Cassim *et al, Contemporary Company Law* 422. If the minimum number of directors is not met, those board decisions remain valid.

50 Cassim *et al, Contemporary Company Law* 425.

51 Section 68(3) of the 2008 Act relevant to temporary directors.

52 The *Companies Bill* 2007, available at DTI 2007 http://www.uct.ac.za/usr/companylaw/downloads/legislation/Companies_Bill_2007.pdf.

director could not have existed.[53] In this regard the actions or decisions or votes cast during board meetings by disqualified or ineligible directors are invalid.[54] In addition it could be argued that the 2008 Act merely inserted the phrase "entitled to serve" and that the legislature did not consider it important to add a section similar to section 214 of the 1973 Act, since it is clear that if no consent were given to the company, the person would not be entitled to serve as a director. [55] The effect would therefore be similar to a disqualification in the Bill. We therefore have the unique situation of defining a director in a manner similar to that in previous legislation without adding a section similar to section 214.

6 Arguments for valid acts

It is trite law in Australia and South Africa that a director of a company is its agent.[56] The company, being the principal, needs an agent to conclude commercial activities on its behalf, such as signing commercial contracts with other parties on behalf of the principal.[57] Since the 2008 Act is silent on the validity of acts committed by *de facto* directors, we will briefly refer to the South African common law principles pertaining to the validity of acts committed by agents with defective authorities.[58] The general rule is that a person who acts without another's express or implied authority cannot bind the principal to any contract or transaction in whose name the agent acts. Therefore, the latter is a simple principle of the law of agency.[59] However, there are two exceptions to this general principle, namely ratification and apparent authority.[60] Ratification works retrospectively to validate an act committed by a person who professed to act as an agent but under the

53 On the other hand, a temporary director must also provide acceptance of his or her appointment.

54 Sections 66(5)(b)(i) and 66(7)(a) of the 2008 Act hold that an ex officio director has all the powers and functions of any other director of the company; Cassim *et al, Contemporary Company Law* 405.

55 Sections 66(5)(b)(i) and 66(7)(a) of the 2008 Act; Cassim *et al, Contemporary Company Law* 405.

56 See in general *Northside Developments Pty Ltd v Registrar General* [1990] 170 CLR 146, 160-161; Mason J indicated when the law of agency is not relevant to directors.

57 Pretorius *et al, South African Company Law* 464; Blackman 1993 *SALJ* 478, for a detailed discussion of relevant case law authority relevant to valid and invalid acts.

58 Blackman 1993 *SALJ* 474. Here the author discusses when a shareholder can compel a company to follow the provisions of the constitution.

59 Kerr *Law of Agency* 92.

60 *Dowjee Co Ltd* v *Waja* 1929 TPD 80, where the Court discussed the ratification of the general meeting of shareholders when a director's appointment was defective; Smith 1978 *MLR* 148 discusses whether ratification is possible under all circumstances. The author states that it is very difficult to formulate a test as to when an act is ratifiable or non-ratifiable.

circumstances was not an agent of the principal.[61] The principal could ratify the act and dismiss the professed agent from acting as such in future.[62]

The problem is whether section 66(7) makes provision for ratification. Section 66(7) is clear that a person can act as a director or, in other words, is entitled to serve as such when he or she has, for instance, provided written consent to the company to act as a director. In addition, whether this written consent could be similar to other statutory conditions which also require written consent is unclear from a South African perspective; for instance the condition in the *Alienation of Land Act* 68 of 1981.[63] Section 2(1) of the *Alienation of Land Act* states the following in respect of valid contracts signed by an agent who has written authority to act as such: [64]

> No alienation of land … shall … be of any effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.

From the above it is clear that should an agent purchase land without any form of written consent from the principal, the transaction or contract is not ratifiable since the agent was not entitled to act as such.[65] Written consent in this regard could either be sent to the principal for reporting purposes or by the principal to the agent for the purposes necessary to authenticate the relevant written consent.[66] In the South African common law or the law of

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61 See in general Van der Linde 2015 *TSAR* 838, where aspects of ratification are discussed.

62 Smith 1978 *MLR* 151. If the company is unable to ratify the action by majority vote, a shareholder may approach a Court for an order to validate the action committed by an agent.

63 In Australia, a similar legal problem was decided by *Northside Developments Pty Ltd v Registrar General* [1990] 170 CLR 146, 166, 204-205, 216, where the NSW *Real Estate Property Act* 25 of 1900 and the liability of the Registrar-General are considered when an invalid mortgage is registered in a property transaction. The Registrar-General argued the indoor management rule to escape liability.

64 Kerr *Law of Agency* 58.

65 Compare this to Australia in *Northside Developments Pty Ltd v Registrar General* [1990] 170 CLR 146, 166, 190, where law of agency was excluded on the basis of a misrepresentation of director authority made by the company; Kerr *Law of Agency* 97; see Tomasic, Bottomley and McQueen *Corporations Law in Australia* 218. Here the authors discuss the fact that an agent must be capable of entering into a contract. If he is not capable, then the contract cannot be ratified; see, in general Blackman 1993 *SALJ* 473-477.

66 Kerr *Law of Agency* 61. Concerning the authentication of written consent, Professor Kerr relied on various arguments to interpret the concept of written authority. Professor Kerr explained that written authority in the *Alienation of Land Act* 68 of 1981 should be interpreted to imply "their written" consent. In other words, written consent should be authenticated as that of the principal, not the agent *per se*. On the other hand, the agent could send a letter that states "I act as an agent" whereby the principal accepts this in writing or the principal might provide a letter that states

agency, the law is not clear regarding whether an agent must at all times give written consent. There are authorities that state that the agent must at all times keep the written consent whenever he concludes a transaction on behalf of the principal relevant to the purchasing or selling of land.[67] Although this last scenario falls outside the scope of this article, it illustrates the difficulties associated with statutory written consent or authority as a requirement to entitle a person to act on behalf of the principal as an agent to conclude valid contracts. If no written consent or authority has been obtained or no authentication exists, the transactions or contracts for the purchase of land entered into on behalf of the principal remain unenforceable.[68]

In *Menelaou v Gerber*[69] the High Court described in four pages the approach of the Courts regarding why written authority was not necessary for a person to renegotiate the price of land on behalf of the principal. The purchaser signed an offer to purchase and the agent renegotiated the selling price. The offer to purchase was amended to include an extra R3000. The question the High Court had to decide was whether written authority relevant to the renegotiation of the purchase price of land was required by section 2(1) of the *Alienation of Land Act*. The High Court held that written authority is only required to enter into valid contracts on behalf of the principal and is not pertinent to price negotiations. In this case, a valid contract was originally entered into by the purchaser and seller, and the *Alienation of Land Act* does not make provision for written authority when negotiating an increase in the purchase price after signature. In other words, there was a valid contract and the increase in purchase price was also agreed to by both parties, even if the negotiations occurred via an agent without written authority. To require written authority from the principal to renegotiate the purchase price is "absurd", as was held by the High Court.[70] However, the 2008 *Act* regulates the application of the *Turquand* rule in section 20(7) which reads as follows:

"You act as an agent", which the agent accepts in writing. The legal technicalities relevant to when a letter constitutes either consent or authority should be avoided.

67 Kerr *Law of Agency* 66. Professor Kerr refers to an example of written consent and refers to Professor De Wet and the Hon Mr Justice Nienaber.

68 In this regard the parties to a contract of sale of land are the proposed agent and the seller. The seller could hold the proposed agent liable as signatory to the contract.

69 *Menelaou v Gerber* 1988 3 SA 342 (T).

70 *Menelaou v Gerber* 1988 3 SA 342 (T) 346, where the Court held: "To find that an agent, verbally authorised thereto, cannot negotiate lawfully on behalf of her principal because of the concluding words of the section seems absurd." The Court referred to s 2(1) of the *Alienation of Land Act*.

> A person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement.

The above section states that a third person can assume, when dealing with a director, that this person has complied with all formal and procedural requirements in terms of the 2008 Act, including the memorandum of incorporation of the company.[71] This includes section 66(7). As long as the third person did not know or reasonably ought not to have known that a director had not complied with section 66(7), then the transactions or contracts entered into by the director on behalf of the company are valid, making the director *de facto*. However, this issue becomes complicated when a situation occurs where a director does not comply with the rules of the memorandum of incorporation or section 66(7); accordingly, the shareholders are not allowed to ratify (even by special resolution) the defect in his or her authority as regulated in section 20(3).[72] Although the latter falls outside the scope of this research, Courts will examine those circumstances and determine what weight to give them.[73] One of the advantages of the 2008 Act is that a director, shareholder or trade union of the company may apply for a Court order to prevent a director from acting as such when the requirements of section 66(7) are not fully met.[74] These parties will rely on the provisions of section 66(1), which will be discussed in the next paragraph. The consequences of section 66(1) are relevant to our discussion above and will be in conflict with the above discussion.[75]

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71 See in general *Bell Resources Holdings Pty Ltd v Commissioner for Act Revenue* (1990) 8 ACLC 533, 543, where the Court refused to accept the principles of the *Turquand* rule, where the director/secretary signed company documents and the Court held that the "transferee company with the transferor company were such that each of those three ought to have known that document had not been duly sealed." One may argue that an estate agent, due to his profession, should know the requirements of written consent when dealing with a company.

72 See in general Blackman 1993 *SALJ* 478.

73 Section 20(3) of the 2008 Act states: "An action contemplated in subsection (2) may not be ratified if it is in contravention of this Act."

74 Section 20(4) of the 2008 Act; Blackman 1993 *SALJ* 478. An illegal transaction can never be ratified by the company.

75 Section 20(2) and (7) of the2008 Act. If the authority of a *de jure* director is limited in the memorandum, and the director exceeded those limits, the shareholders can ratify the director's actions by a special resolution.

7 Arguments for valid board decisions

With regard to votes cast or board decisions, it seems that the CIPC leaves very little scope for non-compliance with section 66(7). Section 66(1) of the 2008 Act states that the board of directors manages the business and the affairs of the company. The phrase "affairs of a company" straightforwardly implies the internal relations of the company; in other words, the day-to-day resolutions relevant to the company, such as the daily administrative management of the company.[76] On the other hand, the "business of the company" implies those relationships with third parties or the external relations of the company, for example concluding contracts with third parties.[77] In the previous paragraph we focussed on the latter scenario and the relevance of the *Turquand* rule.[78] Section 66(1) continues by stating that the board manages the affairs of the company except to the extent that the Act or memorandum provides otherwise.[79] Section 66(7) states clearly that a director is entitled to serve as such when the requirements of that section are met.[80] In this regard, as long as the provisions of section 66(7) are not met the director is not entitled to participate in the affairs of the company.

In order to understand the 2008 Act it is important to refer to Australia, which embodies the current thinking on the appointment of directors. Before doing so, it should be noted that where the board knows that a director was "appointed", the law of estoppel can also be applied as if the appointment were "valid". In this regard, the board or director – depending on the circumstances – is estopped from establishing its defectiveness.[81] Although

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76 Cassim *et al, Contemporary Company Law* 417; there are no definitions in Act 2008 for affairs and business. However, the definition of business rescue in s 128(1)(b)(i) relates to the management of affairs, business and property. In s 142(1), books and records relate to the affairs of the company.

77 Delport *New Entrepreneurial Law* 66.

78 Emphasis added; Cassim *et al, Contemporary Company Law* 423.

79 See in general Blackman 1993 *SALJ* 481. Here the author discusses the internal-management principle of a company.

80 See in general *R v Mall* 1959 4 SA 607 (N) 622, where Caney J relied on the differences in appointment relevant to s 69 of the 1926 Act. Section 69 is germane only if an appointment has been made and not when no appointment has been made; also see *Inland Revenue Commissioner v Heaver* [1949] 2 All ER 367, 369.

81 *Africa's Amalgamated Theatres Ltd v Naylor* 1912 WLD 107, 114-116; *Flegg* v *McCarthy & Flegg* 1942 CPD 109, 114; *Dowjee Co Ltd* v *Waja* 1929 TPD 66 80, 86. If a *de facto* director is appointed and the shareholders take no steps to appoint the director properly, then for all practical purposes the director is appointed *de jure* as far as third persons are concerned. At 77 the word "quorum" is defined in regulation 60, but the Court held that an error had occurred in the printing of the Table. The Court did not refer specifically to the error and whether the error was eventually corrected remains unclear. Regulation 60 states: "No business shall be transacted at any general meeting unless a quorum of members is present at the time when the

the law of estoppel falls outside the scope of this article, it effectively confirms the common law position in this respect.[82] However, the relationship between estoppel and section 66(1) is unclear, since section 66(1) requires compliance with the 2008 Act (more specifically section 66(7)) and could exclude, for example, the common law principles of estoppel.[83]

8 Australia

South Africa and Australia have historically a germane United Kingdom company law foundation. Ireland is another example. Even the Irish *Companies Consolidation Act,* 1908 in section 285 defines a director as "any person occupying the position of a director by whatever name called", and section 74 states: "The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification."

meeting proceeds to business; save as herein otherwise provided, a person or persons entitled under these regulations to vote and holding not less than one-sixtieth of the share capital represented at the meeting and personally present at the meeting shall be a quorum." According to this regulation, the majority shareholder possessed 499 out of 500 shares and, strictly speaking, consisted a quorum; hence, a proper appointment as a director was made by the single shareholder who appointed himself as managing director. At 78 the Court held that a single person cannot constitute a quorum, largely as a result of the printing error in regulation 60, which existed at that time. At 80 the Court refused to consider an argument based on estoppel; Smith 1978 *MLR* 147 and 150. Before applying estoppel, a shareholder can, for example, use a derivative action to set aside the resolutions taken by directors or the board for procedural irregularities. The author argues that the resolution may still be valid even if the procedure is irregular. It would be difficult to set aside board resolutions based on defective appointments of directors. In this regard the author refers to *Browne v La Trinidad* (1887) 37 Ch D 1.

82 In Australia and the application of the law of estoppel; see *Northside Developments Pty Ltd v Registrar General* [1990] 170 CLR 146 164-165, where the High Court held the importance to strike a fine balance in the law – the interests of the applicant and the interests of the respondent – in other words consent to conclude a contract as valid based on, for example, the indoor management rule; Hargovan 2017 *Governance Directions* 111.

83 Section 66(1) of the 2008 Act states: "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." It should be noted that s 214 of the 1973 Act required some form of appointment and in that appointment an irregularity or defect occurred. If there were no appointment, s 214 had no application to *de facto* directors. See in this regard *Marrok Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd* 1975 3 SA 403 (A) 412; also see *Morris v Kanssen* [1946] AC 459 (HL) 471, where s 214 was to an extent similar to s 180 of the UK *Companies Act*, 1948 and where Lord Simmons discussed the legal differences in an appointment and no appointment relevant to s 180.

In the Australian *Corporations Act,* 2001 a director is a person who exercises influence on the board of directors.[84] However, this Act excludes professional consultants with influence over the board, such as practising solicitors (attorneys) or auditors who give advice to the board.[85] Section 201M states that any act done by a director is valid[86] even if the director's appointment was defective.[87] Section 206B regulates automatically disqualified directors. This includes an order of a Court, where a director was disqualified in a foreign jurisdiction. However, the automatic disqualification of South African directors requires no Court order; in this regard, in Australia share qualification does not constitute grounds for disqualifying a director who was disqualified in South Africa.[88] Section 201D enables director consent and should consent not be recorded, this is considered an offence. However, it is not an offence committed by the director; the company commits the offence.[89] Generally, the appointment of a temporary director should be validated by the following general meeting of shareholders of the company.[90] If this meeting does not approve the temporary appointment or if it were not approved at the said meeting, then that director automatically ceases to act as such after the meeting.[91] For a proprietary company, this meeting must take place within two months, while for a public company it must take place at the next annual general meeting of shareholders.[92] In the event of an alternate director, this director is

84 Section 9(b)(i-ii) of the *Corporations Act*, 2001 regulates both shadow directors ((b)(ii)) and *de facto* directors ((b)(i)). In the *Companies Act* 61 of 1973, *de facto* directors were not considered directors in terms of s 208, that regulates the minimum number of directors, or s 213, where share qualifications were not obtained, or s 215, pertaining to an incomplete director register; see *Re Canadian Reclaiming & Colonizing Co (Coventry & Dixon's Case)* (1880) 14 ChD 660; *L Suzman (Rand) Ltd v Yamoyani (2)* 1972 1 SA 109 (W) 113; *Re Richborough Furniture Ltd* [1996] BCLC 507; *Re Lo-Line Electric Motors Ltd* [1988] 2 All ER 692 (CA); Baxt 1976 *JBL* 211.

85 Also see s 205B(1) of the *Corporations Act*, 2001; see *Featherstone v Hambleton (As Liquidator of Ashala Pty (Ltd) (In Liq)* [2015] QCA 43, where a sole director was under the influence of a *de facto* director; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 concerning a company acting as a consultant to the board.

86 Also see s 120(1) of the *Corporations Act*, 2001.

87 Also see s 205B(1) of the *Corporations Act*, 2001.

88 Section 853A and s 206B(6) of the *Corporations Act*, 2001, which states: "A person is disqualified from managing corporations if the person is disqualified, under an order made by a Court of a foreign jurisdiction that is in force, from: (a) being a director of a foreign company; or (b) being concerned in the management of a foreign company; or (c) being a director of a passport fund, or of an operator of a passport fund; or (d) being concerned in the management of a passport fund."

89 Section 201D(3) of the *Corporations Act*, 2001.

90 Eg s 201H of the *Corporations Act*, 2001.

91 Section 201H(2)-(3) of the *Corporations Act*, 2001.

92 Section 201H(2)-(3) of the *Corporations Act*, 2001.

appointed by the approval of the existing board, which can terminate the appointment at any time. Section 201K(3) states that the actions or powers of an alternate director are "just as effective [valid] as if the powers were exercised by a director."[93] However, the appointment of an alternate director must be in writing (as must any resignation) and the company must keep a record of the written appointment or resignation. Apart from this, the 2001 Act contains no similar statutory condition to that of "entitled to serve". In other words, no written consent is personally required from an Australian director or alternate director before he or she is "entitled to serve" as such. In the *Deputy Commissioner of Taxation v Austin*[94] the Australian Federal Court considered the "entitlement" to act as a director. In this case, a director resigned but continued to work for the company by, for example, making decisions at board level and concluding transactions with third persons on behalf of the company. The question posed to the Court was whether this director was entitled to serve without any form of appointment.

The director argued that he honestly believed he had resigned as company director and no longer acted in that capacity.[95] The Court focussed on the definition of a director in section 60(a) of the *Corporations Act* 2001, which states the following:

> … a person occupying or acting in the position of a director of the body, by whatever name called and whether or not validly appointed to occupy, or duly authorised to act in, the position.

The Court held that the director signed cheques and agreements on behalf of the company during and after his resignation as if he still were a director of that company. He also, for example, negotiated with creditors regarding how much debt per month the company could repay.[96] The Court did not define "acting as director" and a restrictive interpretation of a director was adopted. For example, if a director delegated his authority to an employee of the company, the employee would not be acting as a director or as a *de facto* director.[97] Furthermore, if an employee is acting as an expert and is taking important decisions on behalf of the company, he is not acting as a

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93 My inclusion. This section is known as a replaceable rule; in other words, a company's constitution can omit or vary this section.

94 *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 56.

95 *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 56, 8 of electronic copy. The electronic copy has no page numbers, but the relevant title of the paragraph is "Family tragedies and confusion".

96 *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 56, 7 under the paragraph heading "Other activities of Mr Austin".

97 *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 56, 11-12.

director or *de facto* director.[98] In this case Mr Austin assisted the company in taking financial survival decisions during an emergency period. Although the Court held that the law is clear about who constitutes a director in terms of section 60, the emergency circumstances affecting the company could not be ignored. As a director, Mr Austin assisted the company between 17 April and 21 June 1996.[99] According to the Court, should Mr Austin have acted for a shorter period, he would not have acted as a director of the company or as a *de facto* director because the Court held the view that the wording of section 60 is very flexible. However, 17 April to 21 June is a long period, and under these circumstances he was acting within section 60. As a result of the functions Mr Austin performed, it could also not be held that he acted merely as an expert or manager or consultant to the company. He made key business decisions that were associated with the responsibilities of a director.[100] The Court thus held the following:[101]

> The test in the statute is not whether a person has done acts which only a director can lawfully do, but whether he or she has *occupied* or acted in the position of a director. Directors commonly do not confine their actions to things which only they can lawfully do. Sometimes, indeed, they do quite unlawful things while still acting as directors.

The Court did not focus on section 201M (or section 201D that requires consent) which is similar to section 214 of the *Companies Act,* 1973. The Court focussed only on the definition of a director and whether a person could occupy the position of a director irrespective of the "things which only" directors can do. Should South Africa follow a similar approach, this means that the emphasis should be solely on section 1 of the *Companies Act* 2008; the emphasis should not fall on either section 214 of the 1973 Act or on section 66(7) of the 2008 *Act*. Section 1 of the 2008 *Act* defines a director as "any person occupying the position of a director or alternate director". Since section 1 uses the same word – "occupy" – it confirms the reasoning of the *Deputy Commissioner of Taxation* case that the term "occupy" is germane from a South African perspective. Assuming that the term "occupy" has been satisfied, section 1 of the definition of a director in the South African *Companies Bill* 2007 differs from section 1 of the 2008 Act.[102]

9 Conclusion

98 *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 56, 13.
99 *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 56, 9.
100 *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 56, 15.
101 Emphasis added. *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 56, 16.
102 Cassim *et al*, *Contemporary Company Law* 408-410.

In the *Deputy Commissioner of Taxation* case the Court interpreted who can act as a director and held that an exception can exist as to when a person will not be acting as a *de facto* director. The only requirement in this regard was to act for a shorter period than 17 April to 21 June.[103] In the event of business decisions after 21 June, it seems that the application of section 201M (or section 201D) was irrelevant.[104] Without referring to section 201M in its judgment, the Court confirmed that the definition of a director has little meaning; for instance, practising solicitors who influence the decisions of the board are not *de facto* directors.[105] From a South African perspective, the focus should also be on "occupying" the position of a director and not on "entitled to serve" as a director in alignment – to a certain extent – with the *Deputy Commissioner of Taxation* case.

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103 *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 56; relevant to emergency circumstances to control a company as a director. Under emergency circumstances, the person may still be acting as an agent in terms of the *actio negotium gestor* principle. For a brief explanation of the relevance of a *gestor* as a type of agent/director, see *Dowjee Co Ltd* v *Waja* 1929 TPD 66, 69**.**

104 See para 1 of the article.

105 *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 56, 16.

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List of Abbreviations

ABLR	Australian Business Law Review
ARITA Journal	Australian Restructuring Insolvency and Turnaround Association Journal
C&SLJ	Company and Securities Law Journal
CIPC	Companies Intellectual Property Commission
DTI	Department of Trade and Industry
JBFLP	Journal of Banking and Finance Law and Practice
JBL	Journal of Business Law
LQR	Law Quarterly Review
MLR	Modern Law Review
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg