De facto directors and the legality of their boardroom decisions

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Chapter 1: Introduction

1.1 Title

De facto directors and the legality of their boardroom decisions

1.2 Keywords

De Facto director, *De Jure* director, entitled to serve, board of directors, Memorandum of Incorporation, written consent.

1.3 Research problem statement

1.4 Background to the research problem

The promulgation of the 2008 *Companies Act* on 1 May 2011,[1] facilitated the introduction of new legal concepts, terminologies, and provisions to the South African corporate law and governance landscape.[2] Same, also resulted in the omission of some key concepts previously contained in the 1973 *Companies Act*. Some commentators saw these developments as the worsening of an already underdeveloped South African company law jurisprudence. The 2008 *Companies Act* was envisioned to be an ideal corporate law tool for legal, social, and economic governance in South Africa as a constitutionally democratic state comprising of an open economy.[3] It was hoped that the *Act* would enhance and achieve international economic competitiveness for South Africa, that it would be simpler, and more flexible than the former corporate law statutes,[4] and it was to be a medium of facilitating clarity, predictability, high corporate governance standards, and consistency in regulating business enterprises.[5] It is however noted with disappointment that the *Act* did not adequately deal with aspects of corporate

1 Davis et al *Companies and other Business Structures* 4.
2 Cassim et al *Contemporary Company Law* Preface to the First Edition.
3 Van Niekerk *The Development and Reform of the Rules Regulating Authority to Contract on Behalf of Companies in South African and English Law* 168.
4 Van Niekerk *The Development and Reform of the Rules Regulating Authority to Contract on Behalf of Companies in South African and English Law* 168.
5 Botha 2012 *TSAR* 786.

representatives,[6] including *de facto* directors. South African company law jurisprudence on *de facto* directors is highly underdeveloped, confusing,[7] unsettled, and vexatious.[8] It is settled South African case law that under circumstances in which a person is appointed as a director, or when such a person ostensibly acts as a director though they were never appointed as such, or by reasonable inference such a person appears to be authorised by a company to act in such capacity, but whose appointment is defective, irregular, faulty, unprocedural, or was in fact never appointed, or formally authorised to act as director, is defined as a *de facto* director.[9] Same judicial proposition was noted with approval in *S v Van den Berg* .[10] There is however conflict between case law precedence in as far as decided cases judgments, and the legislator, in reference to the 2008 *Act*[11] regarding the identification or statutory entitlement to be identified as a *de facto* director, within the context of the 2008 *Act*. The 2008 *Act* does not refer to a *de facto* director, or to circumstances that would render a person to be identified or classified as a *de facto* director. The 2008 *Act* defines a director as a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated.[12] This definition is however considered to be unhelpful and redundant.[13] It is further submitted that the 2008 *Act* only recognises four categories of directors, namely a director appointed in terms of the company constitution,[14] an *ex officio* director,[15] an alternate

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6 Van Niekerk *The Development and Reform of the Rules Regulating Authority to Contract on Behalf of Companies in South African and English Law* 168.
7 Cassim 2021 *ICCLJ* 1.
8 Van Niekerk *The Development and Reform of the Rules Regulating Authority to Contract on Behalf of Companies in South African and English Law* 216.
9 *R v Mall* 1959 (4) SA 607 (N) p624.
10 *S v Van den Berg* 1979 (1) SA 208 (D) p216.
11 *Companies Act* 71 of 2008.
12 Section 1 of the *Companies Act* 71 of 2008.
13 Botha 2012 *TSAR* 788.
14 Section 66 (4) (a) (i) of the *Companies Act* 71 of 2008.
15 Section 66 (4) (a) (ii) of the *Companies Act* 71 of 2008.

director,[16] and a director appointed by shareholders.[17] Section 66 is decisively crucial in identifying and classifying classes or categories of varying directorship statuses. Section 66 stipulates that a person becomes a director of a company when that person has been appointed or elected in accordance with section 66, or holds an office, title, designation, or similar status entitling that person to be an *ex officio* director of the company[18] and has delivered to the company a written consent to serve as its director.[19] Section 66 (7)(b) is a mandatory provision having the effect that no person shall be entitled to serve as a director, without having submitted the required written consent. The Act therefore only accommodates and identifies *de jure directors* and makes no reference to *de facto* directors, who are otherwise also known as "pretended" directors.[20] There is no formal or any specific reference to *de facto* directors in the 2008 *Act*.[21] This specific development has led to questions being posed as to whether the 2008 *Act* does regulate aspects *de facto* directors, and or boardroom decisions made by such directors. *De facto* directors are persons in respect of whom attempts were made to appoint them as directors, which appointment was legally flawed, yet such a person acted on equal terms with directors and proceeded to perform some or all of the functions that are for the exclusive execution of directors.[22] Although the section 1 definition appears to be open and capable of being subjected to an interpretation that could include *de facto* directors, based on the words "and includes any person occupying the position of a director or alternate director, by whatever name designated", section 66 (7)(b) contradicts and prohibits such an approach/interpretation by stating that any such person will only be entitled to serve as director upon delivering a written consent to be identified and serve as such. It is submitted that the 1973 *Act* could be interpreted in a way to accommodate *de facto*

16 Section 66 (4) (a) (iii) of the *Companies Act* 71 of 2008.
17 Sections 66 (4) (b) and 68 (1) of the *Companies Act* 71 of 2008.
18 Section 66 (7) (a) of the *Companies Act* 71 of 2008.
19 Section 66 (7) (b) of the *Companies Act* 71 of 2008.
20 Coetzee and van Tonder 2014 *OBITER* 296.
21 Idensohn 2010 *SA Merc LJ* 339.
22 Botha 2012 *TSAR* 788.

directors due to the open and inclusive nature of its wording as it contained no prohibitive provisions similar to section 66(7)(b).[23] The 1973 *Act* stated that a director includes any person occupying the position of director or alternate director of a company, by whatever name he may be designated.[24] "Includes" was indicative of the inclusive nature of the 1973 *Act*,[25] however the 2008 *Act* appears to prohibit the extensive interpretation or identification of a director by means of the exclusionary provisions of section 66 (7) (b). The 1973 *Act* recognised that a person could assume the role of a director whilst holding a different title, a proposition attributed to the words "by whatever name designated" as contained in the 1973 *Act* definition.[26] I submit that this assumption cannot be associated with the 2008 *Act* due to the exclusive and exhaustive nature of section 66 provisions, regardless of the same wording appearing in the 1973 *Act* definition. It further goes without saying that the 1973 *Act* procedures of appointing a director were pragmatic, simple, and easily comprehensible.[27] Same, can however not be said about the 2008 *Act* which is considered complicated and contradictory.[28] The *status quo* is deemed unsustainable, considering South Africa's high corruption level, maladministration of state-owned enterprises, some of which were in fact being directed by *de facto* and shadow directors, and the overall state capture of the executive branch of government.[29] The lack of statutory provisions, clarity, or legal certainty in regulating *de facto* directors and the legal status of boardroom decisions made by such directors in the context of the 2008 *Act*[30] is cause for concern and calls for legal clarification.[31] Establishing clarity on these aspects of company law will also ensure that actual directors are legally properly

23 Coetzee and van Tonder 2014 *OBITER* 296.
24 Section 1 of the *Companies Act* 61 of 1973.
25 Coetzee and van Tonder 2014 *OBITER* 296.
26 Coetzee and van Tonder 2014 *OBITER* 297.
27 Kilian 2020 *PER/PELJ* 5.
28 Kilian 2020 *PER/PELJ* 5.
29 Cassim 2021 *ICCLJ* 1.
30 *Companies Act* 71 of 2008.
31 Kilian 2020 *PER/PELJ* 6.

identified and held to account for their actions regardless of the defects observed during their purported appointments.

1.5 Motivation

Sadly, it is unquestionable that many companies are rather disgracefully, not managed or directed by formally appointed directors, or their legally constituted boards, a practice which is susceptible to abuse.[32] Beside the high levels of corruption and maladministration that are prevalent in South Africa, and the significant role that business enterprises plays within the social and economic life of South Africans,[33] scholars and jurists have expressed a need to develop South Africa's company law in order to bring it on par with comparable regimes of the same governances structures.[34] It appears as if the 2008 *Act* has failed to fulfill its intended purposes of making corporate governance more effective, predictable, simpler, to provide clarity, and certainty in as far as the regulation of *de facto* directors and their boardroom decisions is concerned. There is therefore a need to ensure that persons who exercises management and control over companies are properly identified and held to account for their conduct.[35] The possible refinery/development of South Africa's company law in aspects of *de facto* directors and the legal status of such directors' boardroom decisions will make the 2008 *Act* more effective and comprehensive by introducing provisions that will enable and facilitate statutory regulation of aspects of *de facto* directors, which regulation is not provided for by the 2008 *Act* in its current form. At present South Africa's company law jurisprudence lacks behind the Australian and United Kingdom company law jurisprudences which are considered more advanced, with clear statutory and judicial guidelines on the identification, legal statuses of *de facto* directors, and the legality of their corporate decisions.[36] It therefore goes without saying that a prosperous economy

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32 McLennan 1982 *SALJ* 400-401.
33 Botha 2012 *TSAR* 786.
34 Cassim 2021 *ICCIJ* 26.
35 Idensohn 2010 *SA Merc LJ* 326.
36 Cassim 2021 *ICCJL* 2.

is grounded on the basis of clear, certain, and accessible corporate governance laws and principles.[37]

1.6 Justification for benchmarking with Australian and English jurisdiction

The Australian and English company law regimes are considered to be advanced when it comes to the regulation of aspects of de facto directors.[38] South Africa has a pluralistic legal system comprising of amongst other, English law.[39] English company law has a historic influence on both Australian,[40] and South African company law jurisprudence, particularly on the law of agency and corporate representation.[41] South African courts have over the years relied on, and cited English judgments, cases, and commentaries when adjudicating corporate law matters.[42] This influence can be observed in shared commonalities and similarities to some extent, regarding how the South African *Companies Act*, Australian *Corporations Act*,[43] and the United Kingdom *Companies Act*[44] statutorily goes about aspects of corporate directorship.[45] It is therefore prudent that these two foreign jurisdictions are considered to give effect to the constitutional, statutory, and judicial interpretation, enhancement and overall development of the provisions of the South African *Companies Act*, relating to aspects of *de facto* directors and the validity of their business decisions. The approach I have adopted in order to seek remedy for the perceived deficiencies of the *Companies Act* by considering foreign law principles is constitutionally mandated in accordance with provisions of section 39(1)(c) and (2) of the *Constitution*.[46]

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37 Seedat Section 76 of the Companies Act 71 of 2008 as a mechanism of enforcement for the King IV Code on Corporate Governance for South Africa 4.

38 Cassim 2021 *ICCJL* 2.

39 Rautenbach and Bekker *Introduction to Legal Pluralism* 12.

40 Kilian 2020 *RER/PELJ* 18.

41 Van Niekerk *The Development and Reform of the Rules Regulating Authority to Contract on Behalf of Companies in South African and English Law* 45.

42 Van Niekerk *The Development and Reform of the Rules Regulating Authority to Contract on Behalf of Companies in South African and English Law* 46.

43 Australian *Corporations Act* of 2001.

44 United Kingdom *Companies Act* of 2006.

45 Cassim 2021 *ICCJL* 2.

46 Section 39(1)(c) and (2) of the *Constitution of the Republic of South Africa*, 1996.

1.7 Research question

To what extent are aspects of de facto directors and the validity of their boardroom decisions regulated within the context of the 2008 *Companies Act*?

1.8 Research aims and objectives

This project aims to highlight, analyse, and study applicable provisions of the *Act* of 2008 dealing with the aspects of directors' recognition, identification, and appointments *vis-à-vis de facto* directors and the legality of their boardroom decisions within the context of the 2008 *Act* particularly section 1 and 66 of the Act. The study also aims to establish, assess, and interpret the 2008 *Act*'s capabilities to identify and regulate *de facto* directors and their boardroom decisions on the basis of its current form and empowering provisions. The study further aims to highlight and argue that the provisions of section 1 in as far as persons defined as directors, and section 66 (7) (b) are contradicting each other, and thus incompatible. The research also aims to assess the nature and implications of section 66 (7) (b) on the 2008 *Act*'s ability to identify, recognise, accommodate, and regulate *de facto* directors, in its current form.

The objective of the study is to show that the 2008 *Act* makes no provisions for the identification, recognition, and regulation of *de facto* directors and their related boardroom decisions. Another objective of this study is to argue that the 2008 *Act* definition of a director would need to be amended in order to include a director who was defectively appointed, as well as to argue for the alteration or deletion of section 66 (7) (b) to make it inclusive of a *de facto* director. These objectives will be achieved by studying and arguing earlier South African case law precedence that gave cognisance to *de facto* directors, preceding South African company law legislation affecting same, as well as by studying and applying Australian and English company law legislation and judicial principles regulating aspects of *de facto* directors.

1.9 Research methodology

The research question will be answered by means of combined applications of two research methodologies, namely literature review and the legal comparative analyses method. The literature of applicable sources will be internet and library based, consisting of the review and analysis of primary sources such as the 1996 *Constitution of the Republic of South Africa*, South African *Companies Act* 71 of 2008, Australian *Corporations Act* of 2001, United Kingdom *Companies Act* of 2006, *King IV Report* on corporate governance, South African, Australian, and English case. Beside the attempts to answer the research question, I will also make use of accredited search engines such as Juta, LexisNexis, Google scholar, and the University library to establish and outline the origin of *de facto* director concept and its introduction into South African jurisprudence. I will also peruse and analyse law textbooks, journals, and other scholarly texts or secondary sources to answer the research question, and to achieve the aim and objective of this research. A comparative analysis will be applied to study court judgments on *de facto* directors based on South African company law legislation preceding the 2008 *Act*, and how the Australian and English jurisdictions deals with the same concept.

1.10 Framework

The research chapters are laid out as follows;

Chapter 1 Introduction

Chapter 1 introduces and discusses the research concept, including the research question, problem statement, and the relevance, and importance of the research concept. The discussion will include the origin of *de facto* director concept, its introduction into the South African corporate governance sphere, the enactment of the 2008 *Act* and a detailed discussion of key legislative provisions.

Chapter 2 Detailed analysis of South African *de facto* director jurisprudence

This segment consist of a detailed analysis of South African case law and provisions of preceding company law legislation on *de facto* directors. The analysis focuses on the interpretation of the then applicable legislation, legal principles, the wording of specific

provisions including the statutory definition of a director, the recognition, and classification of directors within the context of the current and preceding South African company law legislation.

Chapter 3 English and Australian *de facto* director jurisprudence

This chapter scrutinises English and Australian legislation, case law and related legal principles regulating the identification, recognition, and classification of *de facto* directors. The analysis will include a comprehensive study of the two foreign jurisdictions' definition of a director, *de facto director* and the validity of their boardroom decisions, legislative, judicial interpretation similarities, and or differences between the three regimes.

Chapter 4 Conclusion and recommendations

This segment answers the research question, discusses the findings based on the analysis of 2008 *Act*, South African case law, as well as by considering primary and secondary research material. The chapter concludes the study with recommendations of potential amendments that will enable the 2008 *Act* to recognise, identify, and regulate aspects of *de facto* directors. The recommendations are based on the findings of all the material considered during the research including legal principles/legislation of Australian and England.

1.11 Relevance of the study for the research unit

This research is relevant to the North-West University's *Law*, *Justice*, and *Sustainability* research unit as it concerns company law and corporate governance, which falls under the sub-project of finance, trade, and investment. Corporate governance and company law are important governance tools that regulates trading aspects, management of business enterprises, relationships companies and their directors/boards, and maladministration, which are all aspects that concerns, or impacts lives of South Africans from all walks of life.

1.12 Statement regarding ethics

No interviews or questionnaires will be conducted for the purpose of this research. As stated earlier, the study will be based on the analysis of decided cases, legislation, foreign law case law, and secondary study material like textbooks, journal articles, and related commentaries. I have attached herewith the required ethics checklist.

Chapter 2 South African *de facto* director jurisprudence

This chapter consists of a historical exposition of the South African company law evolution/development, detailed analysis of past and latest South African *de facto* director case law jurisprudence, judicial principles, and targeted provisions of preceding and

present company law legislation regarding *de facto* directors and the legal statuses assigned to their boardroom decisions. The analysis include the constitutional government's views on the company law legislation preceding the 2008 *Act* relative to aspects of directorship, accountability, envisioned objectives, desired characteristics of the 2008 *Act*, interpretation of the then applicable legislation, legal principles, phrasing of specific provisions including the statutory definition of a director, the recognition, and classification of directors within the context of the current and preceding South African company law legislation.

2.1 Historical background, development, and evolution of company law in South Africa

Company law legislation was first introduced in South Africa during 1861,[47] with the *Joint Stock Companies Limited Liabilities Act* of 1861 of the Cape Colony[48] being the original founding companies law legislation of the Republic. The *Joint Stock Companies Limited Liabilities Act* was a verbatim duplication,[49] of the *United Kingdom Joint Stock Companies Limited Liabilities Act*.[50] The 1909 *Companies Act*[51] was a provincial statute only applicable in Transvaal,[52] hence the *Unions Companies Act* of 1926[53] become South Africa's first national company law,[54] followed by the *Companies Act* of 1973,[55] and the *Close Corporations Act* of 1984,[56] which instruments were very much formulated on the basis of English company law principles.[57]

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47 Item 2.1 in Gen Not 1183 in GG 26493 of 23 June 2004.
48 *Joint Stock Companies Limited Liabilities of the Cape Colony Act* 23 of 1861.
49 Item 2.1 in Gen Not 1183 in GG 26493 of 23 June 2004.
50 *The Limited Liability Act* 1844 c. 110 7 & 8 Vict.
51 *Companies Act* 31 of 1909.
52 Kilian 2020 *PER/PELJ* 7.
53 *Companies Act* 46 of 1926.
54 Item 2.1 in Gen Not 1183 in GG 26493 of 23 June 2004.
55 *Companies Act* 61 of 1973.
56 *Close Corporations Act* 69 of 1984.
57 Item 2.1 in Gen Not 1183 in GG 26493 of 23 June 2004.

2.2 Government's opinion on the need for reformation of South Africa's company law governance culminating into the enactment of the 2008 Act

It is an international norm to continuously review company law to ensure relevance to contemporary market trends and practices.[58] Contemporary corporate governance principles are characterised by the abandonment, and modification of some redundant governance practices as well as the introduction of newly developed governance principles inspired by globalisation, social ethics, progressive ethical governance standards, mitigation of economic losses resulting from governance failures, and proper administration of corporate governance.[59] Government appreciated the important need to make domestic law competitive and to bring it on par with international trends.[60] Since the 1973 *Act* and its predecessor legislation were enacted during the colonial dispensation, there was a need to constitutionalise all company law and to regulate social, corporate, governance relationships between natural and corporate citizens.[61] The 1973 *Act* was also found to lack clear statutory corporate governance rules, laws, regulations pertaining to responsibilities, liabilities, obligations, accountability, and duties of directors, thus enhancing reliance on common law principles and governances codes/practices to solve corporate governance infringements.[62] The 1973 *Act* was also found to be ineffective and less sophisticated to address corporate governance violations by directors and rather more suited to only deal with conventional, obvious, and general criminal offences.[63] Company law legislation prior to the current *Act* was therefore found to be deficient in corporate governance regulation and general protection of shareholders.[64]

2.3 Envisioned flexibility, simplicity, inclusiveness, intelligibility, harmonisation of the 2008 Act

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58 Item 2.2.1 in Gen Not 1183 in GG 26493 of 23 June 2004.
59 Item 2.2.1 in Gen Not 1183 in GG 26493 of 23 June 2004.
60 Item 2.2.1 in Gen Not 1183 in GG 26493 of 23 June 2004.
61 Item 2.2.2 in Gen Not 1183 in GG 26493 of 23 June 2004.
62 Item 2.2.3 in Gen Not 1183 in GG 26493 of 23 June 2004.
63 Item 2.2.3 in Gen Not 1183 in GG 26493 of 23 June 2004.
64 Item 3.1 in Gen Not 1183 in GG 26493 of 23 June 2004.

It was envisioned that the provisions of the 2008 *Act* will be drafted in a simplified manner that is easy to understand and apply without having to resort to experts advise for interpretation.[65] It was also hoped that the new legislation will be comprehensive and flexible enough to regulate governance and administrative procedures without having to resort to common law principles to resolve company management issues.[66] The new *Act* was to be harmonised with international jurisdictions in order to eliminate uncertainties related to its application, and to make the application of the *Act* less costly by minimising litigation arising from uncertainties of its provisions.[67] The new company law must only contain mandatory provisions that are absolutely necessary, hence the law should provide optional, additional, voluntary, or default provisions or requirements through companies' Memorandum of Incorporation.[68]

2.4 Past and present statutory provisions dealing with aspects of de facto directors and the validity of their conduct

2.4.1 Transvaal Companies Act

Although this *Act* was a provincial legislation, it is still part of the historical jurisprudence of the Republic. The *Act* became operational on 01 January 1910 with the objective of consolidating and amending the law amongst other, on incorporation and registration of companies and related associations.[69] This legislation had provisions capable of acknowledging, identifying, and validating the consequences or boardroom decisions of *de facto* directors.[70] The *Act* defined a director to include any person who is an occupant of the position of director, an alternate director of a company, regardless of whichever name is assigned to such a person.[71] The Transvaal *Act* clearly provided for validity of

65 Item 3.3 in Gen Not 1183 in GG 26493 of 23 June 2004.
66 Item 3.3 in Gen Not 1183 in GG 26493 of 23 June 2004.
67 Item 3.5 in Gen Not 1183 in GG 26493 of 23 June 2004.
68 Item 4.2 in Gen Not 1183 in GG 26493 of 23 June 2004.
69 Long title of the *Transvaal Companies Act* 31 of 1909.
70 Kilian 2020 *PER/PELJ* 7-8.
71 Section 2 of the *Transvaal Companies Act* 31 of 1909.

boardroom decisions of *de facto* directors. The decisions of a person occupying the position of a director shall be valid, and the validity thereof supersedes any appointment irregularities that may be uncovered at a later stage.[72] Sections 70 to 73 of the Act dealt with aspects of appointment and qualification of directors. In case of a Limited company, a person was prohibited from being appointed, named a director of a company[73] if such an individual or their authorised agent prior to the registration of the company's articles of association fails to submit a written consent to the Registrar of Companies to act as a director,[74] and to acquire a predetermined quantum of shares.[75] It was mandatory for an applicant to submit a list of names of directors who consented in writing to the Registrar during the course of registering the company's memorandum and articles of association, and a willful insertion of a name of a purported director who has not consented in writing amounted to prohibited and punishable conduct.[76] The section 70 restrictions were not applicable to private companies.[77] Every company was obligated to keep a register containing the names, physical addresses, and occupation of their directors.[78] Failure to comply constituted a punishable contravention of the *Act*.[79] The only *de facto* director related case I could find under the jurisdiction of the Supreme Court of Transvaal was decided on 25 December 1894, before the 1909 *Act* became operational. In *Liquidators of the Republican and Colonial Loan Agency and Trust Company v The Natal Bank*,[80] the Court found that a company could be bound by the actions of a *de facto* director, or the actions of formerly *de jure* directors who became *de facto* on the basis of disqualification arising from provisions of Articles contained in the company constitution.[81] The facts of

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72 Section 72 of the *Transvaal Companies Act* 31 of 1909.
73 Section 70 (1) of the *Transvaal Companies Act* 31 of 1909.
74 Section 70 (1) (i) of the *Transvaal Companies Act* 31 of 1909.
75 Section 70 (1) (ii) of the *Transvaal Companies Act* 31 of 1909.
76 Section 70 (2) of the *Transvaal Companies Act* 31 of 1909.
77 Section 70 (3) of the *Transvaal Companies Act* 31 of 1909.
78 Section 73 (1) of the *Transvaal Companies Act* 31 of 1909.
79 Section 73 (2) of the *Transvaal Companies Act* 31 of 1909.
80 *Liquidators of the Republican and Colonial Loan Agency and Trust Company v The Natal Bank* 1894 1 Off Rep.
81 *Liquidators of the Republican and Colonial Loan Agency and Trust Company v The Natal Bank* 1894 1 Off Rep p 375.

the case are that Article 80 of a company required that at least five directors must vote in favour of a resolution related to borrowing against company assets or acquisition of securities, while Article 43 stated that any director who shall die, resign, be removed, become insolvent, cede their property to creditors, or reside more than twelve miles from Pretoria, shall be disqualified as *de jure* director and ceases to be director.[82] Two of the company's directors became disqualified as per Article 43 due to alleged insolvency because of sequestration of an estate, and the other due to having established residence in Johannesburg, and having casted votes that authorised the passing of security over company assets to the Natal bank a few months before the company was liquidated.[83] The liquidators argued amongst other grounds of defence, that according to company Articles 80 and 43, the board resolution that authorised the passing of security over company assets was invalid due to the votes casted by the two disqualified directors, therefore failing to constitute a quorum of five directors as required by Article 80.[84] The Natal Bank contested that the two disqualified directors acted *de facto*, hence their decisions must be considered valid.[85] Although the Court concluded that there was not enough evidence tendered to substantiate the alleged disqualification cited by the liquidators, the Court found that even if such disqualification was factual, it amounted to internal procedural formalities which the agent of the bank could not have been expected to be cognisant about, and could in any event not invalidate acts concluded under such circumstances.[86] In *Africa's Amalgamated Theatres, Ltd and Others v Naylor and Others*,[87] it was stated that when signatories to the company's constitution/memorandum of

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82 *Liquidators of the Republican and Colonial Loan Agency and Trust Company v The Natal Bank* 1894 1 Off Rep p 376.

83 *Liquidators of the Republican and Colonial Loan Agency and Trust Company v The Natal Bank* 1894 1 Off Rep p 377.

84 *Liquidators of the Republican and Colonial Loan Agency and Trust Company v The Natal Bank* 1894 1 Off Rep p 376.

85 *Liquidators of the Republican and Colonial Loan Agency and Trust Company v The Natal Bank* 1894 1 Off Rep p 376.

86 *Liquidators of the Republican and Colonial Loan Agency and Trust Company v The Natal Bank* 1894 1 Off Rep p 381.

87 *Africa's Amalgamated Theatres, Ltd and Others v Naylor and Others* 1912 WLD.

association had failed to appoint the original board of directors in writing as stipulated by the company's articles/rules and such a board had executed directorial functions with the blessings, awareness, and consent of all the subscribers/shareholders, such a board had acted as a *de facto* board of directors with respect to their concluded acts, and the resolutions so taken by the *de facto* board could not be challenged on the grounds of irregularity, informality, unprocedural, or defectiveness of the board's appointment.[88] Section 72 does not validate a defective appointment or convert a *de facto* director into a *de jure* director, it simply gives legal validity to boardroom decisions of a de facto director.[89]

2.4.2 The Union of South Africa Companies Act 46 of 1926

This legislation was signed into law on 11 June 1926 with the aim of amongst other, to regulate the incorporation, administration, and management of companies.[90] The *Act* defines a director to include any person occupying the position of director or alternate director of a company, by whatever name he may be called.[91] The definition of director is understood to include a *de facto* director.[92] By statutorily defining the term "director", legislature aimed to make it easier for companies to assign alternative names or titles of their choice to directors such as "board", "management committee", "governors", and so forth.[93] The objective was therefore to make sure that a number of people, or certain persons were to be included in the definition, or to be considered directors for the purpose of the *Act*, and to enable nomenclature pertaining to those executing functions of a director, whether they were procedurally appointed or not.[94] The focus should therefore be on the acts of a person rather than the manner or procedures of appointment and

88 *Africa's Amalgamated Theatres, Ltd and Others v Naylor and Others* 1912 WLD p 107.
89 *Africa's Amalgamated Theatres, Ltd and Others v Naylor and Others* 1912 WLD p 116.
90 Long title of the *Union of South Africa Companies Act* 46 of 1926.
91 Section 229 of the *Union of South Africa Companies Act* 46 of 1926.
92 *Attorney-General v Blumenthal* 1961 (4) SA 313 (T) p 253.
93 Du Plessis 1995 *J. S. Afr. L.* 155.
94 Du Plessis 1995 *J. S. Afr. L.* 155.

must include a *de facto* acting as director of a company.[95] The judicial interpretation or identification of a director must give consideration to the conduct of the actor, regardless of the validity of their appointment.[96] Put differently, everyone who brings themselves within the scope of the *Companies Act* must be subjected to its provisions, and such a person must not escape liability on the basis of an unprocedural appointment.[97] A narrow interpretation of the *Act* may result in abuse, unaccountability, and scapegoating on the basis of technicalities, hence the assumption should be that whoever factually acts as a director must be assigned the status of director for the purposes of the *Act*.[98] The original 1926 *Act* did not mandate the appointment of directors.[99] Provisions requiring the appointment of directors in respect of public companies were introduced into the 1926 *Companies Act* during 1939 by insertion of section 38 of the 1939 *Amendment Act*,[100] for companies incorporated after 01 January 1940.[101] This obligation became applicable to private companies in 1952[102] by insertion of section 40 of the *Amendment Act* of 1952.[103] Section 67 provides for restrictions on appointments of directors. A person shall not be capable of being appointed a director of a company through the articles of association, or be named as such in any prospectus issued by or on behalf of a company, or in relation to an intended company, before the registration of the articles or the publication of the prospectus or the lodging of the statement in *lieu* of prospectus,[104] provided that such a person has submitted a written consent to act as director,[105] and has acquired a specified threshold of shares in such a company.[106] The *Act* acknowledges the existence, or possible existence of *de facto directors* and the legal status of their boardroom decisions.

95 Du Plessis 1995 *J. S. Afr. L*. 155.
96 Du Plessis 1995 *J. S. Afr. L*. 156.
97 Du Plessis 1995 *J. S. Afr. L*. 158.
98 Du Plessis 1995 *J. S. Afr. L*. 158.
99 Blackman *Commentary on the Companies Act Chapter VIII Directors* (ss 208-251).
100 Section 38 of the *Companies Amendment Act* 23 of 1939.
101 Blackman *Commentary on the Companies Act Chapter VIII Directors* (ss 208-251).
102 Blackman *Commentary on the Companies Act Chapter VIII Directors* (ss 208-251).
103 Section 40 of the *Companies Amendment Act* 46 of 1952.
104 Section 67 (1) of the *Union of South Africa Companies Act* 46 of 1926.
105 Section 67 (1) (a) of the *Union of South Africa Companies Act* 46 of 1926.
106 Section 67 (1) (b) of the *Union of South Africa Companies Act* 46 of 1926.

Section 69 explicitly provides that the acts of a director or manager shall be valid regardless of defects that may be established at a later stage in relation to the appointment or qualification of such a director.[107] Based on the provisions of section 69, there is no doubt that the boardroom decisions of a *de facto* director are considered to be valid decisions. The validating provision, definition of a director, and the written consent requirement are the same as the corresponding provisions of sections 2, 67 (1) (a), and 72 of the *Transvaal Companies Act*. In *Acutt v Seta Prospecting and Developing Company*,[108] the court stated that parties transacting with *de facto* directors were under no legal obligation to enquire about the formalities or procedural aspects of appointment of the said *de facto* directors prior to transacting.[109] The question of law in *Acutt v Seta Prospecting and Developing Company*, amongst other was to determine whether a person who was not formally appointed as managing director had the authority to contract and bind the Respondent company. Appellant was promised a commission by a *de facto* director of the Respondent company and as such sought to bind the Respondent company to pay the promised commission made to him by its *de facto* managing director. It was argued on behalf of Respondent that the *de facto* managing director was not authorised to make such promises, hence same could not be binding to the Respondent company. The Court found that the formalities of appointment were of no critical importance or significance.[110] The determining factors were whether Appellant had acted as a managing director, whether the company's board had authorised him to act in the capacity of director, and whether he was ostensibly recognised as such.[111] The Court found that the *de facto* managing director was indeed authorised by the Respondent company's board of directors to transact on its behalf, and inherently authorising the payment of the commission associated with the contract in dispute, and therefore binding on the Respondent company.[112]

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107 Section 69 of the *Union of South Africa Companies Act* 46 of 1926.
108 *Acutt v Seta Prospecting and Developing Company Ltd* 1907 TS.
109 *Acutt v Seta Prospecting and Developing Company Ltd* 1907 TS p 801.
110 *Acutt v Seta Prospecting and Developing Company Ltd* 1907 TS p 814.
111 *Acutt v Seta Prospecting and Developing Company Ltd* 1907 TS p 814.
112 *Acutt v Seta Prospecting and Developing Company Ltd* 1907 TS p 819.

2.4.2.1 The *Union of South Africa Companies Act* case law analysis

Under the *Act* of 1926 a director whose terms of office has expired but continued to occupy office as director and execute functions as such was considered a *de facto* director and their acts were regarded as valid and binding on the entity they served.[113] This same legal principle was applicable to both incorporated and unincorporated business entities.[114] In *Ex Parte United Party Club 1930 WLD* the Court had to determine the validity of acts instituted by member of a management committee whose tenure of office had expired, and whether these committee members had *locus standi* to institute legal proceedings on behalf of the entity they claimed to represent. The entity/club/unincorporated society's constitution mandated that the society shall be governed by a general committee elected at an annual meeting constituting of paid-up members whose term of office shall expire at the end of February each year.[115] After being elected at a formally constituted meeting the preceding year, the society's estate was sequestrated and it stopped functioning, plus no subscription fees were paid, and the committee's management reign also expired.[116] The committee had nevertheless approached the Court according to the provisions of its constitution in an attempt to conduct the sequestrated club's business. Relying on English company law principles in a matter of *Consolidated Nickel Mines Ltd*,[117] the Court concluded that although the committee's tenure of office had expired, no elections were held, neither were subscription fees paid, owing to the club's sequestration, the committee was procedurally elected previously and under the circumstances they could lawfully act on behalf of their society and their actions are considered lawful and binding, similarly to those of *de facto* directors.[118] In *Marrok Plase v Advance Seed Co*[119] the court adjudicated on aspects of

113 *Ex Parte United Party Club* 1930 WLD.
114 *Ex Parte United Party Club* 1930 WLD.
115 *Ex Parte United Party Club* 1930 WLD p 280.
116 *Ex Parte United Party Club* 1930 WLD p 280.
117 *Consolidated Nickel Mines, Ltd*. (1914, 1 Ch. 883).
118 *Ex Parte United Party Club* 1930 WLD p 284.
119 *Marrok Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd* 1975 3 SA 403 (A) p 412.

irregularly appointed directors, *vis-à-vis de facto* directors. The Court cautioned against adopting an approach that seeks to excessively interpret section 69 in a restrictive manner.[120] The presiding judge outlined the primary purpose of the section by stating that the validating provision of section 69 of the *Act* was drafted with the principal aim of protecting the interest of persons who will unknowingly conclude business deals or contracts with directors whose appointments might not have satisfied all the requirements of the *Act*, particularly requirements of an administrative nature.[121] The Court found no legal justification to exclude the operations of section 69 to *de facto* directors.[122] The Court identified a class of *de facto* appointments that could be juridically subjected to the operations of section 69 including a person acting as a director without a formal appointment to that effect, a person continuing to act as a director after the expiry of their term of office, a person acting with the approval of fellow directors or shareholders as a director after their term of office has expired.[123] Section 69 was found to be applicable to a scenario by which an anomaly in the appointment of a purported director is borne out of bona fide oversight or negligence.[124] The Court further explained that failure to comply with the stipulated formalities and technicalities of formally appointing a director in accordance with the prescripts of 1926 *Act* by means of trivial omissions, results in *de facto* directors, whose decisions must therefore be valid in terms of section 69 of the *Act*.[125] In conclusion the Court dismissed the contention that the impugned decision concluded by *de facto* directors on 8 April 1969 was not valid because their names were not recorded in the register of members as required by section 67 (1) (b), as the specific entry was only made almost two years later on 5 March 1971.[126] Although the Court found the appointments defective in accordance with the *Act*, the blank signed

120 *Marrok Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd* 1975 3 SA 403 (A) p 412.
121 *Marrok Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd* 1975 3 SA 403 (A) p 412.
122 *Marrok Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd* 1975 3 SA 403 (A) p 412.
123 *Marrok Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd* 1975 3 SA 403 (A) p 412.
124 *Marrok Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd* 1975 3 SA 403 (A) p 412.
125 *Marrok Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd* 1975 3 SA 403 (A) p 413.
126 *Marrok Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd* 1975 3 SA 403 (A) p 403.

share transfer forms by the original incorporators to Respondents, constituted a formal appointment characterised by wrong appointment procedures,[127] the decision taken by the defectively appointed directors was therefore validated by the provisions of section 69.[128] *In R v Mall*[129] an accused whose term of office as a director has ceased, but continued nevertheless to control and direct the affairs of the company, thus acting in a director's capacity, was charged under provisions of section 381 of the Criminal Procedure Act of 1955[130] and section 185 of the 1926 *Act*.[131] Accused argued that since his term of office as director has ceased upon his replacement as director, he could not be subjected to the operation of section 185 of the *Companies Act* and can therefore not be imputed with the quilt of the company's crimes.[132] Accused further contested that in terms of the *Companies Act*, a director can only be a *de jure* director, one who is statutorily empowered with a legal right in terms of the *Act* or by incorporation, and not a person who exercise control over a company in a *de facto* manner.[133] The *Criminal Procedure Act* of 1955 defines a director of a corporate body to include any person who controls or governs or who is a member of a body or group of persons which controls or governs that corporate body or where there is no such body or group, who is a member of that corporate body,[134] whilst section 185 invokes the application of criminal provisions of insolvency law against a director of a company under specified circumstances.[135] The Court stated that a *de facto* director falls within the class of a director as defined in terms of section 229, and as envisioned in section 185 of the 1926 *Act*. A *de facto* director was described as a person who is elected or appointed a director, which appointment was procedurally irregular or defective. The Court also clarified that mere unauthorised

127 *Marrok Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd* 1975 3 SA 403 (A) p 403.
128 *Marrok Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd* 1975 3 SA 403 (A) p 412.
129 *R v Mall* 1959 4 SA 607 (N).
130 Section 381 of the *Criminal Procedure Act* 56 of 1955.
131 Section 185 of the *Companies Act* 46 of 1926.
132 *R v Mall* 1959 4 SA 607 (N) p 609.
133 *R v Mall* 1959 4 SA 607 (N) p 610.
134 Section 381 (10) of the *Criminal Procedure Act* 56 of 1955.
135 Section 132 (d) (iii) of the *Insolvency Act* 24 of 1936.

usurping of powers, duties, rights, or functions of a director by a person will not qualify such a person as a *de facto* director,[136] meaning that one needs to be authoritatively appointed, nominated, or empowered to function as a director either by incorporation, shareholders, or by fellow directors. The Court opined that *de facto* directorship must be viewed from a perspective that the legislator was cognisant that corporate entities are sometimes directed by persons who are not personally members of duely appointed boards of directors, as a result of other legal corporate relationships such as nominee representations, and interrelatedness of companies.[137] It is therefore the legislator's intention to recognise and subject the conduct of persons who exercise control, direct the affairs of companies, enjoys the rights, responsibilities, functions, and duties of directors from elsewhere other then duely established boards of directors to the operation of the *Act* and to subsequently hold them to account.[138] By usurping statutorily assigned functions, *de facto* directors had placed and subjected themselves to be regulated by prescripts of the *Act* in accordance with the provisions meant to regulate the conduct of duely appointed directors.[139] The contentions or attempts by the accused to distance or exempt himself from being identified as a director, albeit a *de facto* director and to invalidate his decisions under the *Companies Act* were rejected by the Court. It was held that a *de facto* director is one whose appointment was defective, including one whose tenure as duly appointed director has expired, but nevertheless continued to direct the affairs of the company in the same capacity as that of a duly appointed director.[140] Accused's boardroom decisions were therefore validate in terms of section 69 of the *Act*. The intentions of section 69 is closely related to the common law principle of the Turquand Rule, which principle aimed to accord bona fide contracting third-parties protection against nullification of concluded contracts on the basis that the other

136 *R v Mall* 1959 4 SA 607 (N) p 608.
137 *R v Mall* 1959 4 SA 607 (N) p 611.
138 *R v Mall* 1959 4 SA 607 (N) p 611.
139 *R v Mall* 1959 4 SA 607 (N) p 611.
140 *R v Mall* 1959 4 SA 607 (N) p 622.

contracting party was not duly authorised.[141] This principle absolves external parties from any defects that may arise as a result of internal processes deficiencies or irregularities by the other party to the contract, thus creating an assumption the other party has fulfilled all internal requirements to constitute a valid contract.[142] This principle was incorporated into South African company law jurisprudence[143] in *Legg & Co v Premier Tobacco Co*,[144] and applied with approval in *Mine Workers' Union v Prinsloo*.[145] In *S v Shaban*[146] an accused and his accomplices (fellow directors) staged a pretentious act of resigning from the board of directors, and instead installed nominee beneficiaries described by the Court as mere dummies, puppets and stooges.[147] The nominees were remotely controlled by accused who continued to preside, manipulate, and manage the affairs of the company while presenting himself to ostensibly have nothing to do with the company.[148] Accused therefore used the nominee beneficiaries to sign fraudulent documents and thus facilitated fraud through nominees. Accused was nevertheless identified and convicted as a director of the company on the basis of his continued involvement in the management of the affairs of the company, regardless of his purported resignation.[149] The *court a quo* refused leave for accused to appeal his conviction and a petition to the Chief Justice for leave to appeal was similarly dismissed. *L Suzman v Yamoyani*[150] brought a different judicial perspective to *R v Mall*[151] in as far as identification of a person acting *de facto*. *L Suzman v Yamoyani* dealt with a judicial determination whether Respondent was a director or manager as envisioned by section 184 of the *Act* regardless of such formal appointment not having been concluded. Section184 regulate

141 Cassim et al *Contemporary Company Law* 181.
142 Cassim et al *Contemporary Company Law* 181.
143 Cassim et al *Contemporary Company Law* 181.
144 *Legg & Co v Premier Tobacco Co* 1926 AD 132.
145 *Mine Workers' Union v Prinsloo* 1948 (3) SA 831 (A).
146 *S v Shaban* 1965 (4) SA 646 (W).
147 *S v Shaban* 1965 (4) SA 646 (W).
148 *S v Shaban* 1965 (4) SA 646 (W).
149 *S v Shaban* 1965 (4) SA 652 (W).
150 *L Suzman (Rand) Ltd v Yamoyani* (2) 1972 (1) SA 109 (W).
151 *R v Mall* 1959 4 SA 607 (N).

the powers of the court to assess damages against a delinquent director, promoter, manager, liquidator, or officer of a company under liquidation.[152] Respondent was the Principal of a nominee beneficiary.[153] For a period of six weeks after acquisition of the company, beneficial nominee collected daily revenues and handed same to Respondent who deposited the revenue in an account of another entity he manages, and utilised same according to his discretion including payment to creditors of the newly acquired company.[154] The Court relied on the decision of *R v Mall* to dismiss any proposition that Respondent was a *de facto* director on the basis that no evidence was led to prove that an attempt was made to appoint him as director.[155] The Court concluded that Respondent was a *de facto* manager of the company as envisioned by section 184 (1) of the *Act*. The Court relied on the combined *prima facie* conduct of Respondent and evidence presented by applicant to conclude that Respondent's conduct of instructing beneficial nominee to hand over daily revenue to him, receipt of daily revenue and disposal thereof, handling of company summons, and settlement of creditors was tantamount to someone who controlled, managed, and administered the affairs of the business as its principal, hence a *de facto* manager.[156] *S v Hepker*[157] dealt with the conviction of a persons, including one who was not formally appointed as a director on counts of fraud under provisions of the *Criminal Procedure Act* of 1955[158] and section 86 (2) of the *Act*. Section 86 prohibits directors amongst other from concluding certain financial transactions listed therein.[159] Although accused two was never formally appointed as a director of the concerned company in accordance with the prescripts of the *Act*, he was nevertheless convicted as director based on the Court's findings that he was the main controlling brain of the company and that he was equally responsible for perpetrating the offences committed in

152 Section 184 (1) of the *Union of South Africa Companies Act* 46 of 1926.
153 *L Suzman (Rand) Ltd v Yamoyani* (2) 1972 (1) SA 109 (W) P 110.
154 *L Suzman (Rand) Ltd v Yamoyani* (2) 1972 (1) SA 109 (W) P 111.
155 *L Suzman (Rand) Ltd v Yamoyani* (2) 1972 (1) SA 109 (W) P 113.
156 *L Suzman (Rand) Ltd v Yamoyani* (2) 1972 (1) SA 109 (W) P 116.
157 *S v Hepker and Another* 1973 (1) SA 472 (W).
158 *Criminal Procedure Act* 56 of 1955.
159 Section 86 (2) of the *Companies Act* 46 of 1926.

the name of the company.[160] The court made a number of observations that are important in addressing aspects of *de facto* directors and their related boardroom, business, or corporate decisions from company law perspective. The court will identify and hold to account *de jure* directors who allow themselves to be used as "string puppets" (nominal director), and *de facto* directors who actually controls and manages the affairs of companies from outside while they are not formally appointed to do so.[161] The Court will analyse the activities or conduct of those involved in the management of the business to identify those that are factually directing the affairs of a company and the *de jure* directors that are only occupying positions nominally, supposedly, and or ostensibly.[162] If substantiating evidence presented before Court are indicative of a *de facto* director being the driving force that actually controls the affairs of a company, then the delinquent conduct attributed to a *de jure* director shall be equally imputed to such identified *de facto* director.[163] The culpability of either one of them is therefore ascribed to both on equal measure because they acted with a common purpose.[164] Courts have a legal obligation to uphold, maintain, and enforce corporate management morality.[165] Companies that are exclusively owned by their directors are not exempted from being managed in accordance with judicially established governance guidelines, principles, and statutes.[166] Directors, *de jure* or *de facto* has a legal obligation to manage companies fairly in order to protect the interest of those that are affected by their decisions and are likely oblivious to the status of the companies' internal affairs.[167] The desired, preferred, or correct approach is to adopt an attitude of general, judicial, and management intolerance towards corporate governance maleficence of any sort against perpetrators

160 *S v Hepker and Another* 1973 (1) SA 472 (W) p 484.
161 *S v Hepker and Another* 1973 (1) SA 472 (W) p 472.
162 *S v Hepker and Another* 1973 (1) SA 472 (W) p 473.
163 *S v Hepker and Another* 1973 (1) SA 472 (W) p 473.
164 *S v Hepker and Another* 1973 (1) SA 472 (W) p 473.
165 *S v Hepker and Another* 1973 (1) SA 472 (W) p 484.
166 *S v Hepker and Another* 1973 (1) SA 472 (W) p 484.
167 *S v Hepker and Another* 1973 (1) SA 472 (W) p 484.

of whichever statuses.[168] In *Dowjee and Co Ltd v Waja*,[169] the Court adjudicated a matter pertaining to a purported director's authority to act on behalf of a company whilst the director's appointment was found to have been unprocedural and invalid.[170] The *court a quo* had initially ruled that Appellant had no legal standing to act on behalf of the company because he was not a de jure director of the concerned company.[171] On appeal the Court noted that Appellant's defective appointment could be cured by vote of resolution since he was already a shareholder.[172] The Court of Appeal submitted that the appointment of a director is a company internal administration procedure, which procedure cannot be challenged by a company outsider, and should the defect persist without being corrected by the company a *de facto* director will be considered a director *de jure* by company outsiders.[173] In expressing its views about the validity of Appellant's boardroom decisions as a *de facto* director, the Court opined that in terms of section 69[174] a *de facto* director's decisions are as valid as if they were concluded by a director *de jure*.[175] When articulating the effect of the words 'discovered afterwards" in relation to section 69, the Court clarified that the provisions of the validating section is intendent to offer protection to outsiders that transact with the company and to the company itself in instances by which a known defect or irregularity was allowed to prevail without rectification by fellow directors or subscribers.[176] It was further concluded that the validating section is only applicable to completed boardroom decisions, not to contemplated, pending, or acts in progress.[177] The meaning and operation of section 69 was also judicial explained in *Dey v Goldfields Building Finance and Trust Corporation*.[178] The facts are that Respondent company had

168 *S v Hepker and Another* 1973 (1) SA 472 (W) p 484.
169 *Dowjee and Co Ltd v Waja* 1929 TPD.
170 *Dowjee and Co Ltd v Waja* 1929 TPD p 66.
171 *Dowjee and Co Ltd v Waja* 1929 TPD p 66.
172 *Dowjee and Co Ltd v Waja* 1929 TPD p 67.
173 *Dowjee and Co Ltd v Waja* 1929 TPD p 68.
174 Section 69 of the *Companies Act* 46 of 1926.
175 *Dowjee and Co Ltd v Waja* 1929 TPD p 68.
176 *Dowjee and Co Ltd v Waja* 1929 TPD p 70.
177 *Dowjee and Co Ltd v Waja* 1929 TPD p 70.
178 *Dey v Goldfields Building Finance and Trust Corporation Ltd* 1927 WLD.

appointed it's company secretary as a director, resulting in the appointee holding two distinct offices or vacancies of both company secretary and director.[179] The appointment as director was found to be invalid on the basis of occupying two incompatible or distinct offices, which practice was against the law, if the appointee does not vacate the office he occupied prior to being appointment as director.[180] After appointment as director, appointee acted as such by participating in deliberations and casting votes on business decisions.[181] Although the appointment as director was found to be invalid, the deliberations and votes casted were validated in accordance with section 69 because the appointee and Respondent company had no knowledge of the inherent deficiency of his initial appointment as director, and by Article 83 of the Respondent company which had a provision similar to section 69.[182]

2.4.3 The Companies Act of 1973 and case law analysis

A director include any person occupying the position of director or alternate director of a company, by whatever name designated.[183] This definition is well-suited to be applied to a *de facto* director, as it does not necessarily define the term director but identifies a person deemed a director on the basis of the role such a person plays in the governance of a company.[184] This proposition is based on the words "who occupies," rather than "who holds." The argument is that the occupation of the position or role may be assumed lawfully, procedurally, or unprocedurally, and or unlawfully.[185] The focus is therefore on the role that such a person plays, and not concerned with the appointment procedures

179 *Dey v Goldfields Building Finance and Trust Corporation Ltd* 1927 WLD p 181.
180 *Dey v Goldfields Building Finance and Trust Corporation Ltd* 1927 WLD p 181.
181 *Dey v Goldfields Building Finance and Trust Corporation Ltd* 1927 WLD p 181.
182 *Dey v Goldfields Building Finance and Trust Corporation Ltd* 1927 WLD p 181.
183 Section 1 of the *Companies Act* 61 of 1973.
184 Blackman *Commentary on the Companies Act Chapter VIII Directors* (ss 208-251).
185 Blackman *Commentary on the Companies Act Chapter VIII Directors* (ss 208-251).

or the legalities thereof.[186] The definition is therefore inclusive, and not restrictive.[187] There is therefore no statutory limitations to who is perceived a director, as long as a person executes functions that are normally reserved for a director.[188] Newly appointed directors are required to give written consent before they assume directorship.[189] The requisite written consent shall be delivered to the company before a mandatory issuing of a qualifying share certificate in applicable circumstances.[190] The written consent may be submitted to the Registrar of Companies within a prescribed time period after the appointment.[191] A newly appointed director's failure to tender a written consent to serve shall not annul the validity of his appointment,[192] but constitutes an offence.[193] The boardroom decisions of a director of a company shall be nevertheless valid regardless of a future defect, irregularity, or anomaly that may be discovered afterwards regarding his appointment procedure or qualification.[194] Section 214 is only applicable to conduct or boardroom decisions of a director whose appointment was found to be irregular or defective after the acts have been concluded.[195] Companies are not prohibited from incorporating validating articles in their constitutions to enforce validity between the company, third parties, and its members.[196] Absence thereof will however not negate the operations of section 214.[197] Whenever an irregularity in appointment is identified, the defect must be rectified instantly before a valid act can be concluded.[198] *In Gorfil and Another v Marendaz and Others*,[199] relying on foreign authority to give judicial effect to

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186 Blackman *Commentary on the Companies Act Chapter VIII Directors* (ss 208-251).
187 Blackman *Commentary on the Companies Act Chapter VIII Directors* (ss 208-251).
188 Blackman *Commentary on the Companies Act Chapter VIII Directors* (ss 208-251).
189 Section 211 of the *Companies Act* 61 of 1973.
190 Section 211 (1) (a) of the *Companies Act* 61 of 1973.
191 Section 211 (3) of the *Companies Act* 61 of 1973.
192 Section 211 (4) of the *Companies Act* 61 of 1973.
193 Section 211 (6) of the *Companies Act* 61 of 1973.
194 Section 214 of the *Companies Act* 61 of 1973.
195 Henochsberg *Commentary on the Companies Act* 61 of 1973 (s 214).
196 Henochsberg *Commentary on the Companies Act* 61 of 1973 (s 214).
197 Henochsberg *Commentary on the Companies Act* 61 of 1973 (s 214).
198 Henochsberg *Commentary on the Companies Act* 61 of 1973 (s 214).
199 *Gorfil and Another v Marendaz and Others* 1965 (1) SA 686 (T).

the operations of section 214, the Court explained that the provision must be interpreted in plain, simple language in such a manner to enable distinguishing between instances where an attempt was made to appoint a director, and instances where no attempt was made at all.[200] The *Act* recognises the following class of directors, namely, an alternate director,[201] the founding director/incorporator of the company,[202] a director appointed by subscribers,[203] and a *de facto* director.[204] In *Gordon NO and Rennie NO v Standard Merchant Bank and Others*[205] the Court clarified aspects regarding the frequency of wrongful conduct and liability of persons acting as directors on the basis of section 424 (1) of the *Act* . The Court had to determine whether a single wrongful act was sufficient to establish liability on the part of a director as envisioned by section 424 (1). Section 424 regulates liability borne out of fraudulent conducting of business for directors or any other person. The provision states as follows;

> when it appears during any judicial management proceedings related to winding-up, judicial management or otherwise, that any business of the company was/is being conducted recklessly/fraudulently or with intent to defraud creditors or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in a wrongful manner characterised by negligence or fraud , shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.[206]

Defendant argued that a single wrongful transaction does not constitute reckless or fraudulent conducting of the business of the company in terms of the *Act*, implying that the wrongful conduct should have manifested in a number or series of such wrongful

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200 *Gorfil and Another v Marendaz and Others* 1965 (1) SA 686 (T) p 207.
201 Section 1 of the *Companies Act* 61 of 1973.
202 Section 208 (2) of the *Companies Act* 61 of 1973.
203 Section 209 of the *Companies Act* 61 of 1973.
204 Section 211 (4) of the *Companies Act* 61 of 1973.
205 Gordon NO and Rennie NO v Standard Merchant Bank Ltd and Others 1984 (2) SA 519 (C).
206 Section 424 (1) of the *Companies Act* 61 0f 1973.

conduct.[207] The Court opined that a judicial interpretation which seeks to realise the objective of the provision, which is to impute liability on the wrongful conduct of such a director/officer must be preferred.[208] It further stated that the legislature did not intent to absolve a director/officer of liability on the basis of a massive fraud committed in a single transaction, and then hold to account a director who committed fraud by means of fragmented numerous minimal amounts.[209] On the basis of this judgment, I submit that it is the legislator's intention to hold to account persons acting de facto as directors on the basis of their conduct or actions and not to absolve or exclude such persons from the operations of the Act on the basis of a defective, unprocedural, or faulty appointment procedures. Using *Robinson v Randfontein Estates Gold Mining*[210] as a point of reference, it is settled that prior to the *Companies Act* of 2008, South African courts could impute fiduciary duties on *de facto* directors, non-directors, or people not formally appointed as directors who were found to be exercising control over affairs of companies.[211] In *Howard v Herrigel and Another NNO*,[212] Appellant argued that he could not be held accountable for the fraudulent contact of a company because he was not an executive director of the concerned company or involved in the day to day administration of the said company.[213] Appellant's arguments on the basis of the extent of his involvement with the said company was rejected by the Court and found to be unhelpful and deceiving in determining a director's obligations towards a company.[214] The Court highlighted that it was unnecessary to attempt or classify the nature, status, or class of directorship before liability can be apportioned in terms of the *Act*.[215] It was also found that such classification practice or distinction was not a statutory requirement of the *Act*.[216] The Court further

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207 *Gordon NO and Rennie NO v Standard Merchant Bank Ltd and Others* 1984 (2) SA 519 (C) p 520.
208 *Gordon NO and Rennie NO v Standard Merchant Bank Ltd and Others* 1984 (2) SA 519 (C) p 520.
209 *Gordon NO and Rennie NO v Standard Merchant Bank Ltd and Others* 1984 (2) SA 519 (C) p 520.
210 *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.
211 Grove Company Directors: *Fiduciary Duties and the Duty of Care and Skill* 19.
212 *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A).
213 *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) p 678.
214 *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) p 678.
215 *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) p 678.
216 *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) p 678.

stated that liability, and the director's statutory and common law duties to a company takes effect from the moment a person agrees to the appointment of director, or when such a person starts executing executive functions akin to a director of such a company.[217] An incumbent to the position of director must be determined, identified, and held to account on facts and circumstances of their conduct, or role pertaining to controlling the affairs of the company.[218] Legal rules applies the same to all directors regardless of their classification be it *de facto* directors.[219] This approach, said the Court, is the judicially preferred *modus operandi* to conducting an inquiry into directorship misconduct, be it associated with recklessness, negligence, or fraudulent conduct.[220] In *Intramed v Standard Bank of SA*,[221] the Court had to determine the status of an unrehabilitated insolvent who executed functions of a financial director, and the validity of his boardroom decisions. Plaintiff had no legally constituted board of directors,[222] and as such had authorised an unrehabilitated insolvent to manage, control and directs its financial affairs.[223] Plaintiff's financial manager also reported to the *de facto* director.[224] When Defendant retained money in the account of Plaintiff in order to offset a due overdraft debt concluded between Plaintiff and Defendant, by Plaintiff's *de facto* financial director, Plaintiff challenged the lawfulness of boardroom decisions or the agreement in dispute, concluded by its *de facto* financial director on the basis that the signatory to the agreement was not formally appointed as director of Plaintiff or its parent company.[225] In dismissing Plaintiff's contention around the authority of their *de facto* financial director, the Court considered the duration for which such *de facto* director had acted on behalf of Plaintiff, the fact that his authority was never challenged by Plaintiff, or Plaintiff's

217 *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) p 678.
218 *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) p 678.
219 *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) p 678.
220 *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) p 678.
221 *Intramed (Pty) Ltd (in liquidation) v Standard Bank of SA Ltd* [2005] 1 All SA 460 (W).
222 *Intramed (Pty) Ltd (in liquidation) v Standard Bank of SA Ltd* [2005] 1 All SA 460 (W) p 466.
223 *Intramed (Pty) Ltd (in liquidation) v Standard Bank of SA Ltd* [2005] 1 All SA 460 (W) p 484.
224 *Intramed (Pty) Ltd (in liquidation) v Standard Bank of SA Ltd* [2005] 1 All SA 460 (W) p 471.
225 *Intramed (Pty) Ltd (in liquidation) v Standard Bank of SA Ltd* [2005] 1 All SA 460 (W) p 460.

holding company directors, and the fact that Plaintiff's holding company directors has throughout ratified decisions made on behalf of Plaintiff by the *de facto* financial director.[226] The Court concluded that unrehabilitated insolvent was indeed Plaintiff's *de facto* financial director and that the transactions he concluded were valid and binding on Plaintiff company.[227] The facts of *De Villiers NO and Another v BOE Bank*[228] are almost similar to *Intramed v Standard Bank of SA*. The Court had to determine the corporate status of a representative of Appellant's companies who concluded loan agreements between Appellant's companies and the Respondent bank, and the validity/enforceability of those agreements on the basis that Appellant's companies' representative was not a formally appointed director of Appellant's group of companies and therefore lacked formal authorisation, thus he lacked legal authority to conclude binding transaction on behalf of Appellant's companies.[229] In dismissing Appellant's contestations, the court stated that the shareholders and directors of Appellant's group of companies were weary of the loans, and encouraged acquisition thereof, never challenged the authority of the signatory representative, and could therefore be regarded to have authorised and ratified the agreements albeit informally.[230] The Court relied on authority of *Randcoal Services Ltd and others v Randgold and Exploration Co*[231] to conclude that formal ratification of a boardroom decision could be substituted by the principle of implied unanimous assent of directors, as could be observed based on the circumstances of the case.[232] The Court was cognisant of the fact that the impugned agreements were concluded by a *de facto* director, and validated by the directors and shareholders informal approval as per acceptable company law practices.[233] In instances where the Court seeks to prove criminal liability by directors of companies, emphasis is placed on the conduct of a person

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226 *Intramed (Pty) Ltd (in liquidation) v Standard Bank of SA Ltd* [2005] 1 All SA 460 (W) p 489.
227 *Intramed (Pty) Ltd (in liquidation) v Standard Bank of SA Ltd* [2005] 1 All SA 460 (W) p 492.
228 *De Villiers NO and Another v BOE Bank Ltd* 2004 (3) SA 1 (SCA).
229 *De Villiers NO and Another v BOE Bank Ltd* 2004 (3) SA 1 (SCA) p 457.
230 *De Villiers NO and Another v BOE Bank Ltd* 2004 (3) SA 1 (SCA) para 53.
231 *Randcoal Services Ltd and others v Randgold and Exploration Co Ltd* 1998 (4) SA 825 (SCA).
232 *De Villiers NO and Another v BOE Bank Ltd* 2004 (3) SA 1 (SCA) para 53.
233 *De Villiers NO and Another v BOE Bank Ltd* 2004 (3) SA 1 (SCA) p 458.

executing functions that are ordinarily reserved for a director, even if no formal appointment as such has taken place, and this would include *de facto* directors.[234]

2.4.4 *Companies Bill* of 2007

The *Companies Bill* aimed to act as a tool of facilitating the development, formulation, drafting of a clear, predictable, and consistently enforceable company law that would ensure a legally protective environment for economic engagements and transactions within the Republic.[235] The *Bill* contained provisions that would enable efficient company management, elevated corporate governance standards, to make South Africa's corporate governance laws compatible and on par with leading international company law jurisdictions by incorporating[236] or nationalising international best corporate governances practices into the South African context.[237] The *Bill* consisted of five pillars that would facilitate the attainment of the Bill's strategic objectives, namely simplification, flexibility, corporate efficiency, transparency, and predictable regulation.[238] In terms of corporate efficacy, it was expected that the incoming company law will provide elucidation on board structures, directors' roles, responsibilities, liabilities,[239] as well as to provide transparency by means of clear identification of directors and related governance accountability.[240] Importantly, the new company law was not intended to be used as a tool of discarding reasonable and relevant provisions of the established South African company law jurisprudence, but to rather introduce befitting provisions that are relevant and applicable to a constitutional democracy and open economy.[241] The new company law had to be compatible and in alliance with the Republic's legal, social, and economic realities, while seeking to retain provisions of the existing company law regime deemed

234 *S v Van Denberg and Others* 1979 3 All SA 133 (D) p 140.
235 *Companies Bill* of 2007 background explanatory memoranda p 3.
236 *Companies Bill* of 2007 background explanatory memoranda p 3.
237 *Companies Bill* of 2007 background explanatory memoranda p 4.
238 *Companies Bill* of 2007 background explanatory memoranda p 4-5.
239 *Companies Bill* of 2007 background explanatory memoranda p 5.
240 *Companies Bill* of 2007 background explanatory memoranda p 5.
241 *Companies Bill* of 2007 background explanatory memoranda p 6.

capable of achieving the desired legislative objectives.[242] Chapter 4 Part B of the *Bill* dealt with aspects of boards and directors. A person who has not consented to becoming a company director is disqualified from serving as such.[243] A disqualified person must not be elected, appointed, or consent to be elected or appointed as a director of a company.[244] Such a person should not make boardroom decisions or participate in boardroom decisions that affect the business as a whole or a sizeable part of such a business,[245] or exercise authority that has the potential to significantly impact the financial standing of such a company.[246] In fact, a disqualified person must not have company related communication with the directors,[247] if it is known that the directors are likely to implement such communication[248] or if the disqualified person intended to have their views, wishes, or instructions implemented by such directors.[249] Under no circumstances must a disqualified person act in a company director capacity.[250] Companies are prohibited from deliberately appointing disqualified individuals as directors,[251] and a serving director's tenure ceases immediately upon being disqualified.[252]

2.4.5 Summary of chapter Two

It is unquestionable that English law principles has influenced South African company law jurisprudence since its genesis or introduction in 1861 through the enactment of the *Joint Stock Companies Limited Act*. English company law influence continued to shape subsequent South African company law legislation, namely *Companies Acts* 31 of 1909, 46 of 1926, 61 of 1973, *Close Corporations Act*, and the *Companies Act* of 2008. All South African *Companies Acts* preceding the 2008 *Act* were cognisant of the existence of

242 *Companies Bill* of 2007 background explanatory memoranda p 6.
243 Section 89 (5) (b) of the *Companies Bill* of 2007.
244 Section 89 (1) (a) of the *Companies Bill* of 2007.
245 Section 89 (1) (b) of the *Companies Bill* of 2007.
246 Section 89 (1) (c) of the *Companies Bill* of 2007.
247 Section 89 (1) (d) of the *Companies Bill* of 2007.
248 Section 89 (1) (d) (i) of the *Companies Bill* of 2007.
249 Section 89 (1) (d) (ii) of the *Companies Bill* of 2007.
250 Section 89 (1) (e) of the *Companies Bill* of 2007.
251 Section 89 (2) of the *Companies Bill* of 2007.
252 Section 89 (3) of the *Companies Bill* of 2007.

de facto directors, hence these instruments contained statutory provisions validating boardroom decisions and conduct of directors whose appointments were procedurally defective. Section 72 of the *Act* of 1909, section 69 of the *Act* of 1926, and Section 214 of the *Act* of 1973 bears reference to the respective *de facto* director conduct validating statutory provisions. Prior to the 2008 *Act*, South African company law jurisprudence recognised the following class of persons as *de facto* directors and whose boardroom decisions are considered valid, namely a *de jure* director who becomes disqualified during the tenure of service, unprocedurally appointee, a person not formally appointed, a director whose term of office has expired, a person controlling dummy, nominee, or puppet directors, and an unrehabilitated insolvent acting as director with the blessing of the board/shareholders. In terms of the former legislation, non-compliance with the requirements of submitting a written consent to serve as director was considered a formality/procedural issue which did not invalidate an appointment or conduct of such a director. The enactment of the 2008 *Act* was intended to facilitate and introduce certain governmental objectives for the Republic's corporate governance instruments. Government sought to introduce provisions of company law that were simple and easy to understand, interpret, implement, predictable, and on par with the best international regimes and corporate governance practices. The aim was to retain functional, efficient, and progressive provisions of the 1973 Act, in relation to transparency in corporate governance, identification of directors, their roles, and responsibilities, enhancement of shareholders protection, corporate governance accountability, and to minimise reliance on common law principles to settle corporate governance legal issues. The explanatory memorandum on section 89 (5) (b) of the *Companies Bill* and provisions of section 66 (7) (b) of the *Act* of 2008 does however not make provisions for a *de facto* director, and the legal status of their boardroom decisions. Whilst section 89 (5) (b) of *Companies Bill* disqualifies a person from serving as a director upon failing to submit written consent to serve as such, section 66 (7) (b) of the 2008 Act states that a person will only be entitled to serve as director upon tendering a written consent. Presently, the concept of de facto director has not been judicially settled on the basis of the 2008 *Act* provisions. There is

however mixed reactions, legal opinions, uncertainty, confusion, and contradictory academic perspectives regarding the existence and regulation of aspects of *de facto* director and the validity of their boardroom decisions within the context of the 2008 Companies Act. The 2008 *Act* contains no clause validating boardroom decisions of *de facto* directors, unlike the preceding company laws of the Republic.

Chapter 3 United Kingdom and Australian *de facto* director jurisprudence

This chapter consist of an exposition of *de facto* director concept according to the United Kingdom and Australian respective jurisprudences. The exposition entails the definition, classification, recognition of directors, including *de facto* directors, and the validity of their corporate decisions. This segment will conclude with a brief comparative analysis of the two foreign regimes with the aim of highlighting legislative and, or judicial interpretation principles similarities, or distinctions.

3.1 United Kingdom statutory regime

The United Kingdom *Companies Act,* 2006 defines a director as including any person occupying the position of director, by whatever name called,[253] whilst a person in accordance with whose directions or instructions the directors of a company are accustomed to act is considered a shadow director.[254] The acts of a person acting as director are valid regardless of future findings relating to an erroneous appointment of such a director,[255] a person acting in a capacity of director whilst disqualified from acting as such,[256] acting as director when their tenure as director has lapsed,[257] and casting

253 Section 250 of the *Companies Act*, 2006.
254 Section 251 (1) of the *Companies Act*, 2006.
255 Section 161 (1) (a) of the *Companies Act*, 2006.
256 Section 161 (1) (b) of the *Companies Act*, 2006.
257 Section 161 (1) (c) of the *Companies Act*, 2006.

votes as director while incapacitated to do so.[258] The validity clause similarly applies to purported directors that are appointed by means of a void resolution in respect of public companies.[259] The *Companies Act*, 2006 authoritatively stipulates that a shadow director is considered a director-proper, for the purposes of the *Act*, hence the provisions of the *Act* are applicable to them on equal footing as in the case of a *de jure* director.[260] The *Act* further makes provision for ratification[261] of a shadow director's wrongful conduct.[262] Directors are required to conclude a service contract with the company wherein they undertake to personally render directorial services,[263] a copy of which must be kept by the company,[264] for at least a year after the end of the concerned director's tenure.[265] Should the contract not be in test, the company must compile a written memorandum outlining the terms of the director's service contract.[266] Failure to file and avail the directorial service contract requirements renders the responsible company official in contravention of the *Act* and liable to financial penalties.[267]

3.2 United Kingdom case law analysis

The concept of *de facto* director and the validity of their boardroom decisions has been part of English company law jurisprudence for a long time,[268] and has been judicially argued since 1800s.[269] in *Foss v Harbottle* the Court stated that the acts of a board acting *de facto* are valid, regardless of the unlawfulness of the boards' constitution.[270] The same

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258 Section 161 (1) (d) of the *Companies Act*, 2006.
259 Section 161 (2) of the *Companies Act*, 2006.
260 Section 230 of the *Companies Act*, 2006.
261 Section 239 (1) of the *Companies Act*, 2006.
262 Section 239 (5) (c) of the *Companies Act*, 2006.
263 Section 227 (1) (a) of the *Companies Act*, 2006.
264 Section 228 (1) (a) of the *Companies Act*, 2006.
265 Section 228 (3) of the *Companies Act*, 2006.
266 Section 228 (1) (b) of the *Companies Act*, 2006.
267 Section 228 (6) of the *Companies Act*, 2006.
268 *Holland (Respondent) v The Commissioners for Her Majesty's Revenue and Customs (Appellant) and another* [2010] UKSC 51 para 26.
269 *Canadian Land Reclaiming and Colonising Co, Coventry, and Dixon's case* (1880) 14 Ch D 660; *Mangles v Grand Collier Dock Co (1840) 10 Simons 519; Foss v Harbottle* (1843) 2 Hare 461.
270 *Foss v Harbottle* (1843) 2 Hare 461 p 498.

principle was reiterated with approval in earlier judgments of *County Life Assurance Co*,[271] *Murray v Bush*,[272] and *Mahony v East Holyford Mining*.[273] The manner of appointing directors is an internal company procedure which a transacting/contracting party has no legal obligation to query.[274] *De facto* directors are equally liable for criminal or governance contraventions as if they were *de jure* directors.[275] For a period of about 150 years, English company law jurisprudence only recognised two types of *de facto* directors, namely persons who were defectively appointed as directors, and directors whose tenure of office had lapsed but nevertheless continued to act as directors.[276] The English law recognition of only two types of *de facto* directors was first modified in *Re Lo-Line Electric Motors*,[277] when the court barred a *de facto* director from acting as director for a specified period. The Court opined that the statutory objective of the disqualification clause was not to punish or to discourage individuals acting as directors but to protect the general public and creditors from economic harm caused by individuals who trade culpably.[278] It was further submitted that the only determining factor when considering disqualifying a person from acting as director in terms of the provisions of the *Act*, is the individual's conduct as director of a company, regardless of the validity, or lack thereof of the manner in which they were appointed or assumed the office of director.[279] The Court further stated that the phrase "director includes any person occupying the position of director, by whatever name called", is not descriptive by nature, but an identification of categories of persons who must be included and be deemed directors.[280] In *Holland v The*

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271 *County Life Assurance Co* (1870) LR 5 Ch App 288.
272 *Murray v Bush* (1873) LR 6 HL 37.
273 *Mahony v East Holyford Mining Co Ltd* (1875) LR 7 HL 869.
274 *Rama Corpn Ltd v Proved Tin and General Investments Ltd* [1952] 2 QB 147.
275 *Holland (Respondent) v The Commissioners for Her Majesty's Revenue and Customs (Appellant) and another* [2010] UKSC 51 para 77-78.
276 *Holland (Respondent) v The Commissioners for Her Majesty's Revenue and Customs (Appellant) and another* [2010] UKSC 51 para 54.
277 *Re Lo-Line Electric Motors Ltd* (1988) 2 All ER 692.
278 *Re Lo-Line Electric Motors Ltd* (1988) 2 All ER 692 p 699.
279 *Re Lo-Line Electric Motors Ltd* (1988) 2 All ER 692 p 699.
280 *Re Lo-Line Electric Motors Ltd* (1988) 2 All ER 692 p 699.

Commissioners of Revenue and Customs,[281] the Supreme Court had to determine whether a *de jure* director of a corporate director was a *de facto* director of the composite companies (established by *de jure* director of corporate director) of the corporate director in terms of the 1985 *Companies Act*,[282] and whether liability could be imputed to such a person as a delinquent director in terms of section 212 of the *Insolvency Act*.[283] The definition of a director in the 1985 *Act*[284] is the same as the 2006 *Act*, which definition is considered inclusive, rather than exhaustive,[285] whilst the provisions of the *Insolvency Act* dealt with aspects of remedy against delinquent directors, liquidators, officers, or managers of a company.[286] Although Respondent was absolved on the basis of no formal appointment as director of the concerned companies having taken place and lack of evidence to prove that he acted beyond the scope of his statutory obligations as *de jure* director of the corporate director, important *de facto* director principles were elucidated in both majority and minority dissenting judgments. It was reiterated that a company is creature of statute, hence an artificial instrument which can only act through the conduct of human beings.[287] The Court stated that the principles of *de facto* director could only be associated with procedurally appointed directors and that a defectively appointed director does not qualify to be identified as a director within the context the *Companies Act*.[288] The view that only a validly appointed director could identify as a de facto director was later rebutted, and expanded.[289] A *de facto* director is a person who acts, assume, claim, purports, and is portrait by the company as a director although such a person was

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281 *Holland (Respondent) v The Commissioners for Her Majesty's Revenue and Customs (Appellant) and another* [2010] UKSC 51.

282 *Companies Act*, 1985.

283 *Insolvency Act,* 1988.

284 Section 741 (1) of the *Companies Act*, 1985.

285 *Holland (Respondent) v The Commissioners for Her Majesty's Revenue and Customs (Appellant) and another* [2010] UKSC 51 para 20.

286 Section 212 of the *Insolvency Act*, 1986.

287 *Holland (Respondent) v The Commissioners for Her Majesty's Revenue and Customs (Appellant) and another* [2010] UKSC 51 para 20.

288 *Holland (Respondent) v The Commissioners for Her Majesty's Revenue and Customs (Appellant) and another* [2010] UKSC 51 para 20.

289 Cassim 2021 *ICCLJ* 8.

actually never, or validly appointed as a director, and must have discharged corporate functions that are exclusively performed by a director, much more than mere basic management functions that are common amongst managerial staff.[290] The act of performing directorial duties whether authorised or unauthorised makes such an actor a *de facto* director.[291] It must be proven that an individual had assumed the status, tasks, responsibilities, and obligations of a *de jure* director, hence what title an individual holds is inferior to their actual conduct.[292] Every director have a fiduciary duty to safeguard the interest of creditors and the company that they represent.[293] The identification of *de facto* directors and the validation of their directorial decisions is aimed at ensuring that wrongful individuals do not abuse artificial company/corporate structures to prejudice creditors, and avoid accountability.[294] The identification of a *de facto* director is anchored on the conduct of a person who acts as a director whether such a person is procedurally or unprocedurally appointed, or simply usurping the role and functions of a *de jure* director, therefore the determining factor is what the person did, rather than the title he holds.[295] English *de facto* director jurisprudence is based on the 19th century principle that a defectively appointed director who acted as *de jure* director cannot escape liability on the basis of defects in his appointment, which principle also applies to a person acting as *de jure* director while no formal attempt was made to appoint him as such.[296] Judicial determination of whether a person is a *de facto* director is not absolute, unitary, or a prescribed methodology as if cast in stone, because it involves a factual and contextual

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290 *Holland (Respondent) v The Commissioners for Her Majesty's Revenue and Customs (Appellant) and another* [2010] UKSC 51 para 29.

291 *Western Counties Steam Bakeries and Milling Co* [1897] 1 Ch 617, 630.

292 *Holland (Respondent) v The Commissioners for Her Majesty's Revenue and Customs (Appellant) and another* [2010] UKSC 51 para 36.

293 *Holland (Respondent) v The Commissioners for Her Majesty's Revenue and Customs (Appellant) and another* [2010] UKSC 51 para 43.

294 *Holland (Respondent) v The Commissioners for Her Majesty's Revenue and Customs (Appellant) and another* [2010] UKSC 51 para 101.

295 *Holland (Respondent) v The Commissioners for Her Majesty's Revenue and Customs (Appellant) and another* [2010] UKSC 51 para 108.

296 *Popely v Popely* [2019] EWHC 1507 (Ch) para 78.

assessment of given circumstances of each case.[297] Consideration must be applied to a number of factors including whether the concerned person was part of the company's formal governance structures, whether he assumed the role, status, and functions of a director as if he was a *de jure* director.[298] In conducting the factual analysis the courts must at all times be cognisant of the potential overlap between shadow and *de facto* directors, the manner of appointment, the capacity in which the acts were executed, the governance structure of the company, the actual conduct of the person rather than their job title, insignificance of a person's belief or motivation at the time of alleged directorial conduct, whether the company or third parties considered the person and held him as director, whether the impugned conduct was consultative, advisory, or actual decision making, and a thorough comparative assessment of the person's governance/corporate conduct before and during the alleged directorial tenure.[299] Liability for a *de facto* director is a matter of judicial interpretation, arising from the act of occupying the "office of director" factually, and not by means of the operation of law.[300] The original basis of liability for a *de facto* director lies in the fact a person was appointed by means of invalid processes, and had assumed responsibilities of a director, akin to a director in law.[301] Should a person assume directorial responsibility while no attempt was made to appoint him as director, their liability must be determined by examining the governance structure of the company they purported to represent in order to establish the true nature of their corporate/governance conduct.[302] The acts in question must be akin to the acts exclusively designated for a director, if one is to be judicially said to have assumed the role of director.[303] Proof of execution of company functions exclusively reserved for a *de jure* director, actual deeds which may be substantiated by the "holding out" of an

297 *Popely v Popely* [2019] EWHC 1507 (Ch) para 79.
298 *Popely v Popely* [2019] EWHC 1507 (Ch) para 79.
299 *Popely v Popely* [2019] EWHC 1507 (Ch) para 79.
300 *Popely v Popely* [2019] EWHC 1507 (Ch) para 86.
301 *Smithton Ltd v Naggar* (2014) EWCA Civ 939 para 24.
302 *Smithton Ltd v Naggar* (2014) EWCA Civ 939 para 24.
303 *Smithton Ltd v Naggar* (2014) EWCA Civ 939 para 28.

individual as director, active participation and exercise of real influence in directing the affairs of the company on an equal footing with *de jure* directors, are some of the factors that assist in identifying a person as a *de facto* director.[304] Those assuming to act as directors whether lawfully appointed or otherwise and execute directorial duties must accept inherent responsibilities and liabilities of the office they so occupies.[305]

3.3 Australian statutory regime

Modern Australian company law derived its inaugural philosophical basis from the *United Kingdom Joint Stock Companies Act*.[306] Australia was legislatively obligated to enforce English laws within its territory as from 1828.[307] Hence, contemporary Australian company law is a combination of largely English law transplantation, and local Australian developments.[308] The *Corporations Act*[309] became operational on 15 July 2001,[310] with the objective amongst other, to regulate corporations.[311] A company director is (a) a person who is (i) appointed to the position of a director, or (ii) an alternate director and is acting in that capacity, regardless of the name given to their capacity, (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 are accustomed to act in accordance with the person's instructions or wishes.[312] It is an infringement of the *Act* for a company to appoint someone as director without having obtained written consent from the appointee,[313] which consent must be kept by the company.[314] Acts concluded by a director are effective even if their appointment, or the continuation of

304 *Re Mumtaz Properties Ltd* (2011) EWCA Civ 610 para 30.
305 *Re Mumtaz Properties Ltd* (2011) EWCA Civ 610 para 31.
306 Bathurst 2013 http://classic.austlii.edu.au/au/journals/NSWJSchol/2013/34.pdf.
307 Bathurst 2013 http://classic.austlii.edu.au/au/journals/NSWJSchol/2013/34.pdf.
308 Bathurst 2013 http://classic.austlii.edu.au/au/journals/NSWJSchol/2013/34.pdf.
309 *Corporations Act*, 2001.
310 Bostock 2002 *AC* 26.
311 Aim of the *Corporations Act*, 2001.
312 Section 9 of the *Corporations Act*, 2001.
313 Section 201D (1) of the *Corporations Act*, 2001.
314 Section 201D (2) of the *Corporations Act*, 2001.

their appointment, is invalid because of non-compliance with any provisions of the company's constitution, or the *Act*.[315] A third party transacting with a company may assume that relevant provisions of the *Act* and the company constitution of the transacting company are duely complied with.[316] Similar statutory assumptions extends to the procedural appointment,[317] and lawful acquisition of mandate of the contracting/transacting company director.[318] These assumptions are entitled for the benefit and protection of those contracting without prior knowledge of any possible irregularities pertaining to the appointment, or mandate of the other contracting/transacting party.[319]

3.4 Australian case law analysis

Aspects of *de facto* conduct/status has been part of Australian case law since 1805.[320] In *The King v Corporation of Bedford Level*,[321] the Court described an officer *de facto* as a person who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. Specific *de facto* director legal questions were adjudicated in Australian courts for the first time in 1840, in the matter of *Mangles v Grand Collier Dock Co*.[322] For the purposes of the *Corporations Act*, the definition of a director extends to individuals who assumes to act in the position director without being validly appointed. The definition contains no words of limitation and must rather be considered within the context of the purpose of the defining provision.[323] The definition of a director was deliberately crafted to broaden the categories of persons associated with the management of the affairs of a corporate entity and to enable the imposition of legislative

315 Section 201M (1) of the *Corporations Act*, 2001.
316 Section 129 (1) of the *Corporations Act*, 2001.
317 Section 129 (2) (a) of the *Corporations Act*, 2001.
318 Section 129 (2) (b) of the *Corporations Act*, 2001.
319 Section 128 (4) of the *Corporations Act*, 2001.
320 *Buzzle Operations Pty Ltd (In Liq) v Apple Computer Australia Pty Ltd* [2011] NSWCA 109 para 220.
321 *The King v Corporation of Bedford Level* (1805) 6 East 356.
322 *Mangles v Grand Collier Dock Co* (1840) 10 Sim 519.
323 *Grimaldi v Chameleon Mining NL* (No 2) (2012) FCAFC 6 para 32.

standards and liabilities on such persons.[324] Another reason for the inclusive nature of the definition of a director is to progressively integrate the standards and liabilities of those assuming the office of director by whichever means, with the standards and liabilities of *de jure* directors, thus protecting corporations against wrongful conduct of those that significantly manages their affairs.[325] The contemporary proposition or authority in Australian company law is that *de facto* directors are held to be directors for the purpose of the provisions dealing with director's duties and obligations in terms of the *Corporations Act*.[326] A *de facto* director is a person defectively appointed as director, one who continue to act as director after the tenure of their appointment had terminated, or a person who occupies the office of director lawfully or unlawfully, and whose acts are valid and binding on the company regardless of the unlawfulness of the manner in which they occupied the office of director.[327] It is befitting that a *de facto* director, though acting without lawful authority, yet executing the duties of a director is obligated to conduct himself honestly and reasonably diligently.[328] A person must not, and should not attempt to execute directorial duties without lawful authority, however should they do so, their directorial conduct shall be subjected to the governance prescriptions of the *Corporations Act*.[329] The definition of director is designed to allow the inclusion of all people who performs actual directorial duties although they are assigned or prescribed different names or job titles.[330] The question whether a person is a *de facto* director is a question of fact which must be answered according to the nature of the functions, responsibilities and powers executed and carried out by the individual concerned, in the context of the operations, structure, and circumstances of the concerned company.[331] He who occupies the position or office of director invalidly and proceeds to carry out functions that are

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324 *Grimaldi v Chameleon Mining NL* (No 2) (2012) FCAFC 6 para 34.
325 *Grimaldi v Chameleon Mining NL* (No 2) (2012) FCAFC 6 para 34.
326 *Grimaldi v Chameleon Mining NL* (No 2) (2012) FCAFC 6 para 36.
327 *Corporate Affairs Commission v Drysdale* [1978] HCA 52 paras 13;14;16;17.
328 *Corporate Affairs Commission v Drysdale* [1978] HCA 52 para 18.
329 *Corporate Affairs Commission v Drysdale* [1978] HCA 52 para 18.
330 *Corporate Affairs Commission v Drysdale* [1978] HCA 52 para 20.
331 *ACN 152 546 453 Pty Ltd (in liq)* [2022] NSWSC 974 para 78.

inherently or statutorily attached to the office of director is a *de facto* director,[332] and therefore owes fiduciary obligations towards the company and its creditors, same as *de jure* director.[333] Controlling voices of corporate institutions, people who make strategic or key decisions must not be allowed to gain impunity from liability of their wrongful conduct or hide behind formalities under the guise of the invalidity of their appointment procedures.[334] In order to avoid the most unfortunate circumstances whereby wrongful directorial conduct is condoned or absolved on technicalities, whilst the legislature is aiming to widely extend the scope of accountability to those acting as directors or occupying the office of director, it is imperative that the relevant statutory provisions giving effect to the intended legislative purpose is correctly worded, drafted, and framed.[335] Statutory interpretation of a legislative definition must be approached with care and must be focused on the exact statutory text, the verbatim wording of the definition in order to avoid incorporating wrong terminology and non-related concepts.[336] It is the objective of modern company law principles to achieve a greater degree of statutory accountability, and liability for people involved in the management of affairs of juristic institutions.[337] A true usurper of the office, functions, and powers of a director without any formal or purported attempt by the company to appoint him as such is considered a director for the purpose of the *Corporations Act*, and so is an intermeddler who actively indulges in the management of the affairs of the company with the blessings of *de jure* directors.[338] To act in a position of director entails a person doing the work of a director although not appointed to that position.[339] The nature of the work must be that which a reasonable person would expect to ordinarily only be carried out by a *de jure*

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332 *Stuart v Mordialloc Sporting Club Inc; John Barr Investments Pty Ltd v Mordialloc Sporting Club Inc* [2021] VSC 244 para 97.

333 *Stuart v Mordialloc Sporting Club Inc; John Barr Investments Pty Ltd v Mordialloc Sporting Club Inc* [2021] VSC 244 para 98.

334 *Buzzle Operations Pty Ltd (In Liq) v Apple Computer Australia Pty Ltd* [2011] NSWCA 109 para 226.

335 *Grimaldi v Chameleon Mining NL* (No 2) [2012] FCAFC 6 para 40.

336 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 para 887.

337 *Grimaldi v Chameleon Mining NL* (No 2) [2012] FCAFC 6 para 55.

338 *Re Valleys Rugby League Football Club Ltd* [1997] 2 Qd R 645 para 64.

339 *Re Valleys Rugby League Football Club Ltd* [1997] 2 Qd R 645 para 65.

director.[340] It is conceded that maintaining an inflexible distinction between a *de facto* and shadow director might be judicially unsustainable, depending on the type of influence a person has in the company, and over serving *de jure* directors.[341] The requirement of making or participating in strategic corporate decision making, which decision affects the whole or substantial share of the corporation's business contemplates conduct which is beyond mere administrative interventions.[342] It is also not mandatory that the decision maker must have the last say pertaining to the particular decision, or that they must not be subjected to the control, discretion, and guidance of the company's board.[343] Active participation in financial investment decision making is a typical example of the nature of business decisions that affect the entire or significant part of the business of an enterprise.[344] A person may lawfully occupy a position in a company, other than that of director and still make strategic directorial decisions that wholly or substantially affect the financial standing of a company, which decision making may qualifying their conduct as *de facto* director.[345] The existence of a legally constituted, functional, and active board of a company is no ground of justification against a finding of occupying the office of director in the capacity of *de facto* director.[346]

3.5 Summary of chapter three

Australian company law is largely influenced by English company law principles. The English *Companies Act* identifies a director to include any person who occupies the position of director, including a shadow director, and a de facto director. Section 161 (1) of the *Companies Act*, 2006 validates the acts of a *de facto* director. Section 228 (1) (a) of the *Companies Act*, 2006 requires directors to conclude service contracts with the companies on whose boards they serve as directors. Failure to comply with this

340 *Re Valleys Rugby League Football Club Ltd* [1997] 2 Qd R 645 para 65.
341 *Grimaldi v Chameleon Mining NL* (No 2) [2012] FCAFC 6 para 69.
342 *Grimaldi v Chameleon Mining NL* (No 2) [2012] FCAFC 6 para 73.
343 *Grimaldi v Chameleon Mining NL* (No 2) [2012] FCAFC 6 para 73.
344 *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 para 73.
345 *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 paras 73; 74.
346 *Mistmorn Pty Ltd (in liq) v Yasseen* (1996) 21 ACSR 173 para 74.

requirement is not fatal, and it simply renders the responsible official personally liable to a financial penalty. English company law identifies the following classes of *de facto* directors, namely one who was defectively appointed, a person continuing to act as director after their directorial tenure had terminated, and a person acting as director while no formal attempt was ever made by the company/shareholders to appoint them as such (a usurper/intermeddler). The requirements of establishing that a person occupied and acted in the position of director is a factual analysis of individual cases, involving a factual determination, and presentation of evidence that the concerned individual factually took part in strategic corporate decisions on an equal footing as *de jure* directors. Strategic business decisions are those that are ordinarily exclusively carried by a director, which affects the financial position of a business as a whole or a significant part thereof. The *Corporations Act* identifies a director as one who is a *de jure* director, an alternate director, a *de facto* director, and a shadow director. The *Corporations Act* also validates the acts of a *de facto* director. Both English and Australian company law recognises the same class of *de facto* directors, and equally applies the same legal principles to determine if a person acted in the capacity of de facto director. Australian and English law *de facto* director decided cases are interchangeably cited as authority in both countries.

Chapter 4 Conclusion and recommendations

The aim of this study was to investigate and analyse the statutory capabilities of the South African *Companies Act* to regulate aspects of *de facto directors* and the legality of their related boardroom decisions. Based on this study, it is evident that aspects of *de facto* directors are not explicitly provided for under the current *Companies Act*, hence the legal uncertainty, and confusion surrounding the subject matter. Sections 1 and 66 (7) (b) does not provide clarity whether *de facto* directors are include in the statutory definition of a director, however it is well established that the *Act* contains no provision validating acts of a defectively appointed/*de facto* director. The absence of a judicial pronunciation on aspects of *de facto* director under the provisions of the current South African *Companies Act* has proven to be a major challenge in answering the research question with absolute judicial certainty.

This confusion/uncertainty is further exacerbated by the apparent contradiction arising from the *Act*'s inclusive statutory definition of who identifies as a director, which definition appears to clash, or incompatible with the purpose of the exclusionary provisions of section 66(7) (b) which denies a person entitlement to act as director in the absence of furnishing a written consent, the absence of a validating provision similar to section 214 of the 1973 *Act* which validated decisions of defectively appointed directors, and the fact that *de facto* directors and the binding validity of their associated boardroom decisions has previously, been recognised in South Africa's Company Law jurisprudence, whilst the current legislation contains no provisions regulating *de facto* director aspects.

The foundation of past, and present South African company law jurisprudence has always been the English company law principles.[347] South African company law legislation preceding the *Act* of 2008 had explicit provisions regulating aspects of *de facto* directors,

[347] See para 2.1.

and the validity of their associated boardroom decisions. This legislative acknowledgment/recognition was evident through section 72 of the provincial *Transvaal Act*,[348] Section 69 of the *Union of South Africa Act*,[349] section 214 of the *Act* of 1973,[350] with the identification of a person as director premised on the occupation of the office of director, as is the case with the 2008 *Act* definition of a director. It was judicially stated as far back as 1894 in *Liquidators of the Republican and Colonial Loan Agency and Trust Company v The Natal Bank* that the conduct of a *de facto* director was binding on a company,[351] which proposition was continued and noted with approval throughout, prior to the enactment of the 2008 *Act*. The recognition/identification of *de facto* directors and statutory provisions validating their acts are primarily aimed at protecting the interests of third parties or outsiders who might transacts unknowingly with people whose directorship appointment might not have been concluded procedurally.[352] Persons who are defectively elected or appointed as director, unauthorised person usurping the powers of directors *de jure*, one who continued acting in the capacity of director after the expiration of their tenure, a person who becomes disqualified during the course of their tenure yet continued to act as director, are people who are recognised as *de facto* directors in South African company law jurisprudence.

Tendering a written consent before one could act as a director, same as required by section 66 (7) (b) of the 2008 *Act* was also a perquisite of sections 70 (1) (i) of the *Transvaal Act*,[353] 67 (1) (a) of the *Union of South Africa Act,*[354] and 211 of the 1973 *Act*.[355] In terms of the 1973 *Act*, non-compliance with the written consent requirement constituted an offence, which did however not annul the validity of the appointment and

348 See para 2.4.1.
349 See para 2.4.2.
350 See para 2.4.3.
351 See para 2.4.1.
352 See para 2.4.2.1.
353 See para 2.4.1.
354 See para 2.4.2.
355 See para 2.4.3.

the associated boardroom decisions of such a director.[356] Likewise, it was an offence and proscribed conduct in terms section 70 (2) of the *Transvaal Act* to present someone as director if such a person has not consented in writing.[357] Sections 227 (1) (a) and 228 (1) (b) of the United Kingdom *Act* requires a newly appointed director or the company on whose board they serve to conclude and file a type of written consent in a form of a service contract wherein they pledge to personally render the required directorial services, or a written memorandum of the director's service contract agreement if the document was to be compiled by the company.[358] Failure to comply with this requirement does not nullify the appointment, but rather the imposition of a financial penalty for the responsible company official.[359] Comparably, section 201D (1) of the *Corporations Act* prohibits the appointment of a person as director without having submitted a written consent.[360] Contravention of this provision amounts to an offence by the concerned company, and similarly to the English regime, the appointment and decisions taken by the defectively appointed director remains valid, effective and binding.[361]

The English and Australian regimes' statutory definitions of a director are more extensive, inclusive, and explicit regarding aspects of defectively appointed directors and the status of their boardroom decisions, when compared to the statutory provisions of the South African *Act*. The English regime has amplified the statutory identification of *de facto* directors by incorporating the following key phrases, and provisions within their company law statutes, namely; (i) any person occupying the position of director by whatever name called, (ii) a person from whom the company directors are accustomed to receiving directives and instructions, (iii) a director acting in the same capacity after becoming disqualified, (iv) a person acting as director after their formal tenure has lapsed, (v) a

356 See para 2.4.3.
357 See para 2.4.1.
358 See para 3.1.
359 See para 3.1.
360 See para 3.3.
361 See para 3.3.

purported director appointed by means of a void resolution, and by validating the acts of a defectively appointed director which acts includes the casting of votes while incapacitated to act as director.[362] The Australian regime sought to statutory address aspects of *de facto* directors by incorporating the following phrases in their statutory identification of a director, to include (i) a person acting as director while not validly appointed in that capacity, or (ii) a person from whom directors are accustomed to receive directives, and by having a validating clause for the conduct of a defectively appointed director.[363] Other than the opening phrase "who occupies the position of director", South Africa's *Companies Act* has no extensive provisions similar to the above mentioned comparable regimes. Both English and Australian company law statutes and jurisprudence considers the appointment procedures of directors as an internal company matter which can ordinarily not be queried by company outsiders, hence liability is derived from the conduct of the person, rather than the manner in which they were appointed.

The *Companies Bill* gave an exposition of what the incoming *Companies Act* aimed to achieve. Amongst other, the *Act* was envisioned to be an instrument of facilitating, developing, and formulating clear, predictable company laws that would protect and enhance economic engagements and corporate governance, and bring the governance regime on par with leading international regimes and regulatory best practices.[364] On the principle of corporate governance efficacy, it was envisioned the incoming *Act* will enhance transparency by clearly identifying directors and associated governance accountability.[365] It is my submission that the *Companies Act* of 2008 appears to have fallen short in achieving the objectives contained in the *Companies Bill* of 2007 pertaining to aspects of *de facto* directors. Although the *Bill* did not intent to discard relevant and established provisions of the 1973 *Act*,[366] the omission from the 2008 *Act* of a provision similar to section 214 of the 1973 *Act* and the wording of section 66 (7) (b) of the current

362 See para 3.1.
363 See para 3.3.
364 See para 2.4.4.
365 See para 2.4.4.
366 See para 2.4.4.

Act appears to have negated the regulation of *de facto* directors within the context of the *Act* in its current format. It is an established South African, Australian, and United Kingdom company law jurisprudence that corporate governance liability is not derived from the manner of a purported director's appointment, but from actual conduct, for fiduciary duties are imputed on an equal scale for both *de jure* and *de facto* directors.[367] The statutory definition of a director must be wide enough to include every person performing directorial functions, whether validly appointed or not. It is also well established that a person performing directorial duties inherently brings themselves within the operation of the *Companies Act* and must therefore not avoid directorial liability on the basis of a defective appointment, or the wrong wording of the applicable provision of the empowering legislation. Such a lapse could defeat an important statutory objective which was intended by the legislator.

Based on the findings above, I make the underlisted recommendations in order to mitigate the identified legal uncertainty/confusion associated with the regulation of aspects of de facto directors and the validity of their boardroom decisions, within the context of the *Act* of 2008;

(i) The section 1 definition of a director in the South African *Act* must be amended/altered to simply read like the English statutory definition of sections 250, 251 of the *Act* of 2006, and 9 of the *Corporations Act*;

- A director includes any person occupying the position of director, by whatever name called, or
- A director includes any person occupying the position of director, by whatever name called, including a person in accordance with whose directions or instructions the directors of the company are accustomed to act, or

[367] See para 2.4.3.

- A director includes any person occupying the position of director, by whatever name called, including a person in accordance with whose directions or instructions the directors of the company are accustomed to act, or a person who is not validly appointed as a director if they act in the position of a director.

(ii) The South African *Act* must be amended to incorporate a validating provision similar to sections 214 of the 1973 *Act*, 201M (1) of the *Corporations Act*, and 161 (1) (a) of the 2006 *Act*, reading;

- The acts of a person acting as a director are valid notwithstanding that it is afterwards discovered that there was a defect in his appointment.

(iii) The South African *Act* must be amended to incorporate a provision reading;

- A company contravenes section 66 (7) (b) if a person does not give the company a signed consent to act as a director of the company before being appointed.

(iv) The South African *Act* must be amended to explicitly define and regulate aspects of *de facto* and shadow directors.

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