

A COMPARATIVE ANALYSIS OF THE IDENTIFICATION OF DE FACTO AND SHADOW DIRECTORS IN SOUTH AFRICA, THE UNITED KINGDOM AND AUSTRALIA

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1. INTRODUCTION

Company law on de facto and shadow directors in South Africa is disconcertingly undeveloped. The expression ‘de facto director’ connotes a person assuming powers which are reserved for a director, while the expression ‘shadow director’ connotes a person covertly influencing and controlling those acting as directors.¹ These concepts emerged to identify those who exercised a real influence in the company’s affairs and to subject those who effectively control the company’s activities to the duties and liabilities of directors.² In South Africa there is confusion whether, and to what extent, de facto and shadow directors are regulated by the South African Companies Act 71 of 2008 (the South African Companies Act), which came into force on 1 May 2011. This confusion is worrying, particularly since South Africa has become notorious for the high level of state capture of some key state-owned entities.³ It is arguable that

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¹ *Re Hydrodan (Corby) Ltd* [1994] BCC 161 at 163; *Secretary of State for Business, Innovation and Skills v. Chohan* [2013] EWHC 680 (Ch) [137].

² *Secretary of State for Trade and Industry v. Deverell and Another* [2001] Ch 340 (CA) [35]; *Ultraframe (UK) Ltd v. Fielding* [2005] EWHC 1638 (Ch) [1272]; *Chameleon Mining NL v. Murchison Metals Limited* [2010] FCA 1129 [94]. The South African Companies Act 71 of 2008 imposes fiduciary and other duties on company directors, as well as serious consequences for a failure to discharge such duties. See, for instance, s 75 (director’s personal financial interests), s 76 (standards of directors’ conduct), s 77 (liability of directors) and s 162 (application to declare directors delinquent or under probation).

³ See the Public Protector’s ‘State of Capture’ Report (Report No: 6 of 2016/17) (14 October 2016) <https://cdn.24.co.za/files/Cms/General/d/4666/3f63a8b78d2b495d88f10ed060997f76.pdf> accessed 3 August 2020. The report relates to an investigation into complaints of improper conduct by the former President of the Republic of South Africa and other state functionaries relating to the involvement and influence of the Gupta family in the removal and appointment of Cabinet Ministers and directors of state-owned entities, preferential treatment in the award of state contracts, and the award of benefits linked to companies related to the Gupta family. The implicated state-owned entities include Eskom SOC Limited, Transnet SOC Limited, South African Airways SOC Limited and the South African Broadcasting Corporation SOC Limited. The Judicial Commission of Inquiry into Allegations of State Capture, also known as the Zondo Commission of Inquiry, was launched in August 2018 to investigate allegations of state capture, corruption and fraud in the public sector including organs of state in South Africa. A broad range of evidence has been given on numerous state-capture related issues. They include accusations of state capture by the Gupta family regarding contracts that companies associated with the Gupta brothers received from state-owned entities; payment of kickbacks to secure government contracts by the EOH Group, and accusations of maladministration at key state-owned entities such as Eskom SOC

some of the persons responsible for state capture in South African state-owned entities are de facto and shadow directors who should therefore be held liable for their contraventions of the South African Companies Act. But, without a clear statutory definition of a de facto and a shadow director, there is a risk that these persons would not be properly identified as directors and could thus evade legal responsibility for their maladministration, influence and control of a company's affairs.

By contrast, company law on de facto and shadow directors in the United Kingdom (UK) and Australia is more developed than in South Africa. Recent judicial decisions in these jurisdictions have shed much light on the identification of de facto and shadow directors. Owing to similarities in the statutory definition of a 'director' in the South African Companies Act, the Companies Act 2006 in the UK (UK Companies Act) and the Corporations Act 2001 (Australian Corporations Act), useful guidance on the legal principles relating to de facto and shadow directors may be derived from these jurisdictions. These jurisdictions have been chosen because the corporate legislation in the UK and Australia has strongly influenced the South African Companies Act, and South African company law is historically based on the English system of company law. A further advantage is that company law in both the UK and Australia has recently been reviewed.⁴

This comparative approach is reinforced by section 5(2) of the South African Companies Act, which provides that, to the extent appropriate, a court interpreting or applying the Act may consider foreign law. In *Nedbank Ltd v. Bestvest 153 (Pty) Ltd; Essa v. Bestvest 153 (Pty) Ltd*⁵ the High Court observed that company law in South Africa has for many decades tracked the English system and has taken its lead from the relevant English Companies Act and jurisprudence, but that section 5(2) now encourages our courts in interpreting the South African Companies Act

Limited, South African Airways SOC Limited and the South African Broadcasting Corporation SOC Limited. Due to the high number of testimonies to be heard, the deadline for the final report of the Zondo Commission was extended to June 2021. For updated information on the processes of this inquiry, see The Judicial Commission of Inquiry into Allegations of State Capture <https://www.statecapture.org.za/> accessed 9 December 2020.

⁴ The reforms made to the UK Companies Act (of 2006) are significant. The Act repeals virtually the whole of the UK Companies Act of 1985. In addition, the Small Business, Enterprise and Employment Act 2015 made certain significant changes to the UK Companies Act (of 2006). Although company law in Australia is historically based on the company law in the UK and strongly resembles UK company law in fundamental respects, contemporary company law in Australia under the Australian Corporations Act (of 2001) is less dependent on the company law in the UK (see further C.M. Bruner, *Corporate Governance in the Common-Law World: The Political Foundations of Shareholder Power* (New York: Cambridge University Press, 2013), p. 66).

⁵ 2012 (5) SA 497 (WCC) [26].

to look further afield and to have regard in appropriate circumstances to other corporate law jurisdictions.

Referring to company law in the UK and Australia, this article analyses the extent to which the South African Companies Act impacts on de facto and shadow directors. The statutory meaning of a 'director' in the South African Companies Act is discussed, followed by an analysis as to whether the definition encompasses de facto and shadow directors. Attention is drawn to the erosion of the distinction between de facto directors and shadow directors in the UK and Australia. The definition of a 'director' in the UK Companies Act and the Australian Corporations Act is examined, and the differences between these definitions are highlighted. This investigation is done with a view to determining which definition would be more apt in the South African Companies Act. Finally, a new statutory definition of a 'director' in the South African Companies Act is proposed, modelled on Australian law and governing both de facto and shadow directors.

2 THE MEANING OF A 'DIRECTOR' IN THE SOUTH AFRICAN COMPANIES ACT

Section 1 of the South African Companies Act states that a 'director' means: a member of the board of a company, as contemplated in section 66,⁶ or an alternate director of a company and includes any person⁷ occupying the position of a director or alternate director, by whatever name designated.

⁶ The directors contemplated in s 66 are directors appointed in terms of the company's constitution; ex officio directors (a person who is a director as a consequence of holding some other office, title, designation or similar status); alternate directors (a person elected or appointed to serve as a board member in substitution for a particular elected or appointed director), and directors elected by the shareholders. The following types of directors are also recognised in South African law: (i) temporary director, being a person appointed to fill a vacancy and serve as a director on a temporary basis (see s 68(3)); (ii) nominee director, being a director who owes his or her nomination as a director to a shareholder or other third party (see *S v. Shaban* 1965 (4) SA 646 (W) at 651); and (iii) puppet director, being a person who has been placed on the board with the intention that he or she should blindly follow the instructions of his or her controller (see *S v. Shaban* 1965 (4) SA 646 (W) at 652-3). It is beyond the scope of this article to discuss the various types of directors.

⁷ A 'person' is defined in s 1 of the South African Companies Act as including a juristic person. On this basis, the reference to a 'person' in the definition of a 'director' would include a juristic person. But s 69(7)(a) of the South African Companies Act states that a person is ineligible to be a director of a company if the person is a juristic person. It follows that in South African company law, unlike in UK law (see s 155(1) of the UK Companies Act and s 87 of the Small Business, Enterprise and Employment Act 2015), a director must be a natural person, and that corporate directors are not permitted. It could be that corporate directors may be shadow directors in South African law, but this discussion is beyond the scope of this article. The issue becomes important in the context of a holding-subsidiary company relationship.

The words ‘includes any person’ in this definition indicate that the definition of a director is inclusive, and not exhaustive. It follows that the formalities regarding appointment are not crucial when attempting to identify those persons who are directors, and that the meaning of a ‘director’ must be derived from the words of the Act as a whole.⁸ Thus the core attribute to being a director is not that of being registered in the directors’ register,⁹ but whether a person is ‘occupying the position of a director’.¹⁰

The words ‘by whatever name designated’ in the definition above make it clear that certain persons are to be regarded as directors regardless of the title (if any) conferred on them. In *Re Mea Corporation Ltd, Secretary of State for Trade and Industry v. Aviss & Ors*¹¹ the Chancery Division affirmed that, in considering whether a person acts as a director, what is important is not what he calls himself, but what he did. If a person has been designated a ‘consultant’ or ‘manager’, this will not mean that that person may not be found to be a director — it will depend on the nature and extent of the functions to be performed and on the constraints imposed thereon.¹²

It is regrettable that the pivotal phrase ‘occupying the position of a director’ has not been defined in the South African Companies Act or the South African common law. In the leading case of *Corporate Affairs Commission v. Drysdale*,¹³ the High Court of Australia held that the words ‘occupies the position’, in a definition of a director nearly identical to the definition of ‘director’ in section 1 of the South African Companies Act,¹⁴ imply more than ‘holding’ a position. ‘Occupying’ a position, the court said, denotes one who acts in the position with or without lawful authority, while ‘holding’ a position denotes one who is the lawful holder of the office.¹⁵ In other words, if a person occupies the position of a director without lawful authority, he or she would nevertheless be regarded as a director. On this

⁸ *Corporate Affairs Commission v. Drysdale* (1978) 141 CLR 236 at 256; *Re Lo-Line Electric Motors Ltd* [1988] 2 All ER 692 at 699.

⁹ In terms of s 24(3)(b) of the South African Companies Act every company must maintain a record of its current and past directors for seven years. This record is open to public inspection (ss 26(1)(b) and 26(2)).

¹⁰ J. de Lacy, ‘The Concept of a Company Director: Time for a New Expanded and Unified Statutory Concept?’ (2006) *Journal of Business Law*, 267, 270. [2006] EWHC 1846 (Ch) [83].

¹¹ *Re Lo-Line Electric Motors Ltd* [1988] 2 All ER 692 at 699; *Grimaldi v. Chameleon Mining NL (No 2)* [2012] FCAFC 6 [68].

¹² (1978) 141 CLR 236 at 242. The court was tasked with interpreting s 5 of the Companies Act 1961 (Vic), which defined a director to include ‘...any person occupying the position of director of a corporation by whatever name called...’.

¹³ The only difference between the two definitions is that s 5 of the Companies Act 1961 (Vic) stated ‘by whatever name called’ while s 1 of the South African Companies Act states ‘by whatever name designated’.

¹⁴ *Corporate Affairs Commission v. Drysdale* (1978) 141 CLR 236 at 242. See further *Grimaldi v. Chameleon Mining NL (No 2)* [2012] FCAFC 6 [37] and *King & Ors v. Australian Securities and Investments Commission* [2018] QCA 352 [239].

interpretation, a person who is not formally appointed as a director of a company may still be regarded as a director under section 1 of the South African Companies Act if he or she occupies the position of a director. It is trite that a de jure director, being a person validly and formally appointed to the position of a director who has freely consented to this appointment,¹⁶ would be a director under section 1 of the South African Companies Act.

2.1 Controversy as to whether de facto directors are included in the definition of a 'director' in the South African Companies Act

A de facto director is a person who acts as a director and whom the law treats as a director even though he or she has not been formally appointed as a director.¹⁷ The question whether a person is a de facto director generally arises in regard to whether a certain liability (such as a disqualification order, liability for wrongful trading or breach of fiduciary duty) may be imposed on such person who attempts to evade such liability on the basis that he or she is not a formally appointed director.¹⁸ Two types of de facto directors have been distinguished: (i) a person who has been appointed a director but invalidly; and (ii) a person who has never been appointed a director at all.

Applying the interpretation of the phrase 'occupying the position of a director' in *Corporate Affairs Commission v. Drysdale*¹⁹ as denoting one who acts in the position with or without lawful authority, it is submitted that both types of de facto director would fall within the definition of a 'director' under section 1 of the South African Companies Act. Nonetheless, while it is settled law in South Africa that the first type of de facto director falls within the statutory definition of a director, this question is not settled with regard to the second type of de facto director, because of conflicting judicial decisions.

¹⁶ In terms of s 66(7)(b) of the South African Companies Act, for a person to be entitled to serve as a director, he or she must deliver a written consent to the company to serve as its director. A de jure director may easily be identified from the record of directors, but not a shadow director. For a discussion on the meaning of the phrase 'entitled to serve as a director' in s 66(7) of the South African Companies Act, see N. Kilian, 'Legal Implications relating to being "Entitled to Serve" as a Director: A South African-Australian Perspective' (2020) 23 *Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal* 1-27.

¹⁷ *Corporate Affairs Commission v. Drysdale* (1978) 141 CLR 236 at 242-43; *Re Hydrodan (Corby) Ltd* [1994] BCC 161 at 163; *Re Paycheck Services 3 Ltd, Revenue and Customs Commissioners v. Holland* [2011] 1 BCLC 141 [29]; *Grimaldi v. Chameleon Mining NL (No 2)* [2012] FCAFC 6 [37].

¹⁸ *Re Lo-Line Electric Motors Ltd* [1988] 2 All ER 692 at 698; *Re Paycheck Services 3 Ltd, Revenue and Customs Commissioners v. Holland* [2011] 1 BCLC 141 [82]; B. Hannigan, *Company Law* (5th edn, Oxford: Oxford University Press, 2018), p. 162.

¹⁹ (1978) 141 CLR 236 at 242.

The distinction between the two types of de facto directors was drawn in the House of Lords case of *Morris v. Kanssen and Others*.²⁰ In *R v. Mall and Others*²¹ the court, per Caney J, adopted this distinction into South African law. The court was required to consider whether a person was a de facto director within the meaning of section 185 of the Companies Act 46 of 1926, which dealt with the application of criminal provisions of insolvency law. Caney J held that a de facto director is one who has been elected or appointed to that office with a defective or irregular election or appointment, 'but not a person who in fact exercises the functions and enjoys the powers of a director without any colour of authority'.²² In other words, the court held that where no formal step had been taken to elect or appoint the person as a director, he or she would not qualify as a de facto director.

A contrary view was adopted in a subsequent decision, *S v. De Jager and Another*.²³ In this case, De Jager and Shaban had resigned and had appointed two other persons as directors, who were in effect stooges or puppets and acted on their instructions. The then Appellate Division (now the Supreme Court of Appeal) held that De Jager and Shaban were still directors within the statutory definition of a 'director'. The court held that, even though De Jager and Shaban had formally resigned as directors, they 'continued to control the company and occupied the position of directors and fell within the definition of "director" in sec. 229 of the Companies Act'.²⁴ Similarly, in *L Suzman (Rand) Ltd v. Yamoyani (2)*²⁵ the court stated that a person who has assumed and exercised the authority of a director and has de facto functioned as a director vis-à-vis the company, would fall within the statutory definition of a 'director' even though no formal step had been taken to elect or appoint him or her. *S v. Hepker and Another*²⁶ followed *S v. De Jager and Another*²⁷ and included within the ambit of the term 'director' persons 'who are not formally appointed to the board but nevertheless take part in the management, and also those who allow themselves to be used as dummies on a board by acting under the command of others'. In a subsequent case, *S v. Vandenberg and Others*,²⁸ though, the court rejected a contention that the decision in *R v. Mall and Others*²⁹ had been impliedly overruled by the Appellate Division. Instead, the court in *S v. Vandenberg and Others*³⁰ approved of the dictum in

²⁰ [1946] All ER 586 at 590.

²¹ 1959 (4) SA 607 (N) at 622.

²² Ibid.

²³ 1965 (2) SA 616 (A).

²⁴ Ibid. at 623.

²⁵ 1972 (1) SA 109 (W) at 113-14.

²⁶ 1973 (1) SA 472 (W) at 484.

²⁷ 1965 (2) SA 616 (A).

²⁸ 1979 (1) SA 208 (D) at 215.

²⁹ 1959 (4) SA 607 (N).

³⁰ 1979 (1) SA 208 (D) at 215.

*R v. Mall and Others*³¹ that a person who usurps the functions of a director or is permitted by the directors to assume these functions is *not* a de facto director and would not fall within the statutory definition of a 'director'. The decisions in *R v. Mall and Others*³² and *S v. Vandenberg and Others*,³³ though criticised, still enjoy some support.³⁴

In *Re Lo-Line Electric Motors Ltd*³⁵ the Chancery Division, per Sir Nicolas Browne-Wilkinson V.C, rejected the distinction drawn in *Morris v. Kanssen and Others*³⁶ between the two types of de facto director, on which Caney J in *R v. Mall and Others*³⁷ had relied. As pointed out in *Re Lo-Line Electric Motors*,³⁸ in *Morris v. Kanssen and Others*³⁹ the court was dealing with a section that validated the acts of a director 'notwithstanding any defect that may afterwards be discovered in his appointment or qualification', and was thus concerned with the validity of acts done, rather than with whether a person was a director in terms of the statutory definition. It could therefore be argued that it was illogical for this distinction to be invoked in *R v. Mall and Others*⁴⁰ when dealing with the statutory definition of a director.⁴¹

At the time of these decisions, the definition of a 'director' in section 229 of the Companies Act 46 of 1926 applied. It was worded in terms identical to those of the current equivalent definition in section 1 of the South African Companies Act, except that the words 'by whatever name called'

³¹ 1959 (4) SA 607 (N).

³² Ibid.

³³ 1979 (1) SA 208 (D).

³⁴ It has been argued that as the court in *R v. Mall and Others* 1959 (4) SA 607 (N) was dealing with a section which was penal in its nature, for this reason it had to construe the meaning of a de facto director strictly (see *L Suzman (Rand) Ltd v. Yamoyani* (2) 1972 (1) SA 109 (W) at 113 and J.J. du Plessis, 'Some Subtle Distinctions in the Term "Director"' (1995) 1 *Journal of South African Law* 153, 156). It has also been contended that the court in *R v. Mall and Others* 1959 (4) SA 607 (N) placed an impermissibly narrow construction on the definition of a 'director', and that the case of *S v. De Jager and Another* 1965 (2) SA 616 (A) reveals how erroneous the reasoning in *R v. Mall and Others* 1959 (4) SA 607 (N) and *S v. Vandenberg and Others* 1979 (1) SA 208 (D) is (J.S. McLennan, 'Directors' Duties and Misapplications of Company Funds' (1982) 99(3) *South African Law Journal* 394, 405-406; M.S. Blackman et al, *Commentary on the Companies Act* vol 2 (Revision Service 9, Claremont: Juta 2012) Int-7). However, for support of the decisions in *R v. Mall and Others* 1959 (4) SA 607 (N) and *S v. Vandenberg and Others* 1979 (1) SA 208 (D) see P. Delpert, *Henochsberg on the Companies Act 71 of 2008*, vol 1 (Revision Service 24, Durban: LexisNexis, 2020) 22(1) and N. Locke, 'Shadow Directors: Lessons from Abroad' (2002) 14(3) *SA Mercantile Law Journal* 420, 423.

³⁵ [1988] 2 All ER 692 at 700.

³⁶ [1946] All ER 586 at 590.

³⁷ 1959 (4) SA 607 (N).

³⁸ [1988] 2 All ER 692 at 700.

³⁹ [1946] All ER 586 (HL).

⁴⁰ 1959 (4) SA 607 (N).

⁴¹ Du Plessis, 'Some Subtle Distinctions', 157; Blackman, *Commentary on the Companies Act*, p. Int-7.

in section 229 have now been replaced with the words ‘by whatever name designated’. Given the similarity between the definition of a ‘director’ in the above cases and the current statutory definition of a ‘director’, it is not settled whether a de facto director who has never been appointed a director and who usurps the functions of a director or assumes these functions falls within the statutory definition of a ‘director’ in section 1 of the South African Companies Act.

2.2 De facto directors under the UK Companies Act and the Australian Corporations Act

A ‘director’ is defined in section 250 of the UK Companies Act in terms almost identical to those of the definition of a ‘director’ in section 1 of the South African Companies Act: that is, as including ‘any person occupying the position of director, by whatever name called’. For almost 150 years, de facto directors in English law were regarded as persons who had been appointed as directors but whose appointment was defective or had come to an end but who acted or continued to act as directors.⁴² This view changed first in *Re Lo-Line Electric Motors*⁴³ and later in *Re Hydrodan (Corby) Ltd*,⁴⁴ when the Chancery Division defined a de facto director as one who assumes to act as a director without having been appointed validly or at all. This understanding of the concept of a de facto director was approved, inter alia, by the UK Court of Appeal in *Re Kaytech International Plc*⁴⁵ and *Smithton Ltd v. Naggarr*⁴⁶ and by the UK Supreme Court in the leading case of *Re Paycheck Services 3 Ltd, Revenue and Customs Commissioners v. Holland*.⁴⁷ Thus both types of de facto directors are now recognised as directors in the UK. The approach currently adopted in the UK is that there is no single test to determine whether a person is a de facto director; instead, the question is whether the person is part of the corporate governing structure of the company and whether he or she has assumed the status and functions of a director so as to make himself or herself responsible as though he or she were a director.⁴⁸ This is a

⁴² See *Re Paycheck Services 3 Ltd, Revenue and Customs Commissioners v. Holland* [2011] 1 BCLC 141 [54].

⁴³ [1988] 2 All ER 692 at 700. The defendant had never been formally appointed as a director but was held out by the board as being a director and had behaved as such. He was held by the court to be a de facto director.

⁴⁴ [1994] BCC 161 at 163.

⁴⁵ [1999] BCC 390 at 402.

⁴⁶ [2014] BCC 482 [35].

⁴⁷ [2011] 1 BCLC 141 [93], [96].

⁴⁸ *Secretary of State for Trade and Industry v. Tjolle* [1998] BCC 282 at 290; *Re Kaytech International Plc* [1999] BCC 390 at 402; *Secretary of State for Trade and Industry v. Hollier & Ors* [2006] EWHC 1804 (Ch) [81]; *Re Paycheck Services 3 Ltd, Revenue and Customs Commissioners v. Holland* [2011] 1 BCLC 141 [93], [96]; *Smithton Ltd v. Naggarr* [2014] BCC

question of fact and degree, to be assessed objectively by reference to all the relevant evidence.⁴⁹

Australian law also recognises as a de facto director both a person who acts as a director even though not validly appointed and a person who acts as a director even if there has been no purported appointment.⁵⁰ Section 9 of the Australian Corporations Act includes in the definition of a director a person who is not validly appointed as a director if they act in the position of a director. The Full Court of the Federal Court of Australia in *Grimaldi v. Chameleon Mining NL (No 2)*⁵¹ approved of the definition of a de facto director as espoused in *Corporate Affairs Commission v. Drysdale*,⁵² as meaning one whose appointment was defective or otherwise invalid but who nonetheless exercised the office of a director; a person who held over after their appointment came to an end, or a person who occupied the office of director as a usurper. The Federal Court described a de facto director as a person 'who did not have, or no longer had, lawful authority to do so, but who nonetheless occupied the office of director'.⁵³ The approach adopted by courts in Australia, like the approach adopted by courts in the UK, is that whether a person is a de facto director will be a question of degree and requires a consideration of the duties performed by that person in the context of the operation and circumstances of the particular company.⁵⁴

2.3 Proposed definition of a de facto director in the South African Companies Act

Given the conflicting South African authority on the meaning of a de facto director, and considering the meaning of a de facto director in

482 [28], [33]; *Popely & Anor v. Popely & Ors* [2019] EWHC 1507 (Ch) [88]; P. L. Davies and S. Worthington, *Gower Principles of Modern Company Law* (10th edn, London: Sweet & Maxwell, 2016) 470; Hannigan, *Company Law*, pp. 162-64.

⁴⁹ *Secretary of State for Trade and Industry v. Tjolle* [1998] BCC 282 at 290; *Smithton Ltd v. Nagggar* [2014] BCC 482 [45]; *Secretary of State for Business, Innovation and Skills v. Chohan* [2013] EWHC 680 (Ch) [39]; *Popely & Anor v. Popely & Ors* [2019] EWHC 1507 (Ch) [88]. See further *Re Kaytech International Plc* [1999] BCC 390 at 402 and *Gemma Ltd v. Davies and Another* [2008] EWHC 546 (Ch) [40] for some of the factors considered by courts in the UK in determining whether a person is a de facto director.

⁵⁰ *Williams v. Bearing Traders Pty Ltd* [2008] NSWSC 1358; *Buzzle Operations Pty Ltd (in liq) v. Apple Computer Australia Pty Ltd* [2010] NSWSC 233 [231], [236]; *Grimaldi v. Chameleon Mining NL (No 2)* [2012] FCAFC 6 [37]; R.P. Austin and I.M. Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (17th edn, Australia: LexisNexis Butterworths, 2018) 451.

⁵¹ [2012] FCAFC 6 [37].

⁵² (1978) 141 CLR 236 at 242-43.

⁵³ *Grimaldi v. Chameleon Mining NL (No 2)* [2012] FCAFC 6 [37].

⁵⁴ *Deputy Commissioner of Taxation v. Austin* (1998) 16 ACLC 1555, 1559. See further *BCI Finances Pty Limited (in liq) v. Binetter (No 4)* [2016] FCA 1351 [244] for the factors that are considered by Australian courts in deciding whether a person is a de facto director. For a further discussion of *Deputy Commissioner of Taxation v. Austin* (1998) 16 ACLC 1555, see Kilian, 'Legal Implications relating to being "Entitled to Serve" as a Director', 20-21.

the UK and Australia, which is of strong persuasive authority in South African law, it is submitted that the definition of a ‘director’ in section 1 of the South African Companies Act should be amended so that not only a person whose purported appointment was invalid but also a person who had never been appointed but usurps or assumes the functions of a director both fall clearly within the statutory definition of a ‘director’. It is suggested that the definition should be amended by making it clear that a person may ‘occupy’ the position of a director with or without lawful authority. It is suggested that the definition should be amended as follows, with the recommended changes being shown in italics:

‘director’ 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 *with or without lawful authority*, by whatever name designated.

3. CONTROVERSY WHETHER SHADOW DIRECTORS ARE INCLUDED IN THE DEFINITION OF A ‘DIRECTOR’ IN THE SOUTH AFRICAN COMPANIES ACT

The classification of a director as a shadow director is usually performed in order to identify individuals who are influential in the running of a company but who fail to take up a formal position on the board. These individuals usually seek to avoid potential liabilities, because they are already disqualified from being a director⁵⁵ or because they prefer the anonymity of remaining off the board.⁵⁶

3.1 Statutory definition of a ‘shadow director’

Previously, the repealed Companies Act 46 of 1926 in section 70*nov*(10) contained what was, in effect, a definition of a shadow director in regard to the register of directors’ shareholdings.⁵⁷ In addition, the former Companies Act 61 of 1973 in section 219(1)(b)(ii) read with section 219(4)(a) recognised a shadow director in the context of listing the grounds under which a court could disqualify a director or officer.⁵⁸

⁵⁵ See s 69 of the South African Companies Act for a list of the circumstances in which a person would be disqualified from being a director.

⁵⁶ Hannigan, *Company Law*, p. 167.

⁵⁷ Section 70*nov*(10) of the Companies Act 46 of 1926 provided that, for the purposes of section 70*nov* (directors’ shareholdings), any person in accordance with whose directors or instructions any director of a company was accustomed to act should be deemed to be a director of the company. This section was not retained in the Companies Act 61 of 1973 or the current South African Companies Act.

⁵⁸ In terms of s 219(4)(a) of the Companies Act 61 of 1973, the reference to an ‘officer’

The current South African Companies Act does not provide a definition of a shadow director. The Act only mentions the concept of a shadow director in section 56(2)(f) relating to a beneficial interest in securities. Under this provision, a person is regarded as having a beneficial interest in a security of a public company if the security is held *nomine officii* by another person on that first person's behalf, or (inter alia) if that first person gives directions or instructions to a juristic person that has a beneficial interest in that security, and its directors or the trustees are accustomed to act in accordance with that person's directions or instructions. Although this requirement relates to identifying the beneficial owners of securities and does not extend to identifying shadow directors, it is worded very similarly to the statutory definition of a shadow director in the UK Companies Act and the Australian Corporations Act. At best, this requirement perhaps indicates that the South African legislature was aware of the concept of shadow directors.

In sharp contrast to the South African Companies Act, both the UK Companies Act and the Australian Corporations Act explicitly define a 'shadow director'. Thus section 251(1) of the UK Companies Act defines a 'shadow director' as follows:

'Shadow director'

1. In the Companies Acts 'shadow director', in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act.
2. A person is not to be regarded as a shadow director by reason only that the directors act –
 - a. on advice given by that person in a professional capacity;
 - b. in accordance with instructions, a direction, guidance or advice given by that person in the exercise of a function conferred by or under an enactment;⁵⁹

for the purposes of disqualification proceedings in terms of s 219(1)(b)(ii) was to be construed as including a reference to any person in accordance with whose directions or instructions the directors of the company had been accustomed to act. Section 1(2) of the Companies Act 61 of 1973 provided that a person would not be deemed to be a person in accordance with whose directions or instructions the directors of a company were accustomed to act by reason only that the directors of the company acted on advice given by him in a professional capacity. These provisions were not retained in the current South African Companies Act.

⁵⁹ An 'enactment' is defined in s 1293 of the UK Companies Act as including an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978; an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales; an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament, and an enactment contained in, or in an instrument made under, Northern Ireland legislation within the meaning of the

- c. in accordance with guidance or advice given by that person in that person's capacity as a Minister of the Crown (within the meaning of the Ministers of the Crown Act 1975).⁶⁰

Unlike the UK Companies Act, the Australian Corporations Act does not contain a separate definition of a 'shadow director' but incorporates the definition of a 'shadow director' within the definition of a 'director', without explicitly using the term 'shadow director'. Section 9 of the Australian Corporations Act defines a 'director' as follows:

director of a company or other body means:

- (a) a person who:
 - (i) is appointed to the position of a director; or
 - (ii) is appointed to the position of an alternate director and is acting in that capacity;regardless of the name that is given to their position; and
- (b) unless the contrary intention appears, a person who is not validly appointed as a director if:
 - (i) they act in the position of a director; or
 - (ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.

Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body.

Courts in the UK and Australia have shed much light on the statutory interpretation of a 'shadow director'. The phrase 'accustomed to act' has been interpreted to mean a habitual compliance over a period of time or a pattern of behaviour.⁶¹ It has been held that it is sufficient if a governing majority of the board are accustomed to act in accordance with the directions of the shadow director, but not an individual director.⁶²

Interpretation Act 1978.

⁶⁰ A 'Minister of the Crown' is defined in s 8(1) of the Ministers of the Crown Act 1975 as meaning the holder of an office in Her Majesty's Government in the UK, and includes the Treasury, the Board of Trade and the Defence Council.

⁶¹ *Re Hydrodan (Corby) Ltd* [1994] BCC 161 at 163; *Ultraframe (UK) Ltd v. Fielding* [2005] EWHC 1638 (Ch) [1273]; *Chameleon Mining NL v. Murchison Metals Limited* [2010] FCA 1129 [98]; *Buzzle Operations Pty Ltd (in liq) v. Apple Computer Australia Pty Ltd* [2011] NSWCA 109 [198]; *Re Akron Roads Pty Ltd (in liquidation) (No 3)* [2016] VSC 657 [271].

⁶² *Re Unisoft Group Ltd (No 2)* [1994] BCC 766 at 775; *Ultraframe (UK) Ltd v. Fielding* [2005] EWHC 1638 (Ch) [1272]; *Buzzle Operations Pty Ltd (in liq) v. Apple Computer Australia Pty Ltd* [2011] NSWCA 109 [196]-[197]; *Re Akron Roads Pty Ltd (in liquidation) (No 3)* [2011] NSWCA 109 [271].

It has further been held that whether a particular communication is to be classified as a direction or instruction must be ascertained objectively in the light of all the evidence.⁶³ The instructions must be given to the directors so as to affect their decisions as directors, and not in some other capacity.⁶⁴ It should be noted that there must be a causal connection between the instructions and the directors acting on those instructions.⁶⁵ In other words, it is not sufficient if the act that was specified in the instructions is something that the directors would do irrespective of the instructions.⁶⁶ It has also been held that it is not necessary in all cases to show that the de jure directors or some of them act in a subservient manner or surrender their discretion to the shadow director.⁶⁷ It should also be noted that the influence of a shadow director need not be exercised over the whole range of a company's activities or all facets of the company's business.⁶⁸ In other words, in identifying a shadow director courts do not necessarily look for directions or instructions over the 'whole field' of directors' decisions.⁶⁹

As the South African Companies Act does not contain a definition of a 'shadow director', it is not clear whether a shadow director is implicit in the definition of a 'director' in section 1. It is submitted that the definition of a 'director' in the South African Companies Act would nevertheless include a shadow director because of the phrase 'occupying the position of a director', which has been interpreted to denote one who acts in this position with or without lawful authority.⁷⁰ Support for this view is found in *Carlyle Capital Corporation Limited v. Conway*⁷¹ where the Royal Court of Guernsey stated *obiter* that a shadow director would 'occupy the position

⁶³ *Secretary of State for Trade and Industry v. Deverell and Another* [2001] Ch 340 (CA) [35].

⁶⁴ *Gemma Ltd v. Davies and Another* [2008] EWHC 546 (Ch) [40]; *Buzzle Operations Pty Ltd (in liq) v. Apple Computer Australia Pty Ltd* [2011] NSWCA 109 [196]-[197]; *Re Coroin Ltd (No 2)* [2012] EWHC 2343 [594].

⁶⁵ *Buzzle Operations Pty Ltd (in Liq) v. Apple Computer Australia Pty Ltd* [2010] NSWSC 233 [244]; *Buzzle Operations Pty Ltd (in liq) v. Apple Computer Australia Pty Ltd* [2011] NSWCA 109 [196]-[197].

⁶⁶ *Buzzle Operations Pty Ltd (in Liq) v. Apple Computer Australia Pty Ltd* [2010] NSWSC 233 [247]; *Buzzle Operations Pty Ltd (in liq) v. Apple Computer Australia Pty Ltd* [2011] NSWCA 109 [196]-[197].

⁶⁷ *Secretary of State for Trade and Industry v. Deverell and Another* [2001] Ch 340 (CA) [35]; *Re Akron Roads Pty Ltd (in liquidation) (No 3)* [2016] VSC 657 [271].

⁶⁸ *Australian Securities Commission v. AS Nominees Ltd* [1995] FCA 1663 [334]; *Grimaldi v. Chameleon Mining NL (No 2)* [2012] FCAFC 6 [69]; *Secretary of State for Trade and Industry v. Deverell and Another* [2001] Ch 340 (CA) [35]; *Re Mea Corporation Ltd, Secretary of State for Trade and Industry v. Avoiss & Ors* [2006] EWHC 1846 (Ch) [89]; *Buzzle Operations Pty Ltd (in liq) v. Apple Computer Australia Pty Ltd* [2011] NSWCA 109 [202]; *Smithton Ltd v. Nagggar* [2014] BCC 482 [32]; *BCI Finances Pty Limited (in liq) v. Binetter (No 4)* [2016] FCA 1351 [243]; *Re Akron Roads Pty Ltd (in liquidation) (No 3)* [2016] VSC 657 [271].

⁶⁹ *Buzzle Operations Pty Ltd (in liq) v. Apple Computer Australia Pty Ltd* [2011] NSWCA 109 [202].

⁷⁰ See *Corporate Affairs Commission v. Drysdale* (1978) 141 CLR 236 at 242.

⁷¹ Royal Court of Guernsey, Judgment 38/2017, unreported [745].

of director'. The court stated as follows:

[A] person could "occupy the position of director" of a company by issuing directions or instructions to its *de iure* directors which those directors were accustomed to act upon, and thus that person would be a director of the company....

Griffin also argues, in relation to the definition of a 'director' in the UK Companies Act, that the term 'director' should include a shadow director in so far as a shadow director is a 'person occupying the position of director, by whatever name called'.⁷²

A contrary argument is that shadow directors are not included in the definition of a 'director' in section 1 of the South African Companies Act because if they were, the definition would have to be read as saying 'any person, directly or indirectly, occupying the position of a director'.⁷³ In reply to this argument, it is submitted that the words 'directly or indirectly' would be redundant because, as discussed above, the phrase 'occupying the position of a director' denotes one who acts in the position with or without lawful authority.⁷⁴ In other words, it is already implied in the words 'occupying the position of a director' that a person who acts in the position of a director without lawful authority does so indirectly.

3.2. Shadow directors construed as 'prescribed officers' under the South African Companies Act

An alternative view in the literature is that a shadow director would not fall within the definition of a 'director' in section 1 of the South African Companies Act, but would be a prescribed officer because of his or her influence on major decisions of the company.⁷⁵ Section 1 of the South African Companies Act provides that a 'prescribed officer' means a person who, within a company, performs any function that has been designated by the Minister of Trade and Industry in terms of section 66(10). Section 66(10) empowers the Minister to make any regulations designating any specific functions within a company to constitute a prescribed office for purposes of the Act. The Minister subsequently

⁷² S. Griffin, 'Confusion Surrounding the Characteristics, Identification and Liability of a Shadow Director' (2011) 24(3) *Insolvency Intelligence* 44, 47.

⁷³ K. Idensohn, 'The Regulation of Shadow Directors' (2010) 22(3) *SA Mercantile Law Journal* 326, 339.

⁷⁴ *Corporate Affairs Commission v. Drysdale* (1978) 141 CLR 236 at 242.

⁷⁵ Idensohn, 'The Regulation of Shadow Directors', 343; K. Idensohn, 'The Meaning of "Prescribed Officers" under the Companies Act 71 of 2008' (2012) 129(4) *South African Law Journal* 717, 724; Delpont, *Henochsberg on the Companies Act 71 of 2008*, p. 32(2).

determined in regulation 38 of the Companies Regulations, 2011⁷⁶ (the South African Companies Regulations) as follows:

1. Despite not being a director of a particular company, a person is “prescribed officer” of the company for all purpose of the Act if that person –
 - a. exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or
 - b. regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.
2. This regulation applies to a person contemplated in subregulation (1) irrespective of any particular title given by the company to –
 - a. an office held by the person in the company; or
 - b. a function performed by the person for the company.

It is submitted that, for a number of reasons, a shadow director cannot be construed to be a prescribed officer. First, in order to qualify as a prescribed officer, the relevant person must exercise control or participate in the control over the ‘whole, or a significant portion, of the business and activities of the company’. By contrast, as previously discussed, the influence of a shadow director need not be exercised over the whole range of a company’s activities.⁷⁷ In identifying a shadow director, courts do not necessarily look for directions or instructions over the ‘whole field’ of directors’ decisions.⁷⁸ Consequently, if shadow directors were construed to be prescribed officers, this would mean that persons who exercised control in only a few aspects of the company’s business and activities, as opposed to the ‘whole, or a significant portion’ of the company’s business and activities, would not fall within the definition of a ‘prescribed officer’ and could thus evade liability for their actions.

Secondly, there are further respects in which the definition of a ‘prescribed officer’ does not accord with the concept of a shadow director. A prescribed

⁷⁶ Published under GN R351 in GG 34239 of 26 April 2011.

⁷⁷ *Australian Securities Commission v. AS Nominees Ltd* [1995] FCA 1663 [334]; *Grimaldi v. Chameleon Mining NL (No 2)* [2012] FCAFC 6 [69]; *Secretary of State for Trade and Industry v. Deverell and Another* [2001] Ch 340 (CA) [35]; *Re Mea Corporation Ltd, Secretary of State for Trade and Industry v. Aviss & Ors* [2006] EWHC 1846 (Ch) [89]; *Buzzle Operations Pty Ltd (in liq) v. Apple Computer Australia Pty Ltd* [2011] NSWCA 109 [202]; *Smithton Ltd v. Naggar* [2014] BCC 482 [32]; *BCI Finances Pty Limited (in liq) v. Binetter (No 4)* [2016] FCA 1351 [243]; *Re Akron Roads Pty Ltd (in liquidation) (No 3)* [2016] VSC 657 [271].

⁷⁸ *Buzzle Operations Pty Ltd (in liq) v. Apple Computer Australia Pty Ltd* [2011] NSWCA 109 [202].

officer is defined in regulation 38(1)(b) of the South African Companies Regulations as one who ‘regularly participates to a material degree’ in the business and activities of the company. Participating to a material degree is far removed from influencing the directors to act in accordance with one’s instructions or directions. The dictionary meaning of ‘participate’ is to ‘be involved’ or to ‘take part’.⁷⁹ In *Morley & Ors v. Australian and Securities Investments Commission*,⁸⁰ the New South Wales Court of Appeal affirmed that ‘participate’ means ‘to take part in’. The court stated further that ‘participation’ connotes active participation which must be real and direct, but not necessarily in a role in which ultimate control is exercised.⁸¹ In *Shafron v. Australian Securities and Investments Commission*⁸² and *Grimaldi v. Chameleon Mining NL (No 2)*,⁸³ the High Court of Australia and the Full Court of the Federal Court of Australia respectively agreed that ‘participate’ does not mean ‘ultimate control’. A shadow director’s actions go much further than the notion of participation because they involve an element of control. As was stated in *Buzzle Operations Pty Ltd (in liq) v. Apple Computer Australia Pty Ltd*,⁸⁴ the vital factor regarding a shadow director is that he or she has the potential to control. As the definition of a prescribed officer in regulation 38(1)(b) of the South African Companies Regulations requires participation and not control, it does not accord with the concept of a shadow director. Moreover, regulation 38(2)(a) of those regulations refers to an ‘office held’ by the person in the company, which a shadow director does not do because he or she occupies an office in the company, rather than holding it. From these aspects of regulation 38, the discussion now moves to consider the position regarding declarations of delinquency against shadow directors.

Thirdly, if shadow directors were regarded as prescribed officers, this classification would enable them to evade being declared delinquent under section 162 of the South African Companies Act. Under section 162(2), a person may be declared delinquent if that person is a director of the company or within the 24 months immediately preceding the delinquency application he or she was a director of the company, and breached one of the delinquency grounds listed in section 162(5). The effect of declaring a person delinquent is that he or she is disqualified from being a director of a company for as long as the declaration remains in force.⁸⁵

⁷⁹ See A. Stevenson (ed) *Oxford Dictionary of English* 3 ed (2015) https://0-www-oxfordreference-com.oasis.unisa.ac.za/view/10.1093/acref/9780199571123.001.0001/m_en_gb0607280?rskey=gCvknB&result=9 accessed 3 August 2020.

⁸⁰ [2010] NSWCA 331 [883] per the New South Wales Court of Appeal (Spigelman CJ, Beazley JA and Giles JA) quoting the trial judge (Gzell J) [338].

⁸¹ *Ibid.*

⁸² [2012] HCA 18 [22].

⁸³ [2012] FCAFC 6 [73].

⁸⁴ [2010] NSWSC 233 [230].

⁸⁵ Section 69(8)(a).

Under sections 162(5)(a) and 162(6)(a) of the South African Companies Act, a declaration of delinquency made on the ground that a person acted in the capacity of a director or prescribed officer while ineligible or disqualified (in terms of section 69) subsists for the lifetime of the person declared delinquent. On this basis, a court is empowered to disqualify a director or prescribed officer from acting as a director for his or her lifetime. Except for section 162(5)(a), the delinquency grounds listed in section 162(5) apply explicitly to directors, and not to prescribed officers. Some of these grounds are that, while a director, the person grossly abused the position of director; took personal advantage of information or an opportunity; intentionally or by gross negligence inflicted harm upon the company; or acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust.⁸⁶ Consequently, if a shadow director were construed to be a prescribed officer and breached one or more of the delinquency grounds in section 162(5), he or she could evade being declared delinquent on the basis that he or she would not be a director. This outcome would seem illogical, particularly when the allegation that a person is a shadow director usually arises in disqualification proceedings.⁸⁷ In sharp contrast, certain provisions of the Company Directors Disqualification Act 1986 in the UK apply specifically to shadow directors. So, for example, under sections 6, 7 and 8 of the Company Directors Disqualification Act 1986, which relate to the disqualification of a director on a finding of unfitness, the Secretary of State may apply to court to have a director or a shadow director disqualified where the Secretary of State considers it expedient in the public interest to do so.⁸⁸ In South Africa, it would be particularly illogical and unfair if the de jure directors on the board were to be declared delinquent on the basis that one or more of the delinquency grounds listed in section 162(5) of the South African Companies Act were breached, while the shadow director could escape this consequence even though he or she

⁸⁶ See s 162(5) of the South African Companies Act for all the grounds of delinquency. The persons who may bring a delinquency application against a director include the company, a shareholder, a director, the company secretary, a prescribed officer, a registered trade union or employee representative, the Companies and Intellectual Property Commission, the Takeover Regulation Panel and an organ of state. A declaration of delinquency on all grounds save for a breach of section 162(5)(a) subsists for seven years from the date of the court order or such longer period as determined by the court in its discretion (s 162(6)(b)(ii)). On the delinquency application, see further *Gihwala v. Grancy Property Limited* 2017 (2) SA 337 (SCA); *Organisation Undoing Tax Abuse and Another v. Myeni and Others* [2020] 3 All SA 578 (GP); R. Cassim, 'Delinquent Directors under the Companies Act 71 of 2008: *Gihwala v Grancy Property Limited* 2016 ZASCA 35' (2016) 19 *Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal* 1-28; R. Cassim, *The Removal of Directors and Delinquency Orders under the South African Companies Act* (Claremont: Juta, 2020) 227-300; R Cassim, 'Declaring Directors of State-Owned Entities Delinquent: *Organisation Undoing Tax Abuse v Myeni*' (2021) 138(1) *South African Law Journal* 1-20.

⁸⁷ *Re Lo-Line Electric Motors Ltd* [1988] 2 All ER 692 at 698; *Re Paycheck Services 3 Ltd, Revenue and Customs Commissioners v. Holland* [2011] 1 BCLC 141 [82]; Hannigan, *Company Law*, p. 162.

⁸⁸ See ss 6(3C) and 22(5) of the Company Directors Disqualification Act 1986.

had also breached the relevant delinquency ground, and might even have influenced the de jure directors to do so.

For all these reasons, it is therefore submitted that a shadow director should not be construed to be a ‘prescribed officer’.

It is submitted that, in clear amending legislation, the South African legislature should put an end to the uncertainty in South Africa as to whether a shadow director would fall within the definition of section 1 of the South African Companies Act. Proposed amendments are discussed in paragraph 5 of this article.

4. EROSION OF THE DISTINCTION DRAWN BETWEEN DE FACTO AND SHADOW DIRECTORS IN THE UK AND AUSTRALIA

In *Re Hydrodan (Corby) Ltd*⁸⁹ Millet J distinguished a de facto director from a shadow director by describing the former as one who claims to act and purports to act as a director although not validly appointed as such, and the latter as one who does not claim or purport to act as a director, but ‘lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself’. This distinction between a de facto director and a shadow director was subsequently eroded in *Secretary of State for Trade and Industry v. Deverell and Another*,⁹⁰ however, where the UK Court of Appeal stated that ‘lurking in the shadows’ is not necessary to the recognition of a shadow director. The court held that a person may be a shadow director notwithstanding that he or she takes no steps to hide the part he or she plays in the company’s affairs.⁹¹ The court cautioned against using metaphors for shadow directors such as describing the board as the ‘cat’s paw,’⁹² puppet⁹³ or dancer to the tune of the shadow director⁹⁴

⁸⁹ [1994] BCC 161 at 163.

⁹⁰ [2001] Ch 340 (CA) [36]. This case related to shadow directors under the Company Directors Disqualification Act 1986 but the court referred to relevant case law on shadow directors that was decided under the UK Companies Act of 1985, which applied at the time of this decision. The definitions of a ‘director’ and a ‘shadow director’ under the Company Directors Disqualification Act 1986 and the UK Companies Act are identical.

⁹¹ *Secretary of State for Trade and Industry v. Deverell and Another* [2001] Ch 340 (CA) [36].

⁹² See *Re Unisoft Group Ltd (No 2)* [1994] BCC 766 at 775 where the directors were described as the ‘cat’s paw’ of the shadow director.

⁹³ A shadow director has also been described as the puppet master controlling the actions of the board (*Re Unisoft Group Ltd (No 2)* [1994] BCC 766 at 775; *Chameleon Mining NL v. Murchison Metals Limited* [2010] FCA 1129 [96]).

⁹⁴ In *Australian Securities Commission v. AS Nominees Ltd* [1995] FCA 1663 [337] the Federal Court of Australia stated that the idea behind the concept of shadow directors is that the third party ‘calls the tune and the directors dance in their capacity as directors’.

as they imply a degree of control in excess of the statutory definition.⁹⁵

It was further maintained in *Re Hydrodan (Corby) Ltd*⁹⁶ that the concepts of a de facto and a shadow director do not overlap but are alternatives, and in most cases are mutually exclusive. This distinction has now been eroded by courts in the UK and Australia, who no longer regard de facto and shadow directors as being alternatives or fundamentally different.⁹⁷ Instead, the common element that the courts look to identify is those with 'real influence' in the corporate affairs of the company.⁹⁸ In the recent English case of *Popely & Anor v. Popely & Ors*⁹⁹ the court affirmed that a de facto and shadow director have the common characteristic of persons who exercise real influence, other than as professional advisers, over the corporate governance of a company. Sometimes that influence may be concealed and at other times it may be open or 'something of a mixture',¹⁰⁰ and thus it is not entirely clear which of the two descriptions is most apposite.¹⁰¹ Similarly, in *Grimaldi v. Chameleon Mining NL (No 2)*,¹⁰² the Full Federal Court of Australia adopted the position that a rigid distinction between a de facto and a shadow director cannot be maintained, 'as in both instances their real influence in the affairs of the company may be a measure of the actual role they have in it'.

As the role of a shadow director does not necessarily extend over the whole range of a company's activities, it is possible for a person to be both a de facto and a shadow director, consecutively or simultaneously.¹⁰³ An example of this possibility given by the court in *Re Mea Corporation Ltd, Secretary of State for Trade and Industry v. Aviss & Ors*¹⁰⁴ is that a person may

⁹⁵ *Secretary of State for Trade and Industry v. Deverell and Another* [2001] Ch 340 (CA) [36]. See further *Buzzle Operations Pty Ltd (in Liq) v. Apple Computer Australia Pty Ltd* [2010] NSWSC 233 [240] where the Supreme Court of New South Wales also cautioned against using metaphors to describe shadow directors.

⁹⁶ [1994] BCC 161 at 163.

⁹⁷ *Re Kaytech International Plc* [1999] BCC 390 at 402; *Re Paycheck Services 3 Ltd, Revenue and Customs Commissioners v. Holland* [2011] 1 BCLC 141 [91], [110]; *Grimaldi v. Chameleon Mining NL (No 2)* [2012] FCAFC 6 [61], [69]; *Smithton Ltd v. Naggar* [2014] BCC 482 [34]; *Popely & Anor v. Popely & Ors* [2019] EWHC 1507 (Ch) [85].

⁹⁸ *Re Kaytech International Plc* [1999] BCC 390 at 402; *Re Paycheck Services 3 Ltd, Revenue and Customs Commissioners v. Holland* [2011] 1 BCLC 141 [91], [110]; *Smithton Ltd v. Naggar* [2014] BCC 482 [34]; *Popely & Anor v. Popely & Ors* [2019] EWHC 1507 (Ch) [85].

⁹⁹ [2019] EWHC 1507 (Ch) [85].

¹⁰⁰ *Re Kaytech International Plc* [1999] BCC 390 at 402.

¹⁰¹ *Secretary of State for Trade and Industry v. Hollier & Ors* [2006] EWHC 1804 (Ch) [81].

¹⁰² [2012] FCAFC 6 [61], [69].

¹⁰³ *Re Mea Corporation Ltd, Secretary of State for Trade and Industry v. Aviss & Ors* [2006] EWHC 1846 (Ch) [89]; *Buzzle Operations Pty Ltd (in Liq) v. Apple Computer Australia Pty Ltd* [2010] NSWSC 233 [231], [236]; *Re Paycheck Services 3 Ltd, Revenue and Customs Commissioners v. Holland* [2011] 1 BCLC 141 [127]; *Secretary of State for Business, Innovation and Skills v. Chohan* [2013] EWHC 680 (Ch) [46]; *Instant Access Properties (in liq) v. Rosser* [2018] BCC 751 at 792; *Popely & Anor v. Popely & Ors* [2019] EWHC 1507 (Ch) [85].

¹⁰⁴ [2006] EWHC 1846 (Ch) [89].

assume the functions of a director as regards one part of the company's activities (such as marketing) and at the same time give instructions to the board regarding another part of the company's activities (such as manufacturing and finance), thus rendering him or her a de facto and a shadow director at the same time. In this event, the capacity in which the person acts in relation to the company will depend on the nature of the act.¹⁰⁵ In *Secretary of State for Business, Innovation and Skills v. Chohan*,¹⁰⁶ the defendant was found to have been both a de facto and a shadow director. The court held that when the defendant was involved in making certain financial decisions, such as those relating to loans and dividends, he was acting as a de facto director, but that in other instances where he was exercising a real influence in the management of the company, such as sending instructions by email from abroad, he was a shadow director.¹⁰⁷ Although a person may be both a de facto and a shadow director simultaneously, in *Popely & Anor v. Popely & Ors*¹⁰⁸ the court held that it is not possible for an act to be simultaneously carried out in the capacity of both a de facto director and a shadow director. Consequently, it is possible for a person to be both a de facto director and a shadow director, but an act itself can have been carried out only in the capacity of either a de facto or a shadow director.

As pointed out in *McKillen v. Misland (Cyprus) Investments Ltd*,¹⁰⁹ even though the distinction drawn between de facto and shadow directors has been blurred, this does not mean that the distinction has altogether disappeared; for the most part, it remains. Nevertheless, it is evident that courts in the UK and Australia are moving away from a prescriptive approach to the identification of de facto and shadow directors and focusing instead on who exercises 'real influence' on the company's affairs.¹¹⁰

5. PROPOSED DEFINITION OF A SHADOW DIRECTOR IN THE SOUTH AFRICAN COMPANIES ACT

It is submitted that, to dispel all doubt, the South African Companies Act should be amended so that, like the law in the UK and Australia,

¹⁰⁵ *Popely & Anor v. Popely & Ors* [2019] EWHC 1507 (Ch) [85], [88].

¹⁰⁶ [2013] EWHC 680 (Ch).

¹⁰⁷ *Secretary of State for Business, Innovation and Skills v. Chohan* [2013] EWHC 680 (Ch) [49]. See further *Featherstone v. DJ Hambleton as liquidator of Ashala Pty Ltd (in liq)* [2015] QCA 43 [56], where the appellant was held to be both a de facto director and a shadow director.

¹⁰⁸ [2019] EWHC 1507 (Ch) [88].

¹⁰⁹ [2012] EWHC 521 [34].

¹¹⁰ For a critique of the blurring of the distinction drawn between de facto and shadow directors see C. Noonan and S. Watson, 'The Nature of Shadow Directorship: Ad Hoc Statutory Intervention or Core Company Law Principle' (2006) *Journal of Business Law*, 763-98 and Griffin, 'Confusion Surrounding the Characteristics, Identification and Liability of a Shadow Director', 44-47.

it clearly incorporates shadow directors. It is necessary to highlight the differences between the statutory definition of a 'shadow director' under the UK Companies Act and the Australian Corporations Act in order to determine which of the two definitions would be more apt in the South African Companies Act.

The essential difference between the two definitions is that the UK Companies Act draws a definitional distinction between shadow directors and other directors, while the Australian Corporations Act treats 'directors' as encompassing shadow directors. Since the distinction drawn between de facto and shadow directors has been largely eroded by courts in the UK and Australia, as discussed above, it is submitted that South Africa should follow the approach adopted in Australia.

Under the Australian Corporations Act, the statutory duties under the Australian Corporations Act apply to de jure, de facto and shadow directors, unless the context indicates otherwise. The extended definition of a director in section 9(b) of the Australian Corporations Act does not apply if 'a contrary intention appears'. Examples of provisions for which a de facto or shadow director would not be included in the term 'director' are the power to call meetings of a company's members (section 249C), the signing of minutes of meetings (section 251A(3)), and the notice to the Australian Securities and Investments Commission (ASIC) of a change of address (section 205B).¹¹¹

By contrast, under section 170(5) of the UK Companies Act the general statutory duties¹¹² owed by a director to the company apply to a shadow director 'where and to the extent they are capable of so applying'.¹¹³ The Secretary of State may by regulations provide for prescribed general duties of directors to apply to shadow directors with such adaptations as may be prescribed, and for prescribed general duties not to apply to shadow directors.¹¹⁴ It is not yet settled in the UK whether the common-law fiduciary duties (which do not fall under the statutory provisions) apply to shadow directors. In *Ultraframe (UK) Ltd v. Fielding*,¹¹⁵ Lewison J held that the mere fact that a person falls within the statutory definition of a 'shadow director' is not enough to impose on him or her

¹¹¹ See the note to the definition of a 'director' in s 9 of the Australian Corporations Act where these examples are provided.

¹¹² The general duties, specified in ss 171 to 177 of the UK Companies Act, deal with a directors' duty to act within powers; duty to promote the success of the company; duty to exercise an independent judgment; duty to exercise reasonable care, skill and diligence; duty to avoid conflicts of interest; duty not to accept benefits from third parties; and the duty to declare an interest in a proposed transaction or arrangement.

¹¹³ Section 170(5) was substituted by s 89(1) of the Small Business, Enterprise and Employment Act 2015, and came into effect from 26 May 2015.

¹¹⁴ Sections 89(2) and (3) of the Small Business, Enterprise and Employment Act 2015.

¹¹⁵ [2005] EWHC 1638 (Ch) [1284].

the same fiduciary duties as are owed by a de jure or de facto director. In *Vivendi SA v. Richards*,¹¹⁶ though, Newey J rejected this view and held that Lewison J had understated the extent to which shadow directors owe fiduciary duties. Instead, Newey J stated that a shadow director will typically owe these common-law fiduciary duties in relation at least to the directions or instructions that he or she gives to the de jure directors.¹¹⁷ In *Sukhoruchkin & Ors v. Van Bekestein & Ors*,¹¹⁸ the UK Court of Appeal stated that it appears from the differing approaches in these two cases that the law is not settled regarding the circumstances in which a shadow director owes fiduciary duties. It should be noted that the approach adopted in *Ultraframe (UK) Ltd v. Fielding*¹¹⁹ has been strongly criticised.¹²⁰

The fiduciary duties of directors in South African law are derived from both the Companies Act and the common law. Section 76 of the South African Companies Act, which partially codifies the fiduciary duties of directors, includes the duty to avoid a conflict of interest,¹²¹ the duty to communicate information to the company, the duty to act in good faith and for a proper purpose, and the duty to act in the best interests of the company.¹²² Although section 76 does not cover all the common-law fiduciary duties of directors, such as the duty to exercise an unfettered discretion,¹²³ it does not

¹¹⁶ [2013] EWHC 3006 (Ch) [143].

¹¹⁷ *Vivendi SA v. Richards* [2013] EWHC 3006 (Ch) [143].

¹¹⁸ [2014] EWCA Civ 399 [41].

¹¹⁹ [2005] EWHC 1638 (Ch) [1284].

¹²⁰ For a critique of the approach adopted in *Ultraframe (UK) Ltd v. Fielding* [2005] EWHC 1638 (Ch), see Davies and Worthington, *Gower Principles of Modern Company Law*, p. 473; Hannigan, *Company Law*, pp. 173-74; D.D. Prentice and J. Payne, 'Directors' Fiduciary Duties' (2006) 122 *Law Quarterly Review* 558, 562, Griffin, 'Confusion Surrounding the Characteristics, Identification and Liability of a Shadow Director', 46 and C.R. Moore 'Obligations in the Shade: The Application of Fiduciary Directors' Duties to Shadow Directors' (2016) 36(2) *Legal Studies* 326-53, who argue that shadow directors ought to owe the same duties to a company as any other type of director.

¹²¹ Sections 76(2)(a)(i) and (ii) state that a director must not use the position of director, or any information obtained while acting in the capacity of director to gain an advantage for the director, or for another person other than the company or a wholly owned subsidiary of the company, or to knowingly cause harm to the company or a subsidiary of the company. For a further discussion see F.H.I. Cassim, 'The duties and liability of directors' in F.H.I. Cassim (ed), *Contemporary Company Law* (2nd edn, Claremont: Juta, 2012), 549-53.

¹²² Sections 76(2) and (3) of the South African Companies Act. Section 76(3)(c) also imposes on directors a duty of care, skill and diligence.

¹²³ See *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) at 163 and *Mthimunye-Bakoro v Petroleum and Oil Corporation of South Africa (SOC) Ltd and Another* 2015 (6) SA 338 (WCC) [1]-[2]. Even though the duty to exercise an unfettered discretion is not explicitly referred to in the South African Companies Act it could be regarded as being an aspect of the duty of a director to act in the best interests of the company (A. Keay, 'The Duty of Directors to Exercise Independent Judgment' (2009) 29(10) *Company Lawyer* 290, 290; Cassim, *Contemporary Company Law*, pp. 529).

exclude the application of the common-law fiduciary duties. Consequently, the common-law fiduciary duties still apply to directors to the extent that they are not expressly amended by section 76 or are not in conflict with section 76.¹²⁴ Although there is no clear judicial pronouncement on the application of fiduciary and other duties to shadow directors in South African law, courts appear to have adopted the approach that a person will not escape liability for the duties of a director on the ground that he or she was not formally appointed to the office of a director.¹²⁵ It is submitted that the preferable approach to be adopted in South Africa is the approach adopted under the Australian Corporations Act, which subjects shadow directors to the same duties as de jure directors, unless the context indicates otherwise. It is further submitted that shadow directors in South Africa should be subjected to both the statutory and the common-law fiduciary duties, including those common-law fiduciary duties that are not encompassed in section 76.¹²⁶ Since the distinction drawn between a de facto and a shadow director has now been largely eroded, it is difficult to sustain an argument that only de facto directors should be subject to fiduciary duties.¹²⁷ Moreover, as the court in *Vivendi SA v. Richards*¹²⁸ said, a shadow director's role in a company's affairs may be every bit as important as that of a de facto director, and de facto directors are considered to owe fiduciary duties.¹²⁹ Public policy also points towards the imposition of fiduciary duties on shadow directors.¹³⁰

¹²⁴ *Mthimunye-Bakoro v. Petroleum and Oil Corporation of South Africa (SOC) Ltd and Another* 2015 (6) SA 338 (WCC) [61]; *Omar v. Inhouse Venue Technical Management (Pty) Ltd and Others* 2015 (3) SA 146 (WCC) [61]; *CDH Invest NV v. Petrotank South Africa (Pty) Ltd and Another* [2018] 1 All SA 450 (GJ) [47], [61].

¹²⁵ See *Robinson v. Randfontein Estates Gold Mining Co Ltd* 1921 AD 168; *S v. Shaban* 1965 (4) SA 646 (W) at 652; *S v. De Jager and Another* 1965 (2) SA 616 (A) and *S v. Hepker and Another* 1973 (1) SA 472 (W) at 484. In *S v. De Jager and Another* 1965 (2) SA 616 (A), the court held that a director who had resigned and had secured the appointment of a puppet in his place remained bound by the fiduciary and other duties of a director. In *S v. Hepker and Another* 1973 (1) SA 472 (W) at 484, the court stated those who are not formally appointed to the board but nevertheless take part in management will not escape liability on the ground that he or she was not formally appointed to the office of director. See further McLennan, 'Directors' Duties', 403; Locke, *Shadow Directors*, 425 and Idensohn, 'The Regulation of Shadow Directors', 326.

¹²⁶ Based on the approach adopted in the UK in *Ultraframe (UK) Ltd v. Fielding* [2005] EWHC 1638 (Ch) [1284], Idensohn argues that it is not clear whether the common-law fiduciary duties of directors would apply to shadow directors in South Africa (Idensohn, 'The Regulation of Shadow Directors', 344). As discussed earlier, the approach adopted in *Ultraframe (UK) Ltd v. Fielding* [2005] EWHC 1638 (Ch) [1284] was subsequently rejected in *Vivendi SA v. Richards* [2013] EWHC 3006 (Ch) [143] and has been strongly criticised.

¹²⁷ Hannigan, *Company Law*, p. 174.

¹²⁸ [2013] EWHC 3006 (Ch) [142].

¹²⁹ De facto directors owe to the company the same fiduciary and other duties as would a de jure director of that company (*Shepherds Investments Ltd & Anor v. Walters & Ors* [2006] EWHC 836 (Ch) [73]-[81]; *Statek Corporation v. Alford and Another* [2008] EWHC 32 (Ch) [107]; *Ingram (Liquidator of MSD Cash & Carry plc) v. Singh* [2018] BCC 886 [114]; *Instant Access Properties (in liq) v. Rosser* [2018] BCC 751 at 791 and 802).

¹³⁰ *Vivendi SA v. Richards* [2013] EWHC 3006 (Ch) [142].

Another difference between the statutory definition of a ‘shadow director’ in the UK Companies Act and the Australian Corporations Act is that, while section 251(1) of the UK Companies Act refers to ‘directions or instructions’ in accordance with which the directors of the company are accustomed to act, section 9(b)(ii) of the Australian Corporations Act refers to ‘instructions or wishes’. In *Buzzle Operations Pty Ltd (in liq) v. Apple Computer Australia Pty Ltd*¹³¹ the court said that ‘wishes’ cover a wider field than ‘directions’. For this reason, it is submitted that the proposed definition of a ‘shadow director’ in section 1 of the South African Companies Act should incorporate the term ‘wishes’ as well.

Both sections 251(2) of the UK Companies Act and section 9(b) of the Australian Corporations Act protect a professional adviser from being classified as a shadow director on the basis that the directors act on advice given by that person in a professional capacity. This exemption is designed to protect professional advisers such as financiers, lawyers and accountants by ensuring that everyday professional advice given to directors is not frustrated because of concerns over these advisers acquiring the status of shadow directors.¹³² In *Secretary of State for Trade and Industry v. Deverell and Another*,¹³³ the UK Court of Appeal opined that ‘advice’ is capable of being a ‘direction’ or ‘instruction’ because all three share the feature of ‘guidance’. However, it is to be noted that, unlike ‘advice’, directions and instructions involve an element of compulsion.¹³⁴ Whether a particular communication from an alleged shadow director is to be classified as a direction or instruction must be ascertained objectively in the light of all the evidence, and does not depend on the understanding of either the giver or the receiver.¹³⁵ If the conduct of an adviser goes beyond the normal scope of his or her professional capacity and is tantamount to controlling the company’s affairs, he or she will be construed to be a shadow director.¹³⁶ As stated in *Re Tasbian Ltd (No 3)*,¹³⁷ the dividing line between the position of an adviser and that of a shadow director is difficult to draw. The crucial factor is whether the directors have a choice whether to accept the advice.¹³⁸

It is regrettable that the South African Companies Act does not contain a similar exception regarding advice given in a professional capacity. Section 1(2) of the previous South African Companies Act 61 of 1973

¹³¹ [2011] NSWCA 109 [187].

¹³² De Lacy, ‘The Concept of a Company Director’, 282.

¹³³ [2001] Ch 340 (CA) [35].

¹³⁴ M.D. Hobson, ‘The Law of Shadow Directorships’ (1998) 10(2) *Bond Law Review* 184, 209.

¹³⁵ *Secretary of State for Trade and Industry v. Deverell and Another* [2001] Ch 340 (CA) [35].

¹³⁶ See *Re Tasbian Ltd (No 3)* [1992] BCC 358 at 364.

¹³⁷ [1991] BCC 435 at 443.

¹³⁸ *Re PFTZM* [1995] BCC 280 at 292.

contained a provision which was worded in terms almost identical to those of section 251(2) of the UK Companies Act, in the context of listing the grounds under which a court could disqualify a director or officer.¹³⁹ This provision of the Companies Act 61 of 1973 was not retained in its successor provisions, sections 69 (ineligibility and disqualification) and 162 (application to declare directors delinquent) of the South African Companies Act. An equivalent exception ought to be incorporated in the South African Companies Act, particularly because section 72(2) of the South African Companies Act entitles a board committee to consult with or receive advice from any person.¹⁴⁰ As advice may be construed to be a direction or instruction, it is vital to protect professional advisers on board committees from being construed to be shadow directors (unless, of course, their advice goes beyond the normal scope of their professional capacity).

In the exception regarding professional advice, section 9(b) of the Australian Corporations Act differs from its equivalent in section 251(2) of the UK Companies Act by going further and qualifying the professional capacity in which the adviser acts. Section 251(2) of the UK Companies Act provides that a person is not to be regarded as a shadow director by reason only that the directors act on advice given by that person in a professional capacity. A qualification to section 9(b)(ii) of the Australian Corporations Act states that section 9(b)(ii) does not apply merely because the directors act on advice given by the person 'in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company'. So, for example, *legal advice* given by an outside lawyer would fall within the scope of advice given in the proper performance of functions attaching to his or her professional capacity, but *financial advice* given by that outside lawyer would probably not.¹⁴¹ This proviso would also be important to bankers and other financiers who are not usually regarded as acting in a professional capacity in these circumstances.¹⁴² Since this qualification in section 9(b)(ii) of the Australian Corporations Act is more precise than the one incorporated in section 251(2) of the UK Companies Act, it is submitted that a similar precise qualification should be incorporated in section 1 of the South African Companies Act.

Accordingly, it is submitted that *section 1 of the South African Companies Act* should be amended as follows, the recommended changes being shown in italics:

¹³⁹ See note 58 above.

¹⁴⁰ This provision is subject to the company's constitution or a resolution establishing the committee.

¹⁴¹ Hobson, 'The Law of Shadow Directorships', 209.

¹⁴² *Ibid.*

‘director’ means –

- a 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 *with or without lawful authority*, by whatever name designated; and
- b *unless the contrary intention appears, a person who is not validly appointed as a director if the directors of the company are accustomed to act in accordance with the person’s directions, instructions or wishes.*

Subparagraph (b) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person’s professional capacity, or the person’s business relationship with the directors or the company;

6. CONCLUSION

The definition of a ‘director’ in section 1 of the South African Companies Act fails to provide certainty over whether both types of de facto directors are covered by the definition. It further fails to provide certainty whether a shadow director is encompassed in such definition. It was argued, above, that by virtue of the words ‘occupying the position of a director’, both a person who has been invalidly appointed a director and one who has never been appointed a director would be encompassed in the definition, and so would a shadow director. It was further argued that a shadow director should not be construed to be a prescribed officer as defined in the South African Companies Regulations. Nonetheless, because of conflicting authorities and the absence of a clear judicial pronouncement on this issue, the matter remains unsettled in South African law.

This threefold uncertainty (about the two types of de facto director and the shadow director) creates an obstacle to achieving directors’ full accountability for their mismanaged companies. It was argued that the South African legislature should amend the definition of a ‘director’ in section 1 of the South African Companies Act so that the definition unequivocally recognises both types of de facto directors as well as shadow directors. This amendment would bring the definition of a ‘director’ in the South African Companies Act into line with the equivalent provisions of the UK Companies Act and the Australian Corporations Act, which have influenced many of its provisions. This proposed amendment is reinforced by the purpose of the South African Companies Act in section 7(e) of continuing to provide for the creation and use of companies in a manner that enhances the economic welfare of South Africa as a partner

within the global economy. It would further accord with the purpose in section 7(j) of encouraging the efficient and responsible management of companies.

It was argued, above, that since less emphasis is now placed on the distinction between a de facto and shadow director, it would be preferable for the South African Companies Act to adopt a similar approach to that of the Australian Corporations Act, where the definition of a 'director' has been expanded to incorporate de facto and shadow directors, as opposed to having a separate definition of a 'shadow director', as under the UK Companies Act. This expansive approach would make clear that shadow directors are subject to the same duties as de jure directors, unless the context indicates otherwise. Provision should also be made to protect professional advisers from being construed to be shadow directors.

In the context of state capture in South Africa, one practical effect of subjecting shadow directors to the same duties as de jure directors, would be that, in terms of section 77(2)(a) of the South African Companies Act, shadow directors might be held liable in accordance with the common-law principles relating to a breach of fiduciary duties, for any loss, damages or costs sustained by the company as a consequence of a breach of fiduciary duties. For example, if a shadow director were to influence a state-owned entity to award certain contracts to companies associated with him or her, that shadow director might be held liable for any loss, damages or costs sustained by the company as a consequence of the breach of the fiduciary duties to act in good faith and in the best interests of the company. In addition, shadow directors involved in state capture might be held liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of having been a party to an act by the company despite knowing that it had a fraudulent purpose.¹⁴³ It should be noted that such a director's liability is joint and several with any other person who may be held liable for the same act.¹⁴⁴ Imposing liability on those who covertly influence and control the company would also serve to improve corporate governance practices in companies by correlating legal responsibility and accountability with significant influence and control.¹⁴⁵ It is hoped that holding de facto and shadow directors accountable for their actions would encourage responsible corporate behaviour in South Africa and would serve to address the high level of state capture and corporate maladministration prevalent in South African companies and, in particular, in state-owned entities.

¹⁴³ See s 77(3)(c) of the South African Companies Act.

¹⁴⁴ Section 77(6) of the South African Companies Act.

¹⁴⁵ Idensohn, 'The Regulation of Shadow Directors', 344.