

Short Notes on:

## **REMOVAL OF A DIRECTOR BY SHAREHOLDERS OR BOARD OF DIRECTORS**

### ***Introduction***

Directors of a company must perform their duties in a manner that furthers the interests of both the company and the shareholders. So what happens when a director is encumbering the business affairs of the company or acts in a manner that is contrary to the best interests of the Company? The Companies Act 71 of 2008 (“the Act”) makes provision for the removal of directors in three manners, namely: removal by the shareholders; removal by the board of directors; and removal in accordance with the companies Memorandum of Incorporation. In this article, we will discuss the removal by shareholders and the board of directors.

### ***Removal by Shareholders***

The shareholders of a company appoint the director(s) and thus are also responsible for ensuring the correct processes are adhered to. Irrespective of what is contained in the MOI, any agreements between the director and the company, or between the directors and the shareholders, the shareholders may remove the director. Contrary to the removal by the board of directors, shareholders do not need to have a particular reason in order to remove a director. Section 71(1) of the Act provides for the removal of a director by ordinary resolution. Thus the removal need only be by majority vote. However, the shareholders must ensure procedural fairness and in accordance with Section 71(2) of the Act prior notice of the meeting must be given to the affected director so as to afford the affected director with the reasonable opportunity to make representations to the shareholders prior to the resolution being considered.

### ***Removal by the Board of Directors***

In accordance with section 71(3), removal by the board of directors may only be done if a shareholder or director alleges one of the following grounds:

The director has become ineligible or disqualified to act in terms of the Act;

The director has become incapacitated to the extent that they are unable to perform their functions and unlikely to regain capacity within a reasonable time; and

The director has neglected or been derelict in his or her functions.

Similarly, to the shareholders, the board of directors must ensure procedural fairness and must furnish the director with the notice to the proposed resolution. A statement must also be provided that indicates the grounds alleged for the removal. The director thus has the opportunity to make representations prior to the consideration of the removal.

### ***Remedies available to the Director***

A director who has been removed from their position remains entitled to make an application to court for damages or compensation due should they feel the removal by the shareholders or board of directors were procedurally unfair. Whilst the removal may be taken on review at a court, it is still unclear whether this can be done when the removal was by the shareholders, as the shareholders are entitled to do so by majority vote and should they wish to do so, rather than the director having met one of the alleged grounds. A removal by the board of directors may be taken on appeal to the court, should the affected director believe that the decision was unjust. Any claim that the affected director may have may also include the loss of their position as a director or the loss of any other position resulting from their removal as a director.

### ***Conclusion***

Similar to employee dismissal procedures, the removal of the director must be procedurally fair, and in the case of the board of directors, also substantively fair. It is important for companies and directors alike to know their rights in terms of the Act and to seek sound legal advice should they be unclear on any aspect. Whilst the company is entitled to remove its directors, directors have the right to apply to court in certain circumstances and should exercise this right should they believe they have a strong case to do so.

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