The new Companies Act No. 71 of 2008 (the Act) came into force on 1 May 2011. It significantly expands the duties incumbent upon company directors, a number of which may also be employees.

The Act purports to partially codify and enhance a director’s existing common law obligations. Inter alia, it stipulates that a director has a duty to act in good faith; in the best interests of the company; and for a proper purpose. These obligations are not new when it comes to employment law. However, in addition to these, directors must now also act with a degree of care, skill and diligence that may be reasonably expected of a person carrying out the same functions in relation to the company as those carried out by that director and having the general knowledge, skill and experience of that director.

Importantly, the application of these duties is now expressly broadened within section 77 of the Act, through the expansion of the definition of “director” to incorporate “prescribed officers” of the company. The implications for and the role labour law has to play within this new regulated landscape is not addressed within the Act and has yet to elicit sufficient evaluative consideration.

The key questions that arise then are:

- What, if any, impact do these enhanced obligations of directors and prescribed officers have upon their duties as employees within a company?
- To what extent does this alter the obligations of the company, qua employer, towards its employees when striving to ensure regulatory compliance?

The Labour Court decision of Chillibush v Johnston & Others (2010) LC 1.11.4. reiterates former case law (Amazwi Power Products (Pty) Ltd v Turnbull (2008) 17 LAC 1.11.33, etc) which envisages a dual capacity for directors who are also employees.

That is: one must view the individual from two perspectives correlative to his or her two capacities within the organization. When engaging in activities designated as being within his or her directorial competence one must have regard to both the company’s Memorandum of Incorporation and to its shareholder resolutions. With the advent of
the Act one must now take cognisance of the relevant duties enumerated therein; one need not refer to the implied duties emanating from the common law in the absence of a contract, though the common law still remains relevant. These sources circumscribe and delineate the legitimate boundaries of the director’s rights and obligations. When removing a director from his or her post, shareholders resolutions are decisive. There are now also additional methods through which a director may be removed, including director resolution.

In contrast, when engaging in activities designated as being within the purview of the individual’s obligations as an employee, the employee’s contract of employment, read together with applicable labour legislation, most notably the Labour Relations Act No. 66 of 1995 (LRA), governs the individual’s legitimate sphere of rights and obligations. When dismissing an employee in his or her capacity as such one is required to act in accordance with the provisions encapsulated within the LRA. A director who is also an employee of the company is protected qua his status as employee by virtue of section 220 of the LRA.

Of significance is the question of the extent, if any, to which these two capacities may intertwine. That is, given the pragmatic daily convergence of the functions undertaken by senior employees and directors within an organization, to what extent do enhanced duties applicable to directors impinge upon a director’s role as an employee within the organization?

What is apparent is that there is significant convergence between the fiduciary duties owed by an employee towards his or her employer and a director towards his or her company. It is hard to imagine breaches of certain duties as not infringing an individual’s obligations in terms of both capacities; for example fraud. What is imperative, however, is the recognition that where it is possible to distinguish certain actions as falling under the purview of one function it should be dealt with under the laws applicable to that functional capacity. Most important in this respect are the distinct requirements for the removal of a director and the dismissal of an employee.

Where the director is a senior employee it should be noted that the Act, in section 77(1), makes clear provision for duties to be extended to “prescribed officers” of the company by including these within the expanded definition of “director”.

In section 66(10), the Act stipulates that the minister may, “make regulations designating any specific function or functions within a company to constitute a prescribed office for the purpose of th[e] Act”. Section 38 of the regulations provide that a person will qualify as a prescribed officer if that person either:
- exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or
- regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.

This definition is relatively wide and will encompass most senior managerial employees with a company.

It has been long acknowledged that employees have duties towards their employers, the extent and degree of which vary in accordance with the nature of the employees’ functions (Phillips v Feldstone Africa (Pty) Ltd & Another (2004) ILJ 1005 (SCA)). The duties are regulated by employment contracts and implied terms derived from the common law and applicable legislation.

The Act now constitutes legislation which has a direct bearing on the boundaries and extent of obligations on senior employees within a company. These duties and obligations will have an affect on the consideration of an individual’s competence within the organization and can be taken into account as grounds for dismissal based upon poor work performance or incapacity. Despite this, the procedures for dismissal under employment law and corporate law will both have to be followed. The fundamental distinction between the new Act and prior legislation is the extent to which directors’ duties now have an impact upon the individual in his or her capacity as employee.

Given the enhanced accountability imposed upon directors, one may enquire as to whether the company is enjoined to implement policies seeking to educate directors as to their duties. Although the Act does not mandate such programs, the King III Code on Corporate Governance, 2009, (the Code) recommends that a company implements programs for the, “ongoing training and development of directors” in accordance with a formal process (Principle 2.20).

Although the Code adopts, “an apply or explain” approach which is not binding on companies, it is nevertheless highly influential on corporate governance practices. In addition, listed companies are obliged to comply with a number of the Code’s provisions in light of the requirements embodied in the JSE Listing Requirements.

There are no similar obligations imposed upon the company to train employees in their capacities as such, save to the extent that an obligation to provide training is contained with the individual’s employment contract or has arisen by way of a legitimate expectation on the part of the employee concerned.

However, Schedule 8 to the LRA clearly states that when considering the dismissal of an employee for poor performance or misconduct, regard will be had to whether or not the employee was aware (or should reasonably have been aware) of the required standard of conduct or performance. To the extent that the Act introduces new or more stringent requirements for conduct and performance, there may therefore be a positive duty on an employer to ensure that senior employees and directors are educated on the requirements of the Code and the Act.

In conclusion, the Act has arguably expanded previous duties incumbent upon directors while simultaneously expanding the ambit of such duties to senior employees. To the extent that these duties impose more cumbersome obligations on employees, they have a bearing on the standard of conduct and performance required of such employees. Failure to comply could have a significant impact upon that individual in his or her capacity as an employee in addition to his or her position as a director as well as on the company.
Established in the early 1900s, Werksmans Attorneys is a leading South African corporate and commercial law firm serving multinationals, listed companies, financial institutions, entrepreneurs and government.

Operating in Gauteng and the Western Cape, and connected to an extensive African network through Lex Africa*, the firm’s reputation is built on the combined experience of Werksmans and Jan S. de Villiers, which merged in 2009.

With a formidable track record in mergers and acquisitions, banking and finance, and commercial litigation and dispute resolution, the firm is distinguished by the people, clients and work that it attracts and retains.

Werksmans’ more than 170 lawyers are a powerful team of independent-minded individuals who share a common service ethos. The firm’s success is built on a solid foundation of insightful and innovative deal structuring and legal advice; a keen ability to understand business and economic imperatives; and a strong focus on achieving the best legal outcome for clients.

* In 1993, Werksmans co-founded the Lex Africa legal network, which now has member firms in 30 African countries.

Nothing in this publication should be construed as legal advice from any lawyer or the firm. Werksmans’ legal briefs should be seen as general summaries of developments or principles of interest that may not apply directly to specific circumstances. Professional advice should therefore be sought before any action is taken.