THE RIGHT OF A DIRECTOR TO PARTICIPATE IN THE MANAGEMENT OF A COMPANY: KAIMOWITZ V DELAHUNT 2017 (3) SA 201 (WCC)

REHANA CASSIM
Senior Lecturer in Law, University of South Africa, Pretoria
Attorney and Notary Public of the High Court of South Africa

I INTRODUCTION

Section 66(1) of the Companies Act 71 of 2008 (the 2008 Act) empowers the board of directors of a company to manage the business and affairs of a company, save to the extent that the Companies Act or the company's Memorandum of Incorporation (MoI) provides otherwise. While this provision may at first blush appear unexceptional, it is far from it! Section 66(1) of the 2008 Act is an innovative provision in the 2008 Act in that, for the first time in South Africa's corporate law history, the Companies Act has conferred a statutory power and responsibility to manage the business and affairs of the company on the board of directors. In *Kaimowitz v Delahunt* 2017 (3) SA 201 (WCC) the Western Cape Division of the High Court in Cape Town (the court) was confronted with an important question regarding section 66(1) of the 2008 Act: to what extent do the powers of a company director include involvement in the day-to-day management of a company's business? This note critically analyses the judgment, explores some of the implications of section 66(1) of the 2008 Act, and addresses the relevant employment-law aspects of this case arising from the applicant being both a director and an employee of the company.

II THE FACTS

The applicant was one of five directors of a company. He was also a full-time employee, and an executive director of the company. In May 2016, the applicant received a letter from the company stating that he would no longer be employed by the company. The letter stated that while the applicant would remain a director of the company, his status would now be that of a non-executive director. The applicant was further informed in the letter that he would be entitled to exercise all his rights as a director as provided in both the 2008 Act and the company's

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MoI. It asserted that while the applicant could still attend all directors' meetings, he would no longer be entitled to participate in any management meetings by virtue of the termination of his employment, and, further, that he would no longer be involved in the day-to-day management of the company's business.

As a result of his exclusion from the daily management of the company's business, the applicant launched legal proceedings against the company and its directors. He contended that his dismissal as an employee had been unlawful — a contention which, at the time of the judgment, was the subject of a dispute before the Commission for Conciliation, Mediation and Arbitration (the CCMA), and was not a matter before the court. In the proceedings before the court, the applicant sought an order in terms of section 163 of the 2008 Act, which empowers a director to apply to court for relief from oppressive or unfairly prejudicial conduct. The applicant wished to restrain the directors of the company from barring, interfering with, or in any way preventing him from taking part in the management of the company's business for so long as he remained a director of the company. He further required the board of directors to give him reasonable prior written notice of all management meetings relevant to the business and the affairs of the company. He also requested an order directing that, for so long as he was a director of the company, the directors hold bi-monthly management meetings with him. The applicant also sought an order interdicting and restraining the board of directors and the company from taking any steps which would interfere with his power to take part in the management of the company's business while he was a director of the company.

The applicant's claim that the conduct of the directors was oppressive and unfairly prejudicial to him, was based on his claim that the directors had acted contrary to section 66(1) of the 2008 Act by creating the post of non-executive director for him. This action, the applicant argued, prevented him from fulfilling his lawful obligations as a director, which, he contended, included the management of the company. By virtue of section 66(1) of the 2008 Act, and despite his tenure as an employee of the company having been terminated, the applicant contended that he was entitled, as of right, to participate in the day-to-day business of the company.

The question before the court was whether the applicant was entitled as of right to participate in the day-to-day management of the company's affairs and whether the conduct of the company and the board of directors had indeed been oppressive and unfairly prejudicial to him.

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The court was consequently required to determine the extent to which the powers of a director include involvement in the day-to-day management of a company's business.

III THE JUDGMENT

Davis J held that the overall supervision of the management of a company resides in its board of directors (as opposed to individual directors) which may delegate the management powers to a managing director and/or to a committee of the board (paras 21 and 27). In coming to this conclusion, the court relied on the Australian cases of *Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson* (1995) 16 ACSR 607 (*Daniels v Anderson*), and *Australian Securities and Investments Commission v Healey* [2011] FCA 717 (*ASIC v Healey*). The judge found that the involvement of a director in the affairs of the company must be assessed in terms of enabling that director to perform the duties falling to him as a result of his appointment as a director (para 26). Therefore, each director does not necessarily have to be involved in the day-to-day running of a company's business; nor does each director have to sit on every board committee (para 26). It follows, the court said, that a director is not, as of right, entitled to participate in the day-to-day running of the company's affairs (para 26). Davis J accordingly held that the applicant was not entitled to attend the management meetings (as opposed to board meetings) of the company.

In light of this finding by the court, it was held that the only relief to which the applicant was entitled, would be in terms of any act performed by the board of directors of the company which had undermined, prevented, or reduced his ability to perform his functions as a director of the company (para 27). The court found that the applicant had not made out a case that the actions of the board of directors had impeded or obstructed his capacity to act as a director and to fulfil his fiduciary responsibilities to the company (para 34). The application for relief under section 163 of the 2008 Act was consequently rejected.

IV ANALYSIS AND DISCUSSION

(a) Source of director's power under the 2008 Act

Until the end of the nineteenth century it was generally accepted that the general meeting was the personification and supreme organ of the company, and that the directors were simply its agents subject to the control of the company in general meeting (*Isle of Wight Railway Co v*

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Tahourdin (1883) 25 Ch D 320 (CA); Davies & Worthington, *Gower & Davies' Principles of Modern Company Law* 10 ed (Sweet & Maxwell 2016) 358; Blackman, Jooste, Everingham et al, *Commentary on the Companies Act* vol 2 (Juta 2002 revision service 9, 2012) 7–14). Since the powers conferred upon the directors (as agents) were regarded as having been conferred upon them by the shareholders (as principals), it was deduced that the directors were subject to the control of the shareholders in general meeting (Blackman, Jooste, Everingham et al, 7–14). The implication of this view was that the shareholders could at any time by ordinary resolution give the directors instructions on how they were to exercise their powers of management (Davies & Worthington, 358).

Under the repealed Companies Act 61 of 1973 (the 1973 Act) the power to manage the company's affairs had to be delegated to the board of directors by the shareholders in general meeting, or by the articles of association of the company (art 59 of Table A, the articles for a public company having a share capital; and art 60 of Table B, the articles for a private company having a share capital). If no powers were granted to the board of directors through the articles of association, the board would be powerless to act and the company could act only through its shareholders. Directors, therefore, had no original powers. Section 66(1) of the 2008 Act has now firmly swung the pendulum towards the board of directors as the supreme organ of the company. The section states as follows:

> 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.

With the enactment of section 66(1) of the 2008 Act, original power to manage the business and affairs of the company has, for the first time, been given to the board of directors by statute. The power of the directors is no longer a power delegated by the shareholders through the constitution of the company. As the High Court affirmed in *Pretorius v PB Meat (Pty) Ltd* (1057/2013) [2013] ZAWCHC 89 (14 June 2013) para 25 and *Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd* [2014] JOL 32101 (WCC) para 31, in terms of the 2008 Act, the ultimate power in a company now rests with the board of directors and not the shareholders (unless otherwise provided in the 2008 Act or the company's MoI).

The effect of section 66(1) of the 2008 Act is that the statute itself allocates the powers of management to the board of directors as a whole,

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save to the extent that the 2008 Act or the company's MoI provides otherwise. The MoI may be amended by the shareholders by means of a special resolution or, if necessary, by complying with any different requirements set out in the MoI (s 16(1) and (2) of the 2008 Act). The shareholders are therefore not without power, and they may curtail the powers of the board of directors in the MoI. Interestingly, there are limitations to the exercise of this power by the shareholders in that: (i) a special resolution to amend the MoI must be proposed by shareholders entitled to exercise at least ten per cent of the voting rights that may be exercised on the resolution (s 16(1)*(c)*(i)*(bb)*); (ii) the threshold for passing a special resolution may be increased in terms of section 65(10) of the 2008 Act (s 65(10)); and (iii) in terms of section 16(2) of the 2008 Act, more onerous requirements to amend a company's MoI may be specified in the MoI than those specified in section 16(1)*(c)*(i). Therefore, while the shareholders do have the power to curtail the powers of the board of directors in the MoI and to amend the MoI in order to do so, there are some limitations on their exercise of this power.

In contrast to the 2008 Act, the Companies Act of 2006 of the United Kingdom (the UK Companies Act of 2006) contains no provision conferring management or decision-making power on the board of directors. Instead, it is left to the constitution of the company to determine the distribution of decision-making power between the board of directors and the shareholders (see arts 3 and 4 of the Model Articles for Private Companies Limited by Shares and the Model Articles for Public Companies). This is known as the 'contractarian model', or 'English-model companies', or 'memorandum and articles' model of companies (see Welling, Smith & Rotman, *Canadian Corporate Law Cases, Notes & Materials* 4 ed (LexisNexis 2010) 114; Kershaw, *Company Law in Context* 2 ed (OUP Oxford 2012) 85–93; and Oosthuizen & Delport, 'Rectification of the securities register of a company and the oppression remedy' (2017) 80 *THRHR* 228 at 232–233). In terms of the UK Companies Act of 2006, the constitution of a company is to be treated as a contract between all of the shareholders and the company itself (s 33(1) of the UK Companies Act of 2006 which states that the provisions of a company's constitution bind the company and its members to the same extent as if they were covenants on the part of the company and of each member to observe those provisions. See further Welling, Smith & Rotman, 115; Davies & Worthington, 58–59; and Bruner, *Corporate Governance in the Common-Law World: The Political Foundations of Shareholder Power* (Cambridge University Press 2013) 35–36). The managerial power of the board of directors in the UK does

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not, therefore, arise from statute and is not an original power, but is delegated by the shareholders through the constitution of the company, and is derivative of a contract (Welling, Smith & Rotman, 115; Kershaw, 191–192; Bruner, 36). The originating power of the company in the UK therefore lies with the shareholders and not with the directors. It is, accordingly, a shareholder-centric approach (Bruner, 32).

In sharp contrast to the position in the UK, under the Revised Model Business Corporation Act 1984 (the MBCA) of the United States of America (USA) the power to manage the company is conferred on the board of directors by statute. Section 8–01*(b)* of the MBCA states that corporate powers are exercised by or under the authority of the board of directors, and that the business and affairs of the corporation are managed by or under the direction of its board of directors. It is clear that the powers of the directors flow from the statute itself. This approach also retains flexibility in respect of the constitution in that the default rules may be changed by the company's constitution (s 2.20*(b)* of the MBCA). In similar vein, section 141*(a)* of the Delaware General Corporation Law states that the 'business and affairs of every corporation ... shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.' This approach is known as the 'division-of-powers' model because the statute expressly divides powers within the corporate constitution between shareholders and directors (see Welling, Smith & Rotman, 116–117; Davies & Worthington, 59; and Bruner, 36–65 for a further discussion of this model).

Likewise, under section 198A of the Australian Corporations Act of 2001 the management of the business of a company is a matter for the company's directors. Section 198A(1) states that the business of a company is to be managed by or under the direction of the directors. Section 198A(1) is a replaceable or alterable rule, meaning that it may be ousted or modified by the constitution of the company. As is the position under section 66(1) of the 2008 Act, under section 198A(2) of the Australian Corporations Act of 2001, the powers of the directors may be curtailed by the Australian Corporations Act of 2001 or by the company's constitution. Despite the presence of section 198A(1) in the Australian Corporations Act of 2001, this statute is to a large degree shareholder-centric, as is the position under company law in the UK in which Australian company law is historically rooted (a detailed discussion of the approach adopted in Australia is beyond the scope of this note, but see Bruner, 66–77 and Austin & Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* 16 ed (LexisNexis 2015) para 1.020).

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To sum up, the essential difference between the contractarian and the division-of-powers models, is that the former model is shareholder-centric and leaves the distribution of decision-making power between the board of directors and the shareholders to the constitution of the company, while the latter model is director-centric and expressly, in the statute, apportions powers between the directors and the shareholders.

In essence, the 2008 Act appears to have moved away from the contractarian model to the division-of-powers model. The allocation of powers is now sourced in legislation via section 66(1) of the 2008 Act, save where it is changed by the 2008 Act or by the MoI of the company (see *Kaimowitz v Delahunt* para 13; Cassim et al, *Contemporary Company Law* 2 ed (Juta 2012) 124; Delport, *Henochsberg on the Companies Act 71 of 2008* (LexisNexis 2011) (revision service 16, 2018) 250(3); Esser & Delport, 'Shareholder protection philosophy in terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1 at 9 and Oosthuizen & Delport, (2017) 80 *THRHR* 228 at 244). It is however arguable that to some extent the 2008 Act has adopted a hybrid model in that it does retain certain elements of the contractarian model (see Oosthuizen & Delport, (2017) 80 *THRHR* 228 at 245). For instance, section 15(6) of the 2008 Act, which is analogous to section 33(1) of the UK Companies Act of 2006, provides that a company's MoI and any rules of the company are binding between the company and each shareholder. Section 15(6) of the 2008 Act goes further than section 33(1) of the UK Companies Act of 2006, in that it provides that the company's MoI is also binding between or among the shareholders of the company, and between the company and each director or prescribed officer of the company or any other person serving the company as a member of a board committee, in the exercise of their respective functions within the company. The fact that the power of the board of directors is now sourced in the 2008 Act does not mean that the statute does not confer any powers on the company's shareholders. For example, section 71(1) of the 2008 Act gives shareholders the power to remove directors from office by means of an ordinary resolution, without cause, and despite anything to the contrary in the company's MoI, or any agreement between the company and a director, or between any shareholders and a director. This power reflects the shareholder-oriented governance system in the UK (see Bruner, 29–30). A detailed discussion of the division of powers between the directors and shareholders of a company under the 2008 Act is beyond the scope of this note, but see Esser & Delport, 'Shareholder protection philosophy in terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1 at 8–14 for a further discussion of this issue.

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(b) The entitlement of a director to be involved in the day-to-day running of the company's affairs

As stated above, in *Kaimowitz v Delahunt* the court relied on the Australian case of *Daniels v Anderson* to hold that a director does not have a right to be involved in the day-to-day running of the company's business (para 19). In *Daniels v Anderson* the New South Wales Court of Appeal stated that '[d]irectorial management does not require a detailed inspection of day-to-day activities, but rather a general monitoring of corporate affairs and policies' (667). In *ASIC v Healey* the Federal Court of Australia endorsed this sentiment and asserted that '[d]irectors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company' (para 166). Relying on these dicta, Davis J held that the description of the role of a director in *Daniels v Anderson* serves to illustrate that the day-to-day management of a company may be delegated to a managing director and/or to committees of the board as chosen by the board, as opposed to each individual director, as of right, having the power to involve him- or herself in the day-to-day operations of the company (para 21).

Section 66(1) of the 2008 Act is worded very similarly to section 198A(1) of the Australian Corporations Act of 2001 which states that the 'business of a company is to be *managed by or under the direction* of the directors' (my emphasis). It has been said that the words 'managed by the directors' are potentially misleading since boards of directors, particularly in large companies, can do little more than supervise and monitor the performance of the managers who make business decisions (Austin & Ford, para 7.091).

Section 66(1) of the 2008 Act is notably also worded very similarly to section 8.01*(b)* of the MBCA, which states that 'the business and affairs of the corporation shall be managed *by or under the direction*, [my emphasis] and subject to the oversight, of the board of directors.' Section 8.01*(b)* of the MBCA was amended in 1974 to include the words 'or under the direction of' the board of directors. The reason for the amendment was due to increasing concern that the traditional words 'managed by the board of directors' could be interpreted to mean that directors were required to become involved in the detailed day-to-day administration of the company's affairs (see Model Business Corporation Act Annotated 4 ed vol 2 (American Bar Association 2013) 8–9). It was recognised that, at least for public companies, this language did not accurately describe the role of directors (see Olson & Briggs, 'The Model Business Corporation Act and corporate governance: An enabling statute moves towards normative standards' (2011) 74 *Law and Contem-*

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porary Problems 31 at 32). In order to eliminate any ambiguity as to the director's role in formulating management policy, as opposed to direct involvement in the day-to-day management of companies, the wording was amended to include the words 'under the direction of' the board of directors. The MBCA went further in 2005 and inserted the phrase 'subject to the oversight' of the board of directors in section 8.01*(b)* of the MBCA. These words were inserted in section 8.01*(b)* of the MBCA in order to reflect a contemporaneous amendment to section 8.30*(b)* of the MBCA (dealing with the standards of conduct for directors) in order to differentiate between the board's decision-making functions and its oversight functions (see Model Business Corporation Act Annotated 8–10).

The power conferred on the board of directors under section 66(1) of 2008 Act extends to both the 'business' and the 'affairs' of the company. It is broader than the previous article 59 of Table A and article 60 of Table B under the 1973 Act, which referred only to directors managing the 'business' of the company (Havenga, 'Directors' exploitation of corporate opportunities and the Companies Act 71 of 2008' (2013) *TSAR* 258 at 262). In *Ex Parte Russlyn Construction (Pty) Ltd* 1987 (1) SA 33 (D) 36–37, Didcott J drew a distinction between the power to control the business of a company and the power to control its affairs, and stated that the power to manage the 'affairs' of the company is a wider concept than the power to manage the company's business alone (37). (See further *Ex parte New Seasons Auto Holdings (Pty) Ltd* 2008 (4) SA 341 (W) 345, where the court agreed with this interpretation by Didcott J.)

As the 2008 Act has, in the main, moved away from the contractarian model to the division-of-powers model, and as section 66(1) of the 2008 Act is worded very similarly to section 198A(1) of the Australian Corporations Act of 2001 and section 8.01*(b)* of the MBCA, it is submitted that the interpretation of the phrase 'by or under the direction' of the board of directors under both these foreign Acts, as discussed above, is of persuasive authority in South African law. This submission is bolstered by section 5(2) of the 2008 Act, which states that, to the extent appropriate, a court interpreting or applying the 2008 Act may consider foreign law. In this regard, it is submitted that, in agreement with *Kaimowitz v Delahunt*, under section 66(1) of the 2008 Act, the board of directors is not required to be involved in the day-to-day management of the company's affairs but rather should play a monitoring role over the management of the company. It follows that an individual director does not have a right or entitlement to be involved in the day-to-day management of the company's business.

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This finding in *Kaimowitz v Delahunt* is in harmony with section 7*(j)* of the 2008 Act. This provision states that one of the purposes of the 2008 Act is to encourage the efficient and responsible management of companies. It is submitted that as it is impractical for the board of directors as a whole directly and actively to manage the day-to-day business and affairs of a company — particularly a large company — it is indeed efficient and responsible for the board to adopt a monitoring role over the management of the company, and to delegate the running of the day-to-day business and affairs of the company to an individual director, such as a managing director.

The fact that directors may delegate the day-to-day management of the company's affairs is bolstered by section 72(1)*(b)* of the 2008 Act. This section provides that, save to the extent that the company's MoI provides otherwise, the board may delegate any of its authority to any committee. Additionally, in the context of the business-judgment rule in section 76(4) of the 2008 Act, section 76(4)*(b)*(i)*(bb)* provides that a director is entitled to rely on the performance by any of the persons to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions which may be delegated under applicable law. This notwithstanding, while directors may delegate their functions, there are limitations on their power of delegation in that total abrogation is not permitted as directors must supervise the discharge of the delegated functions and they may not delegate responsibility for the task in question (see s 76(3) of the 2008 Act; *Re Barings plc (No 5)* [1999] 1 BCLC 433 (ChD); Cassim et al, *Contemporary Company Law* 2 ed (Juta 2012) 561 and Delport, *Henochsberg on the Companies Act 71 of 2008* 250(5) for a further discussion of this principle).

Since the power to manage the company's business vests in the board of directors as a whole, as opposed to individual directors, in assessing the role and involvement of a particular director in a company it must be determined what powers to manage the day-to-day affairs of the company have been specifically delegated to him or her by the board of directors. In this regard, the King Report on Corporate Governance for South Africa 2016 (the King IV Report) usefully suggests that delegation to an individual member of the board of directors should be recorded in writing and approved by the board (para 41 at 54 of the King IV Report. See also principle 8 of the King IV Report on the board's power of delegation). It is further suggested that the record should set out the nature and extent of the responsibilities delegated, the decision-making authority, the duration of the delegation, and the delegate's reporting responsibilities (para 41 at 54 of the King IV Report).

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It was affirmed by the High Court in *Makate v Vodacom (Pty) Limited* (08/20980) [2014] ZAGPJHC 135 (1 July 2014) para 166, that individual directors have only the authority that the board delegates to them, or that is delegated to them by someone authorised to do so. In *Kaimowitz v Delahunt* the applicant had been informed that by virtue of the termination of his employment, he would no longer be entitled to attend management meetings. The right to attend to the day-to-day management of the company had, therefore, not been delegated to the applicant. As the applicant was unable to establish that the directors of the company had obstructed his capacity to act as a director or to fulfil his duties, it is submitted that the court correctly dismissed his application based on section 163 of the 2008 Act. While the decision in *Kaimowitz v Delahunt* is useful in clarifying the roles of boards of directors and of individual directors, the practical effect of the judgment would depend on the outcome of the applicant's dismissal dispute before the CCMA. This is discussed below.

(c) Directors as employees of the company

The dismissal of the applicant as an employee of the company was, at the time of this judgment, subject to a dispute before the CCMA the outcome of which could have a substantial impact on the applicant's position in the company.

Executive directors are full-time employees of the company, while non-executive directors occupy the office of director but are not employees of the company (*Protect a Partner (Pty) Ltd v Laura Machaba-Abiodun* [2013] JOL 31048 (LC) para 48). A person simultaneously employed as an executive director and a board member holds two distinct positions (*Kaimowitz v Delahunt* para 19). Since executive directors enjoy a dual status as directors and employees of the company, they enjoy the protection of both the Companies Act and the Labour Relations Act 66 of 1995 (the LRA). (See *PG Group (Pty) Ltd v Mbambo NO & others* (2004) 25 *ILJ* 2366 (LC) para 29; *Amazwi Power Products (Pty) Ltd v Turnbull* (2008) 29 *ILJ* 2554 (LAC) para 15; and *SA Post Office Ltd v Mampeule* (2010) 31 *ILJ* 2051 (LAC) para 21.) As directors they are governed by the provisions of the Companies Act, and as employees they are governed by the provisions of the LRA (*Chillibush Communications (Pty) Ltd v Johnston* (2010) 31 *ILJ* 1358 para 24). Consequently, when an executive director is removed from office, the provisions of both the 2008 Act and the LRA must be considered in the removal process (*Amazwi Power Products (Pty) Ltd v Turnbull* (2008) 29 *ILJ* 2554 (LAC) para 15; *Mpofu v South African Broadcasting Corp Limited (SABC)*

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(2008/18386) 2008 ZAGPHC 413 (16 September 2008); *Wicks v SA Independent Services (Pty) Ltd* [2010] JOL 25715 (WCC); *Chillibush Communications (Pty) Ltd v Johnston* (2010) 31 *ILJ* 1358 (LC); and *SA Post Office Ltd v Mampeule* (2010) 31 *ILJ* 2051 (LAC)). A distinction must, therefore, be drawn between the removal of a director from office as a director of the company, and the removal of a director from his position as an employee of the company. As an executive director enjoys the protection of both the 2008 Act and the LRA if the board of directors wishes to withdraw certain of his or her functions and powers and downscale his or her position on the board to that of a non-executive director — as occurred in *Kaimowitz v Delahunt* — it must follow the proper procedures under the LRA in lawfully dismissing the executive director as an employee.

It is not clear from the facts whether the board of directors in *Kaimowitz v Delahunt* did indeed follow the proper procedures under the LRA when it dismissed the applicant as an employee. As mentioned, the dismissal of the applicant as an employee of the company was the subject of a dispute before the CCMA. Should it transpire that the applicant was not lawfully dismissed as an employee, it would mean that the change in his status by the board of directors from that of executive director to non-executive director, may not have been lawfully executed.

If a company dismisses a former executive director as an employee and his or her dismissal is found to have been unfair under the LRA, he or she is entitled to rely on the remedies under the LRA. He or she is consequently entitled to claim reinstatement, reemployment, or compensation for the unfair dismissal (s 193(1) of the LRA). Section 193(2) of the LRA obliges the court or arbitrator to order that an unfairly dismissed employee be reinstated or reemployed, unless the following applies: (i) the employee does not wish to be reinstated or reemployed; (ii) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (iii) it is not reasonably practicable for the employer to reinstate or reemploy the employee; or (iv) the dismissal is unfair only because the employer did not follow a fair procedure. In *PG Group (Pty) Ltd v Mbambo NO & others* (2004) *ILJ* 2366 (LC) para 29, the Labour Court cast doubt on whether an executive director is entitled to reinstatement because of the dual capacities in which he holds office. While reinstatement may be more difficult with regard to executive directors, this does not mean that in appropriate circumstances a court would not order the reinstatement of an unfairly dismissed director in his capacity as an employee.

In *Whitcutt v Computer Diagnostics & Engineering (Pty) Ltd* (1987) 8 ILJ 356 (IC), for example, the former Industrial Court reinstated a

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financial director of a company as an employee on the ground that his dismissal as an employee had been substantively and procedurally unfair. The court found that the financial director's position in his capacity as an employee could be distinguished from his capacity as a director (362). It consequently reinstated him retrospectively on terms and conditions no less favourable to him than those he had enjoyed before his termination. In *Oak Industries (SA) (Pty) Ltd v John NO* 1987 (4) SA 702 (N) — an application for a review of a decision of the Industrial Court — the High Court found that a managing director of the company was an employee of the company who had been unfairly dismissed. The court upheld the reinstatement of the unfairly dismissed managing director to his employment position within the company. It should be noted that the former managing director was reinstated only to his position of employment, and not to his position as a director of the company.

Even though it may be complicated to reinstate executive directors in the company because of the dual capacities in which they hold office, the above cases show that the courts may nonetheless reinstate executive directors as employees in the company if they have been unfairly dismissed as employees. Their capacities as employees must be capable of being separated from their capacities as directors. It is not always practical strictly to separate the two positions held by an executive director, or consistently to apply a strict separation of such positions (Stoop, 'The company director as employee' (2011) 32 *ILJ* 2367 at 2371; Cassim, 'The division and balance of power between the board of directors and the shareholders: the removal of directors' (2013) 29(1) *Banking and Finance Law Review* 151 at 168). It may be that the two positions of director and employee are so interlinked that the person's capacity as a director cannot logically be separated from his capacity as an employee (Van Eck & Lombard, 'Dismissal of executive directors: comparing principles of company law and labour law' (2004) 1 *TSAR* 20 at 35).

If an employee is not reinstated or reemployed, he or she may claim compensation from the employer for unfair dismissal under section 193 of the LRA. This compensation must be just and equitable, but may not exceed the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal (s 194(1) of the LRA). In addition, the former executive director may, in his capacity as an employee, claim common-law damages for breach of contract over and above the compensation available under the LRA (s 195(1) of the LRA and *Fedlife Insurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) paras 22 and 24).

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To return to *Kaimowitz v Delahunt*, it follows from the discussion above, that if the CCMA were to find the applicant's dismissal as an employee unlawful, he could possibly be reinstated to his position as an employee and hence to his position as an executive director of the company. Such an order would not be made if: the applicant does not wish to be reinstated or to be reemployed; if a continued employment relationship would be intolerable; if it is not reasonably practicable for the company to reinstate or reemploy the applicant as an employee, or if the dismissal is found to be unfair only because the company did not follow a fair procedure in dismissing the applicant. If the dismissal is found to have been unfair and the applicant is not reinstated or reemployed by the company, he or she may claim up to 12 months' remuneration from the company, as well as common-law damages for a breach of contract, if applicable.

Undoubtedly, the consequences of failing to terminate the employment of an executive director in a substantially and procedurally fair manner are severe for a company. The onus rests on the employer to prove that the dismissal was fair (s 192(2) of the LRA). It is consequently vitally important for a company to take cognisance of the applicable labour-law principles and to follow them when dismissing an executive director as an employee. Before dismissing an executive director as an employee of the company, the board of directors should take heed of the role which the director plays in the company as an employee, whether his position as an employee and as a director may be separated, and the consequences for the company if the director is removed from office as an employee but not as a director. The board must also consider whether it will be practical to retain the former employee as a non-executive director, particularly if there has been a breakdown in the relationship between the director and the company.

(d) Removal of a director from office

In *Kaimowitz v Delahunt* the applicant asserted in a supplementary replying affidavit that the directors of the company 'took it upon themselves, from *circa* March 2016 to "put the old bull to pasture"' (para 7 of the judgment). It appears that the applicant was of the view that because of his advanced age the directors wished to remove him from the company, at least as an executive director.

Under section 68(1) of the 2008 Act a director of a profit company may be elected to serve for an indefinite term, or for a term set out in the MoI. If the MoI does not specify a term of office, or does not implement a rotational system for the terms of office of directors, a director may be

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appointed to the board of directors for an indefinite term. This means that if a company no longer wishes to have a particular executive director who is nearing retirement age on its board of directors, it must persuade him or her to resign, failing which either the board of directors or the shareholders would have to remove the director from office.

Under section 71(1) of the 2008 Act, shareholders of a company may at any time remove a director from office by an ordinary resolution adopted at a shareholders' meeting. Shareholders are not required to have a reason to remove a director from office. If the shareholders of a company fail to remove a particular director from office, the board itself, under section 71(3) of the 2008 Act, may remove him or her. The board of directors may, however, remove a fellow board member from office only under grounds specified in section 71(3)*(a)* and *(b)* of the 2008 Act. These grounds are that: the person is ineligible or disqualified to be a director; is incapacitated; or has neglected or been derelict in the performance of the functions of director. The board of directors would have to prove that any of these grounds are present before they may remove a fellow board member from office. For instance, if the board alleges that a director is incapacitated, it would have to prove this, and further that the director is incapacitated to the extent that he or she is unable to perform the functions of a director, and, additionally, that the director is unlikely to regain that capacity within a reasonable time (see s 71(3)*(a)*(ii) of the 2008 Act). A director who has been removed from office by the board of directors on one of these grounds (or any person who appointed that director as contemplated in s 66(4)*(a)*(i) of the 2008 Act) may apply to court within 20 business days to review the board's determination to remove the director from office (s 71(5) of the 2008 Act). It is therefore imperative that the board firmly establish that a proper ground for the removal of a director is present before removing a fellow board member from office.

In terms of section 69(6)*(a)* of the 2008 Act, the MoI may impose additional grounds of ineligibility or disqualification on directors. If a company is concerned about any director who has been appointed for an indefinite term reaching retirement age, it may insert in its MoI, as an additional ground of disqualification, that when a director reaches a specific age, he or she will be disqualified from holding office as a director. A company may even allow its board of directors to extend the retirement age of a director by stating in its MoI that the board of directors has a discretion to extend the retirement age for a specific director. Such a provision ensures that when a director has been appointed for an indefinite term, he or she would be compelled to resign

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as a director upon reaching a specific age on the ground that he or she no longer qualifies to be a director. This would circumvent the complications arising from the shareholders having to remove a director from office under section 71(1), or the board of directors having to do so under section 71(3) of the 2008 Act, or, as occurred in *Kaimowitz v Delahunt*, terminating the employment of an executive director and thereby reducing his status to that of a non-executive director.

V CONCLUSION

Kaimowitz v Delahunt is a key decision in South African company law as it clarifies the role of a director under section 66(1) of the 2008 Act. The interpretation of section 66(1) in *Kaimowitz v Delahunt* accords with the interpretation of the equivalent provisions in the Australian Corporations Act of 2001 and the MBCA. This note has argued, concurring with *Kaimowitz v Delahunt*, that under section 66(1) of the 2008 Act, the board of directors is not required to be engaged in the day-to-day management of the company's affairs. It must, however, monitor the management of the company. An individual director is not, as of right, entitled to participate in the day-to-day management of the company's business. The outcome of this judgment accords with section 7*(j)* of the 2008 Act, which provides that one of the purposes of the 2008 Act is to encourage the efficient and responsible management of companies.

This note has emphasised that the outcome of the applicant's dismissal dispute before the CCMA may have an impact on the practical application of the judgment and on the applicant's position in the company. Some of the practical consequences of failing to terminate the employment of an executive director in a substantially and procedurally fair manner have also been highlighted. In light of these severe consequences, this note identifies some important considerations that should be taken into account by the board of directors before dismissing an executive director as an employee of a company.

Finally, some provisions that a company may consider inserting in its MoI if it is concerned about having to retain directors on its board of directors once they reach retirement age in instances where directors have been appointed for an indefinite term, are suggested. These provisions would circumvent the complication attendant upon having to remove a director from office under sections 71(1) or 71(3) of the 2008 Act, or of terminating the employment of an executive director and downgrading his or her status to that of a non-executive director, as occurred in *Kaimowitz v Delahunt*.

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