

Selected problem areas pertaining to the removal of directors from office

by

Thandokuhle Wandile Shange

Submitted in partial fulfilment of the requirements for the degree

Master of Laws (LLM Mercantile Law)

In the Faculty of Law,

University of Pretoria

November 2024

Supervisor: Dr JS van Wyk

Acknowledgments

I would like to express my deepest gratitude to my supervisor, Dr J.S. van Wyk, for her invaluable guidance, support and mentorship throughout my research journey. Her extensive knowledge and insightful feedback have been instrumental in my academic growth.

I am profoundly grateful to my mother, Nombuso Shange, whose love and sacrifices have been the foundation of my success. Your belief in me has always inspired me to strive for excellence. Nentombi yakwaMlangeni for always being a guiding light.

To my partner, Sanele Majola, thank you for your constant support and understanding during the challenging times of this research. Your presence has been a source of strength.

I would also like to acknowledge my brother, Sphetho Shange, for always being there for me, providing companionship throughout this process.

Lastly, I wish to thank my family for their unwavering love and support, and friends for listening to my ideas and holding space for me to share my thoughts. Your encouragement has been invaluable, and I am grateful for your support in bringing this project to fruition.

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Chapter 1: Introduction

1.1. Introduction

The Companies Act 71 of 2008¹ came into effect on 1 May 2011. With its introduction, the South African legal system saw provisions for the appointment, and consequently, a mechanism for removing directors from the said position. The Act provides that removal can be effected in various ways; removing directors from companies is governed by section 71 of the Companies Act. This provision outlines the procedures for director removal, granting shareholders² and directors³ the power to remove directors through resolutions. The Act also provides for removal through a judicial process and the Companies Tribunal (hereafter referred to as ‘the Tribunal’).⁴

The Act confers upon shareholders the unilateral power to remove directors they have elected. This is done through an ordinary resolution at a purposefully convened shareholders’ meeting.⁵ This provision⁶ is notable for its inviolability; it cannot be limited or restricted by the company’s memorandum of incorporation (“MOI”) and/or any contractual agreements between the company, shareholders, and directors.⁷

The board of directors’ power to remove a director is more limited and carefully defined as it requires cause and reasons for the removal.⁸ This shows a careful approach to how boards govern themselves; only a board of directors with at least three members can utilise this power.⁹ The board can only remove a director for specific reasons, inter alia, if the director becomes disqualified, unable to perform director duties due to incapacity, or if the director has neglected or failed to perform his/her fiduciary duties to the company.¹⁰

¹ Hereafter referred to as ‘the Act’.

² In section 71(1).

³ In section 71(2).

⁴ Section 71(8).

⁵ Sections 71(1) and 71(2).

⁶ Section 71(1).

⁷ See *Golden v Quantum Foods Holdings Limited and Others* (14827_2024) [2024] ZAWCHC 364, para 39.

⁸ Section 71(3) and (4).

⁹ Section 71(3).

¹⁰ Sections 71(3)(a) and (b). See also Cassim (man ed) *et al Contemporary Company Law* (2021) 600.

The Act further provides for judicial oversight and intervention, this includes the right to review decisions made by the board to remove a director¹¹ and a remedy for boards with fewer than three members to approach the Companies Tribunal.¹²

1.2. Research problem

In principle, the process of removing a director should not be complex. However, the Act mandates various procedural and substantive requirements that companies must carefully consider throughout the removal process. Failure to satisfy these prerequisites may lead to judicial invalidation of the removal. Consequently, diligence must be exercised to ensure strict compliance with all statutory obligations embedded within the removal framework. Since the legal framework introduces new mechanisms, *inter alia*, the power of directors to remove their peers,¹³ its adoption and implementation may present challenges that are both substantive and procedural in nature and care should be taken to ensure that this mechanism is not abused by shareholders and directors.¹⁴

This paper explores uncertainties within this legal framework, particularly those arising from inconsistencies in case law and scholarly debates. Three key legal challenges have been identified, which have presented some confusion in relation to the removal of directors and are as follows:

Section 71(2) outlines the procedural criteria to be followed to effect dismissal of a director, stating that prior to shareholders contemplating a resolution as outlined in section 71(1), the concerned director must receive notice of the shareholders' meeting, the resolution and must be given reasonable opportunity to make a presentation in person or through a representative at the shareholders' meeting before the resolution is subjected to a vote.

However, the Companies Act does not specify any particular grounds on which shareholders may remove directors and it is unclear whether reasons for the proposed removal must be provided to the concerned director.¹⁵ Since this section does not

¹¹ Sections 71(5) and 71(6).

¹² Section 71(8).

¹³ Sections 71(3) and 71(4).

¹⁴ Cassim (man ed) *et al Contemporary Company Law* (2021) 601.

¹⁵ Cassim (man ed) *et al Contemporary Company Law* (2021) 595.

explicitly state this (unlike the procedure concerning removal by the board, under section 71(3), which explicitly stipulates that removal can only occur under specific, limited circumstances), it has sparked significant discussion regarding whether reasons are indeed obligatory, and if they are, what criteria determines their sufficiency or rationality.¹⁶

Since the Act is unclear on whether reasons for the proposed removal must be provided to the director by shareholders, courts have reached conflicting findings, some in support of provision of reasons for intended removal and others against, the question remains as to which approach is proper and fair to both shareholders and directors.

The second legal challenge relates to section 71(5), which grants a remedy to a director who has been removed to apply within twenty business days to a court to review the determination of the board.

When reviewing a board's decision not to remove a director, section 71(6) empowers courts to either confirm the board's decision or remove the director if satisfied about their ineligibility, disqualification, incapacity, or negligence/derelection of duties.

The legal term 'review' in this context creates ambiguity regarding the extent of the court's authority. There are two main issues to consider: Firstly, it is unclear whether the court can assess the actual merits of the board's decision.¹⁷ For instance, can the court independently determine if the director was truly negligent or derelict in their duties? Secondly, alternatively, the court's review may be limited to examining only the procedural aspects of the director's removal.¹⁸ This would mean that the court only seeks to satisfy itself on whether proper procedures were followed, such as giving the director a fair opportunity to make representation before a vote is cast.

¹⁶ Conflicting case law and views of scholars will be discussed in this study. See also discussion in Cassim (man ed) *et al Contemporary Company Law* (2021) 595.

¹⁷ Cassim "Dismissal of directors: South Africa's law needs clarity on the role of courts" *The Conversation* 13 August 2019.

¹⁸ In contrast to section 71(6)(b), section 71(5) does not state that a court may reinstate a director to office if it is "satisfied" that he or she is not ineligible, disqualified, incapacitated, or has been negligent or derelict.

A strict reading of the relevant provision in the Act suggests that a court may only assess the procedural steps of the director's removal.¹⁹ This ambiguity in the meaning of "review" raises questions about the extent of the court's authority in director removal cases, and the interpretation of this term can significantly impact how courts deal with s71(5) matters in practice.

While shareholders possess the power to remove directors through ordinary resolution, this authority is subject to specific procedural safeguards and requirements under the Companies Act. The interaction between sections 71(1) and (2) and other provisions of the Act creates a complex framework that must be carefully navigated, particularly in cases involving single-shareholder companies. The third legal challenge is seen in companies with sole shareholders for the following reasons.

The Act does not provide guidance on what would constitute an "ordinary resolution" for purposes of section 71 and the steps to be taken by shareholders to obtain an ordinary resolution where they wish to remove a director. This indicates that the "ordinary resolution" has to be passed in accordance with sections 61 and 65 of the Act.²⁰

Section 65(3) grants shareholders the power to propose resolutions at shareholders' meetings, with a specific requirement that "any two shareholders" may propose such resolutions on matters where they have voting rights. Section 57(2) provides an exception for single-shareholder profit companies (excluding state-owned companies), allowing the sole shareholder to exercise voting rights without time or notice constraints. However, section 57(2)(b) states that this power is limited in instances where section 65 applies to the governance of the company.

Currently, there is no case law that deals with section 71 removals effected in accordance with the provisions of section 57(2). However, as the Act does not explicitly stipulate how such removals ought to be approached, this is a shortcoming in the legal framework.

¹⁹ Cassim "Dismissal of directors: South Africa's law needs clarity on the role of courts", *The Conversation*.

²⁰ Sections 61 and 65 provide for steps to be followed to call a shareholder meeting and to pass shareholder resolutions.

The provisions of the Act may present a tension between the seemingly straightforward process of removing a director and the practical complexities of its execution. An incorrect adoption of the law may disrupt board functionality, effective management of business affairs, and fail to protect the interests of minority shareholders. It may also hinder the fulfilment of fiduciary duties of the board to the company.

The paper will further explore comparable provisions from foreign jurisdiction; this comparative study is conducted to determine the director removal mechanisms available in other jurisdictions and whether any learnings can be observed and adopted in the South African legal framework. The focus will be on the Australian Corporations Act of 2001.

1.3. Research focus

This paper constitutes a composite analysis of the legal framework and procedures for removing directors and the key challenges presented by the framework. It achieves this by looking at three legal questions: Firstly, it will question the legal framework for director removal in South Africa, secondly, it will identify and question the challenges and/or uncertainties presented by this process, and will further explore if there are any possible learnings South Africa can learn from foreign jurisdiction.

1.4. Methodology, delineation and limitations

The paper involves a historical and analytical examination of the relevant South African and foreign legislation with regard to the removal of directors. Legislation, case law, legal books, articles and research papers are used to sufficiently deal with the legal questions and challenges presented by the removal of directors.

A comparative study of the law in Australia will also be carried out. The main purpose of the comparative study is to find possible solutions to the problems identified in this dissertation. Australia has been selected as the comparative jurisdiction as it is the only common law system that distinguishes between the removal of directors in public and private companies, establishing distinct mechanisms for each. Examining these mechanisms will provide valuable insights on whether any principles can answer the legal questions raised in this paper and be effectively applied to enhance South African

law. Furthermore, given South Africa's recent adoption of a board-initiated removal mechanism, which allows for board of directors in both public and private companies to remove fellow directors, studying Australia's framework may help identify potential improvements and refinements to ensure greater clarity and effectiveness in corporate governance.

This research paper initially sought to explore the holistic disqualification and removal of directors through the governance pillars of a company and judicial process. However, this proved to be a lengthy and intricate legal process. Due to time and word count limitations the scope of this paper is only limited to the challenges arising from powers granted by the Act in terms of section 71 and will not focus on powers conferred to the courts in section 162, which is in relation to declaring a director delinquent or placing him under probation. This is, however another part of the law that still presents unanswered questions and challenges.

1.5. Structure of the dissertation

This paper is structured into five sections:

Chapter 1 provides a background of the study and the research techniques utilised.

Chapter 2 delves into the South African legal position and framework pertaining to the removal of directors from office.

Chapter 3 details the identified legal challenges presented by section 71.

Chapter 4 looks into mechanisms found in the Australian jurisdiction with the aim to point out any similarities and notable differences between the jurisdictions' legal and regulatory frameworks, and to gather possible learnings for South Africa.

Chapter 5 provides a conclusion on the main arguments of this dissertation and recommendations for the legislature and policymakers in South Africa to consider.

Chapter 2: An analysis of section 71 of the Companies Act 71 of 2008

2.1. Introduction

This chapter will provide a comprehensive overview of the three distinct mechanisms for director removal under section 71 of the Companies Act: removal by shareholders through ordinary resolution,²¹ removal by the board of directors,²² and removal by the Companies Tribunal.²³ The discussion will examine the procedural requirements, safeguards, and grounds for each removal mechanism, while also exploring the role of the judiciary in reviewing removal decisions.²⁴ Through analysis of relevant case law and scholarly opinions, the chapter will outline the specific conditions and limitations applicable to each removal method, highlighting how these mechanisms operate within the broader framework of corporate governance. Reference made to the male form (his) also include the female (her) and any other applicable forms.

The Companies Act brought about a number of changes to the substantive and procedural aspects of the law relating to the removal of a director.²⁵ The legislation presents two distinct sets of provisions concerning such removals.

The first provision, found in section 137(5), allows for the removal of a director where a company is undergoing business rescue. The process is initiated by way of a court application brought by the business rescue practitioner where the director fails to adhere to his Chapter 6 obligations or hinders the practitioner's ability to carry out his responsibilities.²⁶ It is worth noting that the Act does not specify procedural guidelines for this type of application. Consequently, these matters will be governed by the established rules of court. As indicated in chapter 1, section 137(5) is beyond the scope of this dissertation as the focus is on the second set of provisions relating to the removal of the director by the board or shareholders or the Companies Tribunal.²⁷

²¹ Section 71(1).

²² Section 71(2).

²³ Section 71(8).

²⁴ Sections 71(5) and 71(6).

²⁵ Ncube "You're fired! The removal of directors under the Companies Act 71 of 2008" 2011 *SALJ* 33, 34.

²⁶ Section 137(5). Also see Ncube 2011 *SALJ* 34.

²⁷ Section 71.

Section 71 of the Act provides for three distinct mechanisms to remove directors from their positions. These methods are an ordinary resolution passed by shareholders during a general meeting,²⁸ a removal initiated by the board of directors²⁹ and an order issued by the Tribunal.³⁰ The specific approach to be employed hinges on several factors, such as the category of director facing removal, the total number of individuals serving on the company's board, and the underlying reasons necessitating the director's dismissal. Each of these elements play a crucial role in determining the appropriate course of action for removing a director from his post.

The Act differentiates clearly among the three section 71 mechanisms. The power to remove directors through shareholder action is exclusively reserved for those who have voting rights in the election of the concerned directors.³¹ In contrast, the board and the Tribunal possess the authority to remove all categories of directors regardless of who may have elected them.³²

The phrase '*persons entitled to exercise voting rights in the election of that director*,' as found in section 71(1), allows for both broad and narrow interpretations. Cassim³³ states that a strict, literal interpretation of these words may mean that only the shareholders or persons entitled to vote in an election of the concerned director may vote, effectively rendering board-appointed directors exempted from the provision of section 71(1). A more liberal interpretation is that the phrase does not prevent shareholders from removing a director appointed by the board. Cassim states that the word '*an*' indicates a person who would be entitled to exercise voting rights if that director were to be elected.³⁴ Cassim supports this submission by stating that if the legislature intended for this passage to be interpreted strictly, the words '*the election of that director*' would have been used instead of '*an election of that director*.'³⁵

I do not agree with the liberal interpretation of this passage, I believe that the words '*election of that director*' are specific to the persons who participated in the actual

²⁸ Section 71(1).

²⁹ Section 71(3).

³⁰ Section 71(8).

³¹ Section 71(1).

³² Section 71(3) and 71(8).

³³ In Cassim (man ed) *et al Contemporary Company Law* (2021) 597.

³⁴ Cassim (man ed) *et al Contemporary Company Law* (2021) 598.

³⁵ Cassim (man ed) *et al Contemporary Company Law* (2021) 598.

election of that director and not any other persons merely because they would otherwise be entitled to exercise voting rights.

Shareholders may remove directors by way of an ordinary resolution taken at a general meeting, provided that special notice of the removal and the details of meeting were given to the director.³⁶ Additionally, the director subject to removal must be given a chance to make representations at the meeting where the resolution is voted on.³⁷ This method of removal is permitted even if there are contrasting provisions in any agreement between the company and the director in question.³⁸

The board's power to remove directors is subject to a specific condition.³⁹ It can only be exercised in companies that have a minimum of three directors serving on the board.⁴⁰ In scenarios where this threshold is not met, the matter of removal of a director must be referred to the Tribunal for adjudication.⁴¹

The board of directors may remove a fellow director by adopting a resolution,⁴² this removal must stem from allegations by a shareholder or director that the director has either become ineligible or disqualified under section 69,⁴³ incapacitated without likelihood of reasonable recovery⁴⁴ or has been negligent or derelict in performing their duties.⁴⁵ Before such removal, the board must provide the affected director with adequate notice containing the proposed resolution and detailed reasons,⁴⁶ allowing them reasonable opportunity to prepare and present their response, either personally or through representation, before the resolution is voted upon.⁴⁷

³⁶ Section 71(2)(a).

³⁷ Section 71(2)(b).

³⁸ Section 71(1).

³⁹ Section 71(3).

⁴⁰ Section 71(3).

⁴¹ Section 71(8).

⁴² Section 71(3).

⁴³ Section 71(3)(a)(i).

⁴⁴ Section 71(3)(a)(ii).

⁴⁵ Section 71(3)(b).

⁴⁶ Section 71(4)(a).

⁴⁷ Section 71(4)(b).

2.2. Removal by shareholders

2.2.1. Overview

The power of shareholders to remove directors is not a new phenomenon as section 220 of the Companies Act 61 of 1973 contained similar provisions.⁴⁸ This section was similar to section 71 of the Companies Act 71 of 2008.

It is noteworthy for the purposes of this research and discussions to follow, the foundational difference between the 1973 and 2008 Act when it comes to directors' authority is that, under the 1973 Act, directors' powers were delegated (obtained from the shareholders) and in terms of the 2008 Act, this power comes directly from section 66 of the Act.

Section 66(1) of the 2008 Act provides that the business and affairs of a company must be managed by and/or under the direction of the board.⁴⁹ The board has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Act or the Memorandum of Incorporation (MOI) of the company provides otherwise.⁵⁰ In contrast, under the 1973 Act, directors did not possess original powers; instead, their powers were derived through delegation from shareholders via the articles of association (MOI).⁵¹ This was typically applied through provisions of Article 59 of Table A (articles for a public company) or Article 60 of Table B (articles for a private company), which stated:

"The business of the company shall be managed by the directors who may pay all expenses incurred in promoting and incorporating the company, and may exercise all such powers of the company as are not by the Act, or by these articles..."

Under the 1973 Act, directors' management powers were evidently not inherent but required explicit delegation either through the articles of association or by shareholders in a general meeting. Without such delegation through the articles of

⁴⁸ Letuka *The rights of shareholders to actively participate in corporate governance in terms of South African company law* (LLM mini-dissertation, University of Pretoria, 2019) 10.

⁴⁹ Section 66(1).

⁵⁰ Section 66(1).

⁵¹ Cassim "The power to remove company directors from office: historical and philosophical roots" 2019 *Fundamina* 46.

association, the board would lack authority to act, leaving all power vested in the shareholders as the only means through which the company could operate.⁵²

Section 71(1) states the following:

“Despite anything to the contrary in a company’s Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).”

This section empower shareholders to remove a director through an ordinary resolution taken at a shareholders' meeting, even if the company’s Memorandum of Incorporation or the director’s contract states otherwise. It underscores the fundamental role of shareholders to participate in the governance of the company.⁵³ Shareholders are entrusted with the power to elect directors and, by extension, they have the power to remove directors if they lose confidence in their leadership.⁵⁴

Section 71(1) addresses any agreement between a company, shareholders, and a director. It determines that such agreements cannot prevent the director's removal from office through an ordinary resolution.⁵⁵ Arguably, cases decided in terms of section 220 of the 1973 Act such as *Stewart v Schwab*⁵⁶ and *Amoils v Fuel Transport (Pty) Ltd*⁵⁷ will no longer be applicable. In these aforementioned cases, the directors successfully obtained interdicts that prevented and restrained the members from voting in favour of a resolution that would violate their obligations under the terms of an agreement with the directors concerned.⁵⁸

⁵² Cassim 2019 Fundamina 46.

⁵³ Cassim 2019 Fundamina 56.

⁵⁴ Cassim 2019 Fundamina 56.

⁵⁵ Ncube 2011 SALJ 37.

⁵⁶ 1956 (4) SA 791 (T).

⁵⁷ 1978 (4) SA 343 (W), the court held that shareholders who have contractually agreed to vote in favour of retaining a director do not have the right to breach that agreement. Shareholder agreements regarding the exercise of voting rights in meetings are valid and do not diminish the company's right to remove a director if the required voting threshold is met. See also Letuka 10.

⁵⁸ See also *Blue Square Advisory Services (Pty) Ltd v Mandingoane and Another* (01082/2011) [2011] ZAGPJHC 53 (13 June 2011) para 41 where the court came to a different conclusion, aligning better with section 71 by holding that: “The difficulty I have is that equating the majority members with the company in general meeting is in fact an argument that *Stewart v Schwab* was wrongly decided and that even an agreement between the members and the director is overridden by the provisions of section 220.”

The mechanism afforded by section 71 cannot be contracted out of through any agreement. Delpont is also of the opinion that a contract stating that a dispute must be referred to alternative resolution first is similarly impossible and would interfere with the rights of shareholders as entrenched in section 71.⁵⁹

A director may only be dismissed under this section if they were appointed or elected by the shareholders in accordance with section 66.⁶⁰ A director appointed under section 66(4)(a)(i)⁶¹ by an individual designated in the MOI may be removed per the provisions outlined in the MOI.⁶² Additionally, the MOI may allow for a person to serve as a director *ex officio*, based on their office, title, or designation.⁶³

The Act does not specify the process for removing such a director. This suggests that removal may depend on the terms of the appointment – either when the office, title, or designation ends, or if the MOI explicitly provides for the removal of that type of director.⁶⁴

The provision that “*a director may be removed by an ordinary resolution adopted at a shareholders meeting*” suggests that the resolution must comply with section 65 of the Act which governs shareholder resolutions and how they ought to be passed.⁶⁵ It is important to note that, according to section 65(3), the resolution must be proposed by “*any two shareholders*” of the company.⁶⁶ This introduces another procedural requirement in that at least two shareholders (and no less) must propose a resolution in a director’s removal power, provided that both these shareholders have the authority to vote in the matter.⁶⁷

⁵⁹ Delpont *et al Henochsberg on the Companies Act 71 of 2008* (2011) last updated 2024, service issue 35), commentary on section 71.

⁶⁰ *Henochsberg* commentary on section 71.

⁶¹ Section 66(4)(a)(i) states: “A company’s Memorandum of Incorporation – (a) may provide for – (i) the direct appointment and removal of one or more directors by any person who is named in, or determined in terms of, the Memorandum of Incorporation ...”

⁶² Section 66(4)(a)(i).

⁶³ Section 66(4)(a)(ii).

⁶⁴ *Henochsberg* commentary on section 71.

⁶⁵ Section 71(1).

⁶⁶ Section 65(3)(a) states that “[a]ny two shareholders of a company ... may propose a resolution concerning any matter in respect of which they are each entitled to exercise voting rights”.

⁶⁷ Section 65(3)(a). See also *Foxvest* para 16.

In *Foxvest Group (Pty) Ltd and Another v Rocky Park Holdings (Pty) Ltd and Others*,⁶⁸ the court emphasised the significance and importance of the procedural requirement in section 65(3). The court held that section 65(3) is a provision that grants authority, specifically empowering the two shareholders of the company to propose a resolution on matters in respect of which they hold voting rights.⁶⁹ The provision does not state that “any shareholder” may propose a resolution. The use of the word “two” and the plural “shareholders” is intentional and deliberate by the legislature. The court further held that these terms are neither superfluous nor insignificant; rather, they are of great importance. The combination of these words clearly aims to ensure that a resolution is proposed by at least two shareholders.⁷⁰ It is submitted that the substantive reason why the Act requires “two” shareholders to propose a resolution, is to avoid frivolous resolutions from being proposed where the shareholders would have to vote on and essentially waste time and resources of the company. A resolution has to at least be supported by two shareholders, ensuring the possibility of its legitimacy.

In respect of the requirements set by section 65(3), “non-compliance ... is fatal”.⁷¹ This means that shareholders must comply with all the requirements of sections 71(1) and (2), as well as the provisions of section 65 for the intended removal of the director to be lawful.

In the context of section 65, it is further important to note that, for an ordinary resolution to be approved by shareholders, it must be supported by more than 50% of the voting rights exercised on the resolution.⁷² Although section 65(8) determines that an MOI may set a higher percentage of voting rights to approve an ordinary resolution, this is allowed in respect of the majority requirement necessary for the removal of directors.⁷³

⁶⁸ (2022/2807) [2023] ZAGPJHC 63 (27 January 2023).

⁶⁹ *Foxvest* para 13.

⁷⁰ *Foxvest* para 13.

⁷¹ *Foxvest* para 16.

⁷² Section 65(8) determines: “Except for an ordinary resolution for the removal of a director under section 71, a company’s Memorandum of Incorporation may require – (a) a higher percentage of voting rights to approve an ordinary resolution; or (b) one or more higher percentages of voting rights to approve ordinary resolutions concerning one or more particular matters, respectively...”

⁷³ *Henochsberg* commentary on section 71.

The provisions of section 71(1) will not be applicable and cannot be used in instances of the dismissal of an employee, where the employee is also appointed as a director.⁷⁴

2.2.2. Procedural safeguards

Section 71(2) provides for essential procedural safeguards to protect directors from arbitrary removal. It states that:

“Before the shareholders of a company may consider a resolution contemplated in subsection (1) —

- (a) the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and
- (b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.”

Section 71(2) stipulates that the director facing removal must be given notice of the meeting where the resolution for the removal will be considered. The words “at least equivalent to that which a shareholder is entitled to receive” imply that, in a public or non-profit company, the notice period will be 15 business days and, in any other company, 10 business days.⁷⁵ The notice must also include a copy of the proposed resolution which will be considered in the meeting,⁷⁶ and this resolution must be—expressed with sufficient clarity and specificity;⁷⁷ and accompanied by sufficient information or explanatory material.⁷⁸ Following notification, the director has the right to present a case, either personally or through a representative, at the general meeting before any decision is made regarding his or her removal.⁷⁹ Requirements of notice will be discussed at great specificity under chapter 3.

⁷⁴ See *Kemm and Others v Minister of Energy and Others* (88891/2018) [2019] ZAGPPHC 350 (16 August 2019) para 30.

⁷⁵ Section 61(2). See also Ncube 2011 SALJ 39.

⁷⁶ Section 62(3)(c).

⁷⁷ Section 65(4)(a).

⁷⁸ Section 65(4)(b).

⁷⁹ Section 71(2)(b). See also Ncube 2011 SALJ 39.

The Act does not prescribe specific grounds for the removal of directors by shareholders.⁸⁰ It also does not require that shareholders provide reasons for the proposed dismissal but only a reasonable opportunity to address the meeting, in person or through representation.⁸¹

Although section 71(2) does not explicitly require shareholders to provide directors with reasons for their proposed removal, *Pretorius v Timcke*⁸² was the first case that decided on the matter and the court held that such reasons must nevertheless be given. The Western Cape High Court held that shareholders must provide reasons when removing directors under section 71(2), as this enables directors to make meaningful representations in accordance with the *audi alteram partem* principle.⁸³

In the case of *Miller v Natmed Defence (Pty) Ltd and Others*,⁸⁴ Matojane J was of the opinion that

“[w]here shareholders seek the removal of a director, s 71(1) does not require shareholders to provide the director concerned with a statement setting out the reasons for the proposed resolution, as is the case where the removal is by directors. The legislature has deliberately preserved the right of the majority shareholders to remove a director whom they no longer support. Directors serve at the behest of shareholders who elected them. The shareholders can remove them at will without having to provide reasons.”⁸⁵

The Johannesburg High Court then concluded that, according to the Act, providing reasons for the removal of a director is only mandatory when the decision is made by the board of directors.⁸⁶ The conclusion reached in *Miller* is different from that reached in *Pretorius*.

The recent case of *Mathonsi v Tlokana*,⁸⁷ heard in the Gauteng Local Division, Johannesburg, the court again deviated from the precedent set in *Miller* support of

⁸⁰ *Henochsberg* notes that “[t]he right to make a presentation was also afforded in s 220 of the 1973 Act, but s 71(2) does not (and neither did s 220 of the 1973 Act) require the reasons for a proposed removal.”

⁸¹ See sections 71(2)(a) and (b).

⁸² (15479/14) [2015] ZAWCHC 215 (2 June 2015).

⁸³ *Pretorius* para 11.

⁸⁴ (18245/2019) [2021] ZAGPJHC 352; 2022 (2) SA 554 (GJ) (24 August 2021).

⁸⁵ *Miller* para 29.

⁸⁶ *Miller* para 35. See also section 71(4)(a).

⁸⁷ (2023-134642) (2024) (unreported).

not providing removal reasons by shareholders. It was held that this is the same level of detail that a director sought to be removed is entitled to in terms of section 71(2)(a), and the information should be provided in the proposed resolution.⁸⁸

As the aim of this chapter is to provide an overview of the process, the scholarship and case law dealing with the conflicting views on reasons for the removal of directors by shareholders will be discussed against this background in chapter 3. For now, it is relevant to note the legislative provision and the uncertainty relating to whether or not the legislature intended to include provisions relating the grounds for the removal of a director by shareholders.⁸⁹

At the heart of the procedural requirements of section 71(2) lies the desire to ensure that directors are treated fairly and that the process of removal is transparent. These provisions highlight the importance of adhering to procedural fairness in the removal of directors by ensuring that directors have an opportunity to defend themselves against allegations or decisions that could lead to their removal.⁹⁰ This safeguard is crucial in preventing the abuse of power by shareholders or other stakeholders who might otherwise act precipitously or maliciously.⁹¹

Having discussed shareholder removals, the next section focuses on removal by the board.

2.3. Removal by the board of directors

2.3.1. Overview

Section 71(3) enables the board of directors to remove one of its own members if certain conditions are met. Specifically, a director may be removed if he or she has become incapacitated, has neglected his or her duties, or has otherwise become disqualified or ineligible under section 69 of the Act.⁹² This allows the board to remove

⁸⁸ *Mathonsi* para 37.

⁸⁹ To compare, see the provisions of section 71(4)(a) which govern the removal process where the board of directors remove a director – this subsection expressly requires that a statement setting out the reasons for the resolution be provided to the director whose removal will be discussed.

⁹⁰ Section 71(2)(b).

⁹¹ See *Mathonsi* paras 41- 42 discussions on the genuine deliberation to be done by the shareholders in considering the validity of the resolution to remove a director.

⁹² Section 71(3)(a)-(b).

directors who are no longer able to contribute effectively to the company's management.⁹³

The content of section 71(3) provisions reflect the need for the board to maintain internal accountability and performance standards in that it grants the board of directors power to remove a fellow director who may not be performing effectively.⁹⁴ It gives the board the autonomy to act in the best interests of the company when one of its members is unable to perform his or her duties.⁹⁵ The grounds for removal under this section are specific, ensuring that directors are not removed arbitrarily but only when their capacity to fulfil their role has been compromised. In this regard, section 71(3) states:

"If a company has more than two directors, and a shareholder or director has alleged that a director of the company –

(a) has become –

- (i) ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69 (8) (a); or
- (ii) incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or

(b) has neglected, or been derelict in the performance of, the functions of director,

the board, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be."

This provision is clear in that this mechanism is only available when a company has more than two directors (thus a minimum of three directors). It is also clear that allegations against the director can be made by either a shareholder or another director. The phrase "must determine the matter by resolution" imposes a mandatory obligation on the board of directors to consider and decide on the matter. This

⁹³ Section 71(3).

⁹⁴ Section 71(3)(b).

⁹⁵ Section 71(3)(a).

obligation is triggered whenever any director or shareholder alleges that a particular director has become ineligible, disqualified, incapacitated, negligent, or derelict in performing his or her duties.

This provision requires the board to address such allegations through a formal resolution process, regardless of the allegation's merit or the motivations behind it. Cassim is of the opinion that, even if a single shareholder or director puts forward allegations that may be vexatious or unfounded, the board is still compelled to convene and decide on the matter of the director's removal through a resolution.⁹⁶ Furthermore, she opines that the phrase "may remove a director" in section 71(3) indicates that the board retains discretionary power in deciding whether to remove a director, even after considering the allegations.⁹⁷ This discretion is crucial to the process of director removal in ensuring that directors are not removed based on unfounded allegations but that the board uses its power to assess and make a determination into the allegations and into whether or not the allegations may call for a removal.

Ncube opines that, while allegations initiate removal proceedings, a director will be dismissed only if the allegations are substantiated to the board's satisfaction.⁹⁸ For claims of incapacitation, evidence must be shown that the director is unable to perform their functions and that the director is unlikely to recover within a reasonable time.⁹⁹ This is only applicable where the board removes a director and not where the director is removed by way of a resolution by shareholders.

For a director facing potential removal, the opportunity to present a case to the board becomes critically important.¹⁰⁰ This is especially true when the director believes that the allegations are vexatious.¹⁰¹ The opportunity to address the board allows the director to contest the proposed removal, offering his or her perspective and potentially refuting the claims made.¹⁰²

⁹⁶ Cassim 2016 (1) SALJ 133,143.

⁹⁷ Cassim 2016 (1) SALJ 133, 143.

⁹⁸ Ncube 2011 SALJ 40.

⁹⁹ Ncube 2011 SALJ 40.

¹⁰⁰ The presentation is made in terms of section 71(4)(b).

¹⁰¹ Cassim 2016 (1) SALJ 133, 142.

¹⁰² Cassim 2016 (1) SALJ 133, 142.

The first ground for removal¹⁰³ assumes that the director was initially eligible and qualified for appointment as a director. It allows for removal when subsequent adverse changes to the director's circumstances occur. This provision recognises that a director's fitness to hold office may change over time, necessitating a mechanism to address such situations through removal proceedings.¹⁰⁴ Although section 71(3)(a)(i) mandates the initiation of removal proceedings when a director is alleged to have become ineligible or disqualified under section 69, there is an exception. This exception relates to the grounds outlined in section 69(8)(a).¹⁰⁵

In terms of section 69(8)(a), a person will be disqualified from being a director of a company if a court has prohibited that person from being a director, or has declared the person to be delinquent in terms of section 162 of the Companies Act or section 47 of the Close Corporations Act 69 of 1984. Therefore section 69(8)(a) is an exception to the framework provided in section 71(3) as it is logical to require formal action by a director in terms of section 21(3) when allegations concern incapacity or negligence/derelection of duties (as these require factual determination and director representation), but requiring the same formal process for clear cases of ineligibility or disqualification under section 69(8)(b) appears unnecessary since these situations are typically straightforward and factually evident.¹⁰⁶

Consequently, for all other grounds of ineligibility or disqualification specified in section 69, formal removal proceedings must be instituted.¹⁰⁷

The requirement that the board must determine the matter by resolution means that a formal board meeting is required to take place for the board to vote on the resolution, and this meeting ought to adhere to the quorum and majority specifications as set out in the Act and/or the company's MOI.¹⁰⁸ A key feature of this process is the exclusion of the director under scrutiny from the decision-making body.¹⁰⁹ The words "other than the director concerned" indicates that this particular director is not considered part of

¹⁰³ Section 71(3)(a).

¹⁰⁴ Ncube 2011 *SALJ* 40.

¹⁰⁵ Section 71(3)(a)(i).

¹⁰⁶ *Henochsberg* commentary on section 71.

¹⁰⁷ Cassim "Contesting the removal of a director by the board of directors under the Companies Act" 2016 *SALJ* 133, 134.

¹⁰⁸ Section 73(1) and 73(5) deal with board meetings.

¹⁰⁹ Section 71(3).

the formal board structure for the purposes of this resolution.¹¹⁰ Consequently, the director's presence is not needed when working towards meeting quorum requirements, nor can the director participate in the voting process to meet the requisite majority for a decision to be taken.¹¹¹

This exclusion of the director from the decision-making process ensures that the decision on the director's removal is made impartially by peers and without being influenced by the affected director.¹¹² It is submitted that this maintains the integrity of the process while allowing for a fair assessment of the allegations against the director in question.

Section 71(3) mentions only a "company", which suggests that it could apply to any type of company, whether private or public. However, the reference to three directors (i.e., more than two) seems to refer to one of the main differences between public and private companies, as the former must have at least three directors while the latter only requires one.¹¹³ *Henochsberg* notes that this distinction is not particularly significant for private companies, as the MOI may stipulate that a private company can have more than one director.¹¹⁴ Therefore, the process outlined in section 71(3) will apply to all public companies, but only to some private companies.¹¹⁵

2.3.2. Procedural safeguards

Removal proceedings are initiated on the basis of allegations, but a director will be only be dismissed if the allegations are substantiated to the board's satisfaction¹¹⁶ and after consideration by the board and a decision to this effect.¹¹⁷

Section 71(4) determines:

¹¹⁰ See discussion by *Henochsberg* commentary on section 71: "If the company has three directors and the process is in respect of a single director, it would still be possible to comply with, at least, the requirements of s 73 in respect of a quorum of a majority of directors (s 73(5)(b)) and the majority vote (s 73(5)(d)). The Memorandum of Incorporation can, however, provide otherwise, and if the requirements for the quorum or the vote is higher, a meeting and/or a resolution may not be possible. Various permutations with the same result can be possible even if there are more directors."

¹¹¹ Participation of the concerned director is prohibited by section 71(3).

¹¹² Cassim (man ed) *et al Contemporary Company Law* (2021) 603.

¹¹³ *Henochsberg* commentary on section 71.

¹¹⁴ *Henochsberg* commentary on section 71.

¹¹⁵ *Henochsberg* commentary on section 71.

¹¹⁶ Ncube 2011 SALJ 40.

¹¹⁷ Ncube 2011 SALJ 40.

“Before the board of a company may consider a resolution contemplated in subsection (3), the director concerned must be given –

- (a) notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and
- (b) a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.”

Before the board of directors can deliberate on a resolution to remove a director, the director in question must be provided with a copy of the proposed resolution and a statement detailing the reasons for the removal being proposed. The notice must be specific enough to allow the director to reasonably prepare and present a response.¹¹⁸ The director must also be given a fair opportunity to make a presentation to the board, either personally or through a representative,¹¹⁹ before the board proceeds with voting on the resolution.¹²⁰

It is not clear what would constitute the “sufficient specificity” required by section 71(3)(a). In *Pretorius and Another v PB Meat (Pty) Ltd*,¹²¹ the court relied on Ncube’s approach¹²² for guidance as there was no authority available to give meaning to the requirement. In applying Ncube’s formulation of “sufficient specificity” as “sufficiently detailed reasons to mount a response” to aid in its interpretation of this requirement, the court stated that this formulation implies that each case will ultimately depend on its own specific facts.¹²³ “In requiring this, the 2008 Act protects directors by ensuring that they are in a position to mount a response to the case for their removal.”¹²⁴

2.4. Removal by the Tribunal

The power to remove a director is granted to the Companies Tribunal by section 71(8):

“If a company has fewer than three directors—

¹¹⁸ Section 71(4)(a).

¹¹⁹ Section 71(4)(b).

¹²⁰ See also Cassim 2016 (1) SALJ 133, 142 and Ncube 2011 SALJ 40 discussions.

¹²¹ (1057/2013) [2013] ZAWCHC 89 (14 June 2013).

¹²² Ncube 2011 SALJ 33.

¹²³ *Pretorius* para 10.

¹²⁴ *Pretorius* para 9.

- (a) subsection (3) does not apply to the company;
- (b) in any circumstances contemplated in subsection (3), any director or shareholder of the company may apply to the Companies Tribunal, to make a determination contemplated in that subsection; and
- (c) subsections (4), (5) and (6), each read with the changes required by the context, apply to the determination of the matter by the Companies Tribunal.”

The objective of section 71(8) is to establish an alternative process for the removal of directors in companies where board removals are not an option. The Tribunal may remove directors of companies with one or two directors, while board removals are reserved for those companies with at least three directors.¹²⁵ Section 71(8)(b) grants the right to approach the Tribunal to directors and shareholders of the company pursuant to the exercise of the power conferred in section 71(3), this means that only board-initiated removals can be referred to the Tribunal.¹²⁶

The Act, however does not provide for an instance where the Tribunal may be approached for the purposes of section 71(1) which pertains to director removal by the shareholders. This may be the legislature’s attempt to reserve the shareholders’ right to remove directors to shareholders only and for its exercise not to be dependant or reliant on any other bodies except shareholders, and the courts (in a judicial review).

In all other respects, the procedures for removal by the Tribunal are aligned with those of removal by the board.¹²⁷ The grounds are identical to those that must be satisfied for a board removal.¹²⁸ Additionally, all procedural requirements and the rights to request a review that apply to board removals are also extended to removals by the Tribunal.¹²⁹ The same procedure for removal of a director by the board applies to removal of directors by the Tribunal,¹³⁰ thus, the director concerned must be given notice of the meeting of the Tribunal, including a copy of the proposed resolution and a statement setting out reasons for the resolution.¹³¹ The concerned director must also

¹²⁵ See section 71(3).

¹²⁶ Cassim (man ed) *et al Contemporary Company Law* (2021) 611.

¹²⁷ Section 71(8)(b)

¹²⁸ Section 71(3)-(4).

¹²⁹ Ncube 2011 *SALJ* 46.

¹³⁰ See discussion in Cassim (man ed) *et al Contemporary Company Law* (2021) 612.

¹³¹ Section 71(4)(a).

be given an opportunity to make presentation to the Tribunal in accordance with section 71(4)(b).

The decision of the Tribunal to remove a director is subject to a court's review in terms of section 71(5) and 71(6). It is, however not clear whether a director may apply to court in terms of section 71(6)(a) to review the Tribunal's decision not to remove a director from office.¹³²

Section 71(6)(a) states that '*any director who voted otherwise on the resolution*' may apply to court to review the determination by the board not to remove the director in office. The application of section 71(6)(a) to Tribunal decisions creates ambiguity regarding review rights. When the Tribunal determines not to remove a director, it is unclear whether the remaining director in a company can seek court review since they would not have "*voted otherwise on the resolution*" as the decision was made by the Tribunal rather than directors.¹³³

The powers of the court to review and the orders it is empowered to make under sections 71(5) and 71(6) will be discussed in detail in Chapter 3.

Section 70(2) stipulates that when a board removes a director in terms of section 71(3), the position only becomes vacant after either: the time period for filing a review application has elapsed,¹³⁴ or if a review is filed in terms of sections 71(5) and 71(6), after the court has made its final determination on the matter.¹³⁵ The legislature did not extend similar requirements with regard to Tribunal removals.¹³⁶

Ncube is of the view that while the legislation should have extended section 70(2) provision to Tribunal removals for clarity and consistency, companies should still wait for the review period to expire before filling the position, even though the Act does not explicitly require this for Tribunal removals.¹³⁷ I am in agreement with this view, as appointing a replacement director before the period for filing a review has expired and before the court decides on the matter may be seen as counterintuitive as there is no

¹³² See discussion in Cassim (man ed) *et al Contemporary Company Law* (2021) 612.

¹³³ Cassim "A critical analysis of the judicial review procedures under section 71 of the Companies Act 71 of 2008" 2018 *SA Merc LJ* 302 para viii.

¹³⁴ Section 70(2)(a).

¹³⁵ Section 70(2)(b).

¹³⁶ Cassim (man ed) *et al Contemporary Company Law* (2021) 613.

¹³⁷ Ncube 2011 *SALJ* 47.

knowing of what the court will decide before making a ruling. If the court effectively sets aside the resolution removing a director, the company may be faced with challenges if it has already appointed a replacement director.

2.5. The judiciary

Sections 71(5) and (6) do not permit direct access to the judiciary to remove a director as a first course of action. Instead, judicial intervention is only available through an application to review a decision made by the board or Tribunal, following initial attempts to secure the director's removal through these bodies.¹³⁸ This may be because courts refrain from interfering in the running of the companies and board matters.

Section 71(5) grants the director concerned, or a person who appointed that director,¹³⁹ the ability to challenge the removal in court.¹⁴⁰ The Act stipulates that an application may be brought to court for a review within twenty business days after the board takes the decision. The court may review the circumstances and issue any order it deems just and equitable, including reinstating the director.¹⁴¹ Despite this, it remains unclear whether a court would have the authority to review the substance and merits of the board's decision or if its power would be limited to reviewing only the procedural aspects of the decision.¹⁴²

This ambiguity in respect of the meaning of “review” raises questions about the extent of the court's authority in removal cases. The interpretation of this term can significantly impact how courts deal with section 71(5) matters in practice.¹⁴³

Section 71(6) provides that if the board determines that a director is not ineligible, disqualified, incapacitated, or negligent, any dissenting director or eligible shareholder may request a court review. The court may then either uphold the board's decision or

¹³⁸ Ncube 2011 *SALJ* 46.

¹³⁹ Appointment must have been made in terms of section 66(4)(a)(i).

¹⁴⁰ Removal must have been done in terms of section 71(3) and effected by the board of directors.

¹⁴¹ Section 71(5).

¹⁴² Cassim 2016 *SALJ* 133 at 153.

¹⁴³ Cassim 2018 *SA Merc LJ* 302.

remove the director if it finds grounds for ineligibility, disqualification, incapacity, or negligence.¹⁴⁴

Under section 71(6), when a court reviews a decision where the board has elected not to remove a director, it may either uphold the board's decision or remove the director if the court is "satisfied" that the director is ineligible, disqualified, incapacitated, or has been negligent or derelict.¹⁴⁵ The use of the term "satisfied" suggests that, in such a review, the court has the authority to examine the merits of the matter, not merely the procedural aspects of the board's decision.¹⁴⁶

The anomalies between sections 71(5) and 71(6) will be discussed in detail in Chapter 3.

Notably, the Act does not stipulate the time period in which this review under section 71(6) application may be brought to court. This raises concerns of uncertainty regarding the process as the matter would remain unresolved. Even though a vote against the removal of the director was taken by the board, the remedy afforded by section 71(6) would seem to be available indefinitely. I agree with Cassim's views that a similar provision of twenty business days limit as contemplated in section 71(5) would be sufficient to ensure that the matter is concluded.

Cassim opines that

"[i]t is important that a time limit be imposed as without it the impugned director's status on the board is uncertain in that a director or a holder of voting rights could apply to court at any time to review the board's decision not to remove him or her from office. Even though there would be no uncertainty as to whether the director in question is a board member because the board would simply regard the director as being a member as it did not remove him or her from office, it is submitted that there must nevertheless be a time limit within which a director or a holder of voting rights may apply to court to review the board's determination not to remove the director from office, so as to bring the matter to a finality."¹⁴⁷

¹⁴⁴ Section 71(6)(b)(ii).

¹⁴⁵ Section 71(6)(b). Also see Cassim 2018 SA Merc LJ 316 para-V (b).

¹⁴⁶ Ncube 2011 SALJ 47. See also Cassim 2016 SALJ 153 on discussion of section 71(6).

¹⁴⁷ Cassim 2018 SA Merc LJ 302 para iv (b).

The key issue centres on the difference between section 71(5), which provides a clear twenty business-day deadline for directors to challenge their removal,¹⁴⁸ and section 71(6), which notably lacks any time restriction for challenging a decision not to remove a director.

Cassim's argument is particularly compelling in two aspects. First, the phrase "*could apply to court at any time*" highlights the problematic open-ended nature of the current provision.¹⁴⁹ This creates perpetual uncertainty about a director's status, as their position could theoretically be challenged indefinitely. Second, while Cassim acknowledges that practically the director would continue serving since the board did not remove them, the absence of a time limit still leaves the matter without "finality."¹⁵⁰ It is submitted that an inclusion of a similar twenty business day limit demonstrates a practical solution as it would protect the rights of challenging parties while ensuring corporate stability through definitive timeframes.

Section 71 does not provide for judicial review where the director was removed by shareholders at a meeting called for that purpose. However, in *Litabe v Di Thabeng Wholesale Fuel Supply (Pty) Ltd and Others*,¹⁵¹ the court dealt with director removal by shareholders:

"The court is satisfied that this court may deal with the review application, either based on the principle of legality or the common law. Such right is afforded the applicant in accordance with s34 of the Constitution, notwithstanding the absence of an express right to review the resolution by shareholders as provided for in terms of ss 71(1) and (2)..."¹⁵²

The *Litabe* case shows courts will rely on constitutional principles and common law to fill legislative gaps, ensuring directors have access to justice while respecting shareholder rights. It is submitted that the purpose of allowing judicial review, despite no explicit provision in section 71 for shareholder removals, is to adhere to principles

¹⁴⁸ Section 71(5).

¹⁴⁹ Section 71(6).

¹⁵⁰ Cassim 2018 SA Merc LJ 302 para iv (b).

¹⁵¹ (434/2022) [2023] ZAFSHC 376 (9 October 2023) para 22.

¹⁵² *Litabe* para 22.

of legality and to uphold section 34 of the Constitution. This thus ensures procedural fairness and prevents abuse of removal powers.¹⁵³

The main pitfalls of allowing section 71(1) decisions to be reviewed despite any statutory provision include creating uncertainty about the finality of shareholder decisions and potentially undermining shareholders' fundamental right to remove directors.¹⁵⁴ There is also a lack of clear statutory guidance on review grounds, making it difficult to balance shareholder authority with judicial intervention. This may create a risk of excessive judicial interference in corporate governance and board matters.¹⁵⁵

2.6. Conclusion

The chapter outlined the three distinct mechanisms under section 71, noting the shift from the 1973 Act where directors' powers were delegated by shareholders, to the 2008 Act where powers are original and derived directly from section 66.

Shareholders can remove directors through ordinary resolution despite contrary provisions in MOI or agreements.¹⁵⁶ The *Foxvest* case established that at least two shareholders must propose the removal resolution under section 65(3).

The Act does not prescribe specific grounds for the removal of directors by shareholders.¹⁵⁷ However, the Act provides detailed grounds for removal by the board and the Tribunal. These grounds encompass issues such as ineligibility to serve as a director, disqualification from holding the position, and a failure to perform in accordance with the director's duties.¹⁵⁸

Under shareholder removals, while shareholders retain fundamental power to remove directors through ordinary resolution, procedural safeguards must be followed.¹⁵⁹ The analysis highlighted ongoing uncertainty regarding whether shareholders must provide reasons for removal, where significant case law conflict exists between the case of *Pretorius* which requires shareholders to provide reasons to enable meaningful

¹⁵³ See Cassim 2018 SA Merc LJ 302 para VII.

¹⁵⁴ Protected under section 71(1).

¹⁵⁵ See Cassim 2018 SA Merc LJ 302 para VII.

¹⁵⁶ Section 71(1).

¹⁵⁷ See sections 71(2)(a) and (b).

¹⁵⁸ Section 71(3)(a)-(b).

¹⁵⁹ Section 71(1)-(2).

representation, *Miller* where the court held that shareholders need not provide reasons as directors serve at shareholders' pleasure, and *Mathonsi* supporting Pretorius, requiring detailed information in the resolution.

Regarding board removals, companies with more than three directors may remove a director for specified grounds.¹⁶⁰ In *Pretorius*, the court adopted Ncube's interpretation of "sufficient specificity" as requiring "sufficiently detailed reasons to mount a response," emphasizing that each case depends on its specific facts. The director concerned must be excluded from voting, maintaining impartiality in the decision-making process.¹⁶¹ The research showed robust procedural protections, including notice requirements, statement setting out reasons for resolution and opportunities for director to make representation.¹⁶²

The Tribunal's removal power, while serving as an alternative mechanism for companies with fewer than three directors,¹⁶³ showed potential gaps in the legislation. Notably, the Tribunal's jurisdiction is limited to board-initiated removals under section 71(3), with shareholders deliberately excluded from approaching the Tribunal for removals under section 71(1), arguably preserving their direct removal rights.

The procedural framework for Tribunal removals mirrors that of board removals in section 71(4), requiring proper notice containing the proposed resolution and reasons,¹⁶⁴ while ensuring the affected director has an opportunity to make representations.¹⁶⁵ The grounds for removal remain identical to those applicable in board removals, maintaining consistency in the substantive requirements across these mechanisms.

Application of section 71(6)(a) to Tribunal decisions creates uncertainty about review rights, as remaining directors would not have "voted otherwise on the resolution" as the decision would have been taken by the Tribunal and not the company.

¹⁶⁰ Section 71(3).

¹⁶¹ Section 71(3).

¹⁶² Section 71(4)(a)-(b).

¹⁶³ Section 71(8).

¹⁶⁴ Section 71(4)(a).

¹⁶⁵ Section 71(4)(b).

Unlike board removals under section 70(2) which states that a replacement director can only be appointed after either the review period lapses (twenty days) or, if a review is filed, after the court's final ruling on board removals. The Act notably omits any explicit provisions addressing when Tribunal removals create vacancies. It is submitted, in agreement with Ncube, companies that should practically follow the same approach for Tribunal removals by awaiting the review period's expiry before appointing replacement directors.

Courts cannot be approached directly for director removal; instead, their role is limited to reviewing decisions made by the board or Tribunal.¹⁶⁶ Under section 71(5), removed directors have twenty business days to challenge their removal, though uncertainty exists about whether courts can examine substantive merits or just procedural aspects of these decisions.

Section 71(6) creates a different framework for reviewing decisions not to remove directors, where the court can either uphold the board's decision or remove the director if "satisfied" about specific grounds.¹⁶⁷ This suggests broader review powers than under those section 71(5). However, unlike section 71(5) which provides for a clear twenty-day deadline, section 71(6) lacks any time restriction for bringing review applications to court. As Cassim compellingly argues, this creates ongoing uncertainty about directors' status and needs addressing through a similar time limit for finality.¹⁶⁸

This chapter presents a foundation for a deeper examination of specific legal challenges/issues in the next chapter. These include the requirement for reasons in shareholder removals, the scope of court review powers, and the interplay between different removal mechanisms.

¹⁶⁶ Under sections 71(5) and 71(6).

¹⁶⁷ Section 71(6)(b).

¹⁶⁸ Cassim 2018 *SA Merc LJ* 302 para iv (b).

Chapter 3: An analysis of selected problem areas associated with section 71

3.1. Introduction

While the preceding chapter outlined the statutory provisions, this section addresses the key challenges they pose in practice. Three key legal challenges have been identified that have presented confusion concerning the removal of directors and they are as follows: the right of reasons; uncertainty regarding court powers to review removal decisions; and removal by a sole shareholder. These legal challenges will be discussed in detail. The chapter will further discuss the provisions of the Companies Act applicable to each challenge, case law and submissions largely debated and highlighted by scholars that inform these three key legal challenges.

3.2. Issue 1: The right to reasons

3.2.1. Overview

The board of directors is responsible for overseeing the management of a company's business and affairs.¹⁶⁹ The board possesses the authority to wield all powers and carry out any functions of the company unless otherwise stipulated by the Companies Act or the company's MOI.¹⁷⁰ This power comes with responsibilities and expectations – the board is bestowed with various statutory fiduciary duties and the duty of care, skill and diligence.¹⁷¹ These partially codified duties exist alongside fiduciary duties established by common law¹⁷² and these are to guarantee the proper execution of the managerial duty by the board of a company.

The Companies Act provides for the appointment¹⁷³ and consequently removal of directors¹⁷⁴ from their positions on the board. Section 71(1) stipulates that, subject to section 71(2), a company director may be dismissed through an ordinary resolution passed at a shareholders' meeting by those with voting rights in the election of said director.¹⁷⁵ The shareholders' power to remove a director is a formidable tool at their disposal. This authority prevails regardless of any provisions to the contrary in the company's MOI, rules, or any agreements between the company and the director or between shareholders and the director.¹⁷⁶

Section 71(1) does not explicitly require shareholders to provide any specific grounds or having cause when removing a director from office. In contrast, section 71(3) – which grants the board power to remove a director – mandates that, when the board seeks to remove a director, it must provide the affected director with a detailed statement of reasons for the proposed removal, allowing the director to prepare and

¹⁶⁹ Section 66(1) states: "The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise."

¹⁷⁰ Section 66(1).

¹⁷¹ See sections 76(2)-76(4).

¹⁷² *Henochsberg* commentary on section 76.

¹⁷³ Section 68.

¹⁷⁴ Section 71.

¹⁷⁵ *Davis Companies and Other Business Structures in South Africa* (2021) 226.

¹⁷⁶ Cassim "Confusion in the removal of directors by shareholders under the Companies Act 71 of 2008: *Miller v Natmed Defence (Pty) Ltd*" 2022 SALJ 744.

present a reasonable response.¹⁷⁷ However, no such requirement exists under section 71(2) for shareholder-initiated removal.¹⁷⁸

According to the provisions of the Act, it is apparent that there are no specified reasons for the removal of a director that must be provided by shareholders, only that the director concerned must be given notice of the meeting and the resolution¹⁷⁹ and must also be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.¹⁸⁰ This may necessitate that, for shareholders to remove a director without cause, the only requirement is securing enough votes to pass an ordinary resolution at a shareholders' meeting by those entitled to exercise voting rights in the election of that director.¹⁸¹

3.2.2. *Pretorius and Another v Timcke and Others*¹⁸²

Although section 71(2) does not explicitly require shareholders to provide directors with reasons for their proposed removal, *Pretorius v Timcke* was the first case that decided on the matter, and the court held that such reasons must nevertheless be given. In *Pretorius*, the shareholders sought to dismiss company directors and provided them with notice of the proposed resolution. During the subsequent shareholders' meeting, the shareholders voted to remove the directors. However, the directors contested the removal, citing a defective notice due to lack of reasons for their dismissal. In this regard, Salie-Hlophe J stated that:

"To read into the provision that an affected director can make representations, without being furnished with reasons for his or her intended removal, would render the wording of the provision superfluous and without effect. Its simple interpretation would be that the applicants had to be afforded with reasons in order that they could make representations in respect thereof and meet their case accordingly."¹⁸³

¹⁷⁷ Section 71(4)(a)

¹⁷⁸ Cassim 2022 SALJ 744.

¹⁷⁹ Section 71(2)(a).

¹⁸⁰ Section 71(2)(b).

¹⁸¹ Cassim 2022 SALJ 745.

¹⁸² (15479/14) [2015] ZAWCHC 215 (2 June 2015). Hereinafter "*Pretorius*".

¹⁸³ *Pretorius* para 10.

The court held that the requirement in section 71(2)(b) which allows the director a reasonable opportunity to make a presentation, should be interpreted as obliging shareholders to provide reasons in advance for the proposed removal resolution.¹⁸⁴ This ensures that the director can make informed representations and be aware of the relevant information to present to shareholders regarding the reasons for the intended removal.¹⁸⁵ The court determined that the provision for a “reasonable opportunity to make a representation” for a director under section 71 necessitates shareholders to supply the directors with reasons.¹⁸⁶ This ensures that the directors can effectively present their case at the meeting.¹⁸⁷

The court further opined that, when shareholders seek to remove a director, the rules of natural justice demand that there must be compliance with the *audi alteram partem* principle.¹⁸⁸ It states that the principles of natural justice, particularly the fundamental tenet of *audi alteram partem*, emphasise the right of individuals to present facts and evidence to the decision-maker.¹⁸⁹ This right is inherently linked to the ability to gather the necessary information, details, or documents, enabling the affected party to adequately respond to the case at hand.¹⁹⁰

This notion was also demonstrated by the court in the matter of *Zulu and Others v Zulu*¹⁹¹ where the court held that “[t]he language used in section 71(2) is peremptory and accordingly envisages that *audi alteram* must be afforded to the first respondent. The right to *audi alteram* is also founded and emphasized in courts”.

The court stated that the *audi alteram partem* principle is complied with when certain conditions are met.¹⁹² These conditions include, inter alia, when a body has the authority to take actions or make decisions that negatively affect an individual's liberty, property, or existing rights, or when an individual has a legitimate expectation entitling him or her to a hearing.¹⁹³ The conditions are met when the individual is provided with

¹⁸⁴ Pretorius para 11.

¹⁸⁵ Pretorius para 11.

¹⁸⁶ Pretorius para 10.

¹⁸⁷ Pretorius para 8.

¹⁸⁸ Pretorius para 11.

¹⁸⁹ Pretorius para 11.

¹⁹⁰ Pretorius para 11.

¹⁹¹ (D429/2023) [2023] ZAKZDHC 25 (6 April 2023). Hereinafter “Zulu”.

¹⁹² Zulu para 29.

¹⁹³ Zulu para 29. See also *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) for a discussion of the *audi alteram partem* principle.

reasons for such decisions against them.¹⁹⁴ The court was of the opinion that not providing reasons of removal to the director violates the rules of natural justice – in particular, denying the impacted director the benefits of *audi alteram partem* impairs the process of director removal by shareholders.¹⁹⁵

Notably, Delport cautions that the *audi alteram partem* rule is much wider than the rights afforded in section 71(2) and that this provision does not import the whole essence of the rule.¹⁹⁶

Peach explains the rule as follows:

“The audi alteram partem rule implies that a person must be given the opportunity to argue his case. This applies not only to formal administrative enquiries or hearings, but also to any prior proceedings that could lead to an infringement of existing rights, privileges and freedoms, and implies that potentially prejudicial facts and considerations must be communicated to the person who may be affected by the administrative decision, to enable him to rebut the allegations. This condition will be satisfied if the material content of the prejudicial facts, information or considerations has been revealed to the interested party.”¹⁹⁷

I align with Peach's explanation that the rule requires not just formal hearing opportunities, but meaningful disclosure of facts that may be prejudicial to enable a proper response and/or representation. When this explanation is applied to director removals, this means that directors must receive sufficient information regarding the reasons for their proposed removal, to mount an effective response as per the court's finding in *Zulu*. While I agree with Delport's argument in that the *audi alteram partem* rule is much wider than the provisions of section 71(2), I do however submit that in line with *Peach* and *Zulu*, the essence of *audi alteram partem* is essentially the right to be heard and to respond to adverse allegations and this notion is fully captured within the

¹⁹⁴ *Zulu* para 29.

¹⁹⁵ *Zulu* para 43. (See also *Theart v Theart and Others* [2023] JOL 59305 (WCC) para 36 and para 37 et seq in respect of the audi alteram partem principle).

¹⁹⁶ *Henochsberg* commentary on section 71 states that the that the audi alteram partem rule is also incorporated into sections 33 and 34 of the Constitution of the Republic of South Africa, 1996.

¹⁹⁷ Peach The application of the audi alteram partem rule to the proceedings of commissions of inquiry (LLM mini-dissertation, North-West University, Potchefstroom Campus 2003) 8.

requirements of section 71(2) for notice and representation opportunities for the concerned director.

The two cases discussed above demonstrate the reasoning courts may adopt when justifying why shareholders ought to provide reasons for dismissal to directors.

3.2.3. *Miller v Natmed Defence (Pty) Ltd*¹⁹⁸

However, there have been conflicting views on this matter. In *Miller*, the court disagreed with the findings of *Pretorius*, and concluded that the legislature did not intend to mandate shareholders to provide reasons for their decision to remove directors they had previously elected.¹⁹⁹ Thus, shareholders have the liberty to dismiss directors at their will without the obligation to furnish reasons for their actions as directors serve at the pleasure of the shareholders who appointed them.²⁰⁰

The court held that, according to the Act, providing reasons for the removal of a director is only mandatory when the decision is made by the board of directors.²⁰¹ It further stated that there is no equivalent obligation for shareholders opting to remove a director.²⁰² In fact, the legislature has explicitly safeguarded the prerogative of the majority of shareholders to remove directors they no longer endorse.²⁰³

Upon the examination of the surrounding facts of the *Miller* case, it is apparent that the relationship of trust between the shareholders and Miller had irreparably broken down, as demonstrated by the conflict over salary and bonuses, culminating in the decision to remove him.²⁰⁴ The court thus asserted that, even if it erred in determining that shareholders could dismiss Miller as a director without prior justification, Miller could not remain a director when the shareholders lacked confidence in his ability to manage the company to their satisfaction.²⁰⁵

¹⁹⁸ *Miller v Natmed Defence (Pty) Ltd* (18245/2019) [2021] ZAGPJHC 352; 2022 (2) SA 554 (GJ) (24 August 2021). Hereinafter “*Miller*”.

¹⁹⁹ *Miller* para 36.

²⁰⁰ *Miller* paras 35-36.

²⁰¹ *Miller* para 35. See also section 71(4)(a).

²⁰² *Miller* para 36.

²⁰³ *Miller* para 36.

²⁰⁴ *Miller* para 44.

²⁰⁵ *Miller* para 44.

The court's opinion could be an indication that perhaps decisions to provide reasons may be determined on a case-by-case basis by examining the surrounding facts of the removal and the relation between the affected director and shareholders.

Cassim agrees with the findings in *Miller*.²⁰⁶ She submits that the court was correct in its ruling as furnishing directors with reasons before their removal is not a legislative requirement.²⁰⁷ In her submission, she points out that the court in *Miller* stated that *Pretorius* improperly relied on the remedy of reading-in where the Companies Act is clear and that such an approach was not justified.²⁰⁸

Of note is that *Miller* was decided in the Gauteng Local Division, Johannesburg, and *Pretorius* was decided in the Western Cape Division, Cape Town. According to the doctrine of judicial precedent, as both courts were presided over by a single judge, the decision in *Miller* does not overrule that of *Pretorius* and both these cases are only binding in their respective jurisdictions. A ruling from a higher court is therefore necessary to address this anomaly as these decisions only hold persuasive value in other divisions and jurisdictions.²⁰⁹

3.2.4. *Mathonsi v Raesibe Gloria Tlokana and Others*²¹⁰

Conflicting interpretations of sections 71(1) and (2) are evident in *Mathonsi v Tlokana*, where the Gauteng Local Division deviated from the *Miller* precedent, supporting the need for shareholders to provide reasons for director removal.

In *Mathonsi*, it was held that the decision of *Pretorius* was correct insofar as the interpretation of section 71(1) was concerned.²¹¹ The court further held that the contentions that a meeting to remove a director could be called without the intervention of the board was misplaced.²¹² The court reasoned that while shareholders can request the board to convene a meeting in terms of section 71(1), section 61(3) provides that it is ultimately the board's responsibility to call such meeting and if

²⁰⁶ Cassim 2022 SALJ 746.

²⁰⁷ See also Cassim "Governance and the board of directors" in Cassim (man ed) *et al Contemporary Company Law* 3 ed (2021) 595.

²⁰⁸ See *Miller* para 33.

²⁰⁹ Cassim 2022 SALJ 746.

²¹⁰ (2023-134642) (2024) (unreported). Hereinafter "*Mathonsi*".

²¹¹ *Mathonsi* para 46.

²¹² *Mathonsi* para 22.

shareholders convene the meeting themselves, it is considered unlawful.²¹³ In cases where the board refuses or fails to convene the meeting as requested under section 61(3), the shareholders' remedy lies in section 61(12), which allows them to seek relief through the courts.²¹⁴

It was also misplaced to suggest that shareholders may remove a director without regard to reasons, because directors serve at the pleasure of shareholders.²¹⁵ The court drew attention to section 65, which determines the process for adopting shareholder resolutions.²¹⁶ Particularly attention was drawn to section 65(4)(b), which requires that the proposed resolution must be

“accompanied by sufficient information or explanatory material to enable a shareholder who is entitled to vote on their resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolution.”

It was held that this is the same level of detail that a director sought to be removed is entitled to in terms of section 71(2)(a) and the information should be provided in the proposed resolution.²¹⁷ Accordingly, the court held that section 71 should be interpreted to mean that a director facing removal by shareholders has the right to be informed of the reasons for the potential removal. This allows the director to prepare and present a case during the shareholders' meeting.²¹⁸

The court in *Mathonsi* gave a wide interpretation of section 71(2) as this provision does not require shareholders to have a reason for wanting to remove a director, it is explicit in that the director is only entitled to a notice that is at least equivalent to that which a shareholder is entitled to receive.²¹⁹ To sufficiently opine on the court's findings attention must be drawn to two provisions, namely, section 62 which deals with shareholder notices and section 65 which deals with shareholder resolutions.

²¹³ *Mathonsi* para 22. Also see discussion of board fiduciary duty to convene a shareholder meeting in *Contemporary Company Law* 3 ed (2021) 492-3.

²¹⁴ *Mathonsi* para 22.

²¹⁵ *Mathonsi* para 48.

²¹⁶ *Mathonsi* para 36.

²¹⁷ *Mathonsi* para 37.

²¹⁸ *Mathonsi* para 37.

²¹⁹ Section 71(2)(a).

According section 62, the company must deliver notice to the shareholders, a notice for a shareholders' meeting must be in writing and should include the following:²²⁰ The date, time, location of the meeting, and the record date for determining eligible participants;²²¹ the general purpose of the meeting, as well as any specific purpose outlined in section 61(3)(a), if applicable;²²² and a copy of any proposed resolution submitted to the company for consideration, along with a notice specifying the percentage of voting rights required for the resolution to be adopted.²²³

It can be deduced that for the purposes of section 62(3)(c) a copy of a resolution must be included in the notice provided to shareholders. Therefore it becomes necessary that we look at section 65(4) which deals with shareholder resolutions, which states that a proposed resolution must be sufficiently clear and specific and accompanied by sufficient information to enable a shareholder to determine whether to participate at the meeting.²²⁴ Therefore according to section 71(2)(a) the director concerned must be given notice of the meeting and the resolution, at least equivalent the one detailed above, which complies with sections 62 and section 65.

Following the provisions as outlined above, it is deduced that the court did extend the requirements of the sufficiency of information given to the director that is needed for a valid resolution. I agree with this extension in that '*a proposed resolution must be sufficiently clear and specific and accompanied by sufficient information*' to enable the director to prepare their response, I fail to see how this can be achieved without providing reasons for the resolution. Furthermore, this notice and resolution must be delivered directly to the concerned director prior to the meeting taking place as it is also to be delivered to shareholders with necessary voting powers.

Section 61(5) reinforces that a notice requesting a shareholders' meeting to remove a director can be set aside by a court if deemed frivolous or vexatious.²²⁵ The court in *Mathonsi* held that there is consequently no justification for requiring a board of directors to evaluate the merits or validity of a proposed resolution for removing a

²²⁰ Section 62(3).

²²¹ Section 62(3)(a).

²²² Section 62(3)(b).

²²³ Section 62(3)(c).

²²⁴ Section 65(4)(a)-(b).

²²⁵ *Mathonsi* para 42.

director, while shareholders remain exempt from such scrutiny and can proceed at their discretion.²²⁶

The court concluded that it is incorrect to assert that shareholders can remove a director without considering and providing the underlying reasons, as directors serve at the behest of the shareholders.²²⁷ In his conclusion, Malindi J referred to *Miller*, highlighting that Matojane J in *Miller* disagreed with the findings of the Western Cape decision in *Pretorius* where it was found that section 71(1) requires that shareholders give reasons for a resolution for the removal of a director.²²⁸

Malindi J favoured the court's view in *Pretorius* and further stated that Matojane J in *Miller* was not directed to the *Heatherview Estate Extension 24 v Homeowners Association (NPC) and Mahlatse Trading Enterprise CC and 101 Others*²²⁹ case, suggesting that both the findings in *Heatherview* and *Pretorius* necessitate a finding in favour of mandatory provision of reasons by shareholders.

I fail to draw a correlation between these two matters, as the court in *Heatherview* dealt with the provisions of section 61(3)²³⁰ in relation to shareholders requesting the board to convene a meeting. It did not deal with matters pertaining to section 71. In *Miller*, the court was not called to deliberate on section 61(3); hence, neither the findings nor the principles considered in *Heatherview* have any bearing on *Miller*. It is submitted that the court in *Mathonsi* relied on *Pretorius*'s findings to reach its conclusion and that its suggestion that the findings in *Heatherview* could have had a bearing on the finding in *Miller* is simply exacerbating the confusion.

²²⁶ Mathonsi para 42.

²²⁷ Mathonsi para 48.

²²⁸ Mathonsi para 46.

²²⁹ (Case Number 22616 / 2019) (20 May 2019). Hereinafter "*Heatherview*".

²³⁰ The court held that "[i]t seems therefore that whilst shareholders or members may in terms of section 61(3) request the board to convene a meeting, it is the board that must in fact do so and where the shareholders or members convene the meeting themselves, it is unlawful. Their remedy, where the directors refuse or fail to convene a meeting on request in terms of s 61(3) lies in subsection (12) i.e. to approach a court".

3.2.5. Impact on the processes of the Companies and Intellectual Property Commission

The Companies and Intellectual Property Commission (CIPC) is an agency established by the Act.²³¹ It plays an administrative and regulatory role pertaining to director removals as part of its broader function of overseeing companies and intellectual property matters. Its role and function include the filing of documentation and maintaining of accurate company records.²³² Therefore, when a director is removed by an ordinary resolution of shareholders or by the board, the CIPC must be notified.²³³ This is done by submitting the appropriate forms and supporting documents for the removal to be registered.²³⁴ The CIPC's functions extend to ensuring that the correct legal processes have been followed during the removal.²³⁵ This includes ensuring that the company has adhered to the proper procedures.²³⁶

Pursuant to the Act²³⁷ and regulation 4(2)(b) of the Companies Regulations, 2011 ("the Companies Regulations"), a senior officer of a regulatory agency has the authority to issue a Practice Note at any time. This may include, among other things, the agency's interpretation or intended application of a provision in the Act or the Companies Regulations. However, any Practice Note must align with both the Companies Act and the Companies Regulations.²³⁸ In the event of any inconsistency between the Companies Act or the Companies Regulations and a Practice Note, the Companies Act or Companies Regulations (whichever is applicable) will take precedence.²³⁹

In exercising its function, the CIPC is guided by the Act. Therefore, it is imperative that regulatory requirements are clear to effectively guide the CIPC on the application of the provisions of the Act.²⁴⁰ The confusion of whether or not shareholders ought to

²³¹ Section 185.

²³² Cassim 2018 SA Merc LJ 302, 7.

²³³ *Jones and Others v Delport and Others* (2023-082594) [2024] ZAGPPHC 846 (28 August 2024), para 32.

²³⁴ Section 187.

²³⁵ Cassim "Contesting the removal of a director by the board of directors under the Companies Act" 2016 SALJ 133, 153.

²³⁶ Section 187(4).

²³⁷ Section 188(2)(b)(i).

²³⁸ Regulation 4(3)

²³⁹ Cassim 2022 SALJ 747.

²⁴⁰ Section 187(2). Also see Cassim (man ed) *et al Contemporary Company Law* (2021) 1148.

provide reasons to directors sought to be removed has been dealt with in two Practice Notes issued by the CIPC.

In accordance with the statutory provisions²⁴¹ and the *Pretorius* judgment, the CIPC issued a Practice Note on 20 November 2018²⁴² which mandates shareholders to state the reasons for removing directors in the notice of meeting. If they fail to provide these reasons, their application²⁴³ to the CIPC to change the directors of the concerned entity will be denied.²⁴⁴

On 24 June 2019, the CIPC issued another Practice Note²⁴⁵ stating that a document stating reasons for the removal of the director ought to be submitted to the CIPC in order to enable it to proceed with the director removal process. It should nevertheless be noted that the second note is no longer accessible through the CIPC's website, despite the lack of official amendment or withdrawal from CIPC.

Notably, unless the CIPC revises or revokes both these Practice Notes, companies seeking to amend the status of directors removed by shareholders under sections 71(1) and (2) of the Companies Act must provide the CIPC with a copy of the meeting notice sent to the directors. This notice must include a statement detailing the reasons for the proposed removal.²⁴⁶

As these two Practice Notes were issued pursuant to the ruling in *Pretorius*, the court in *Miller* failed to address the practical implications in light of the CIPC's Practice Notes. The CIPC requires shareholders to provide directors with reasons for their removal, but *Miller* reached a different conclusion from that of *Pretorius*. If shareholders do not comply, the application to change the directors' status within the company may be denied.²⁴⁷

²⁴¹ See section 71.

²⁴² Notice to Customers (Notice No. 74 of 2018) To Provide Reason(s) or Not for Removal of Director by the Shareholders', available at https://www.cipc.co.za/wp-content/uploads/2022/11/Notice_74_of_2018.pdf (accessed on 24 Sept 2024).

²⁴³ Effected through the filing of CoR39 form following a removal.

²⁴⁴ Cassim 2022 SALJ 747.

²⁴⁵ Notice to Customers (Notice No. 42 of 2019) Processing Requirements for the Removal of Directors, available at https://accountingpracticalsolutions.co.za/wp-content/uploads/2019/07/Notice_42_of_2019_Removal-of-Directors-by-shareholders_Pretorius-Case.pdf.

²⁴⁶ Cassim 2022 SALJ 747.

²⁴⁷ Cassim 2022 SALJ 756.

Cassim argues that the CIPC's Practice Notes are in conflict with section 71(2)(b) of the Act as it does not require shareholders to provide reasons.²⁴⁸ However, as it stands, there are three court judgments on this matter: two²⁴⁹ require the provision of reasons to a director in the Johannesburg jurisdiction and one²⁵⁰ in the Western Cape jurisdiction does not. Whilst it may be apparent that the provisions of sections 71(1) and 71(2) do not explicitly mandate the provision of reasons by shareholders, it is advisable that shareholders – in order to ensure effective removal of a director from an administrative perspective – provide reasons for removal to the director in the notice of meeting and prior to voting on the matter. This must be included when the CoR39 form is lodged as the CIPC has also not revoked the Practice Notes issued.²⁵¹

The objectives of the CIPC as set out in section 186(1) include the maintenance of accurate, up-to-date, and relevant company information,²⁵² coupled with its function to enforce the Act and to monitor proper compliance of the Act.²⁵³ Whilst the CIPC is not empowered to interfere in the running of companies, it is empowered by the Act to enforce it. It is then submitted that even though the removal of director occurs when a resolution is taken by the shareholders or the company, the notice of director removal to the CIPC still has to comply with the processing requirements as published by the CIPC. A director can be said to have been 'removed' from the company, but this removal cannot be administratively effected until it is successfully lodged with the CIPC and the company's records are accurate and up-to-date. Therefore, it is crucial that companies comply with the guidelines of the CIPC to avoid any hindrances.

In this regard, the court in the case of *Singh and Others v Companies and Intellectual Property Commission and Others*²⁵⁴ held that ensuring that the register accurately reflects the details of a company's directors is a matter of public interest.²⁵⁵ The court further stated that the CIPC bears an ongoing responsibility to maintain and ensure the accuracy of the company register, in reaching its conclusion it relied on the case

²⁴⁸ Cassim 2022 SALJ 747.

²⁴⁹ See *Pretorius and Mathonsi*.

²⁵⁰ See *Miller*.

²⁵¹ See also Steven "The removal of directors from office under the Companies Act 71 of 2008" (LLM mini-dissertation, University of Johannesburg, 2023) 20.

²⁵² Cassim (man ed) *et al Contemporary Company Law* (2021) 1148.

²⁵³ Section 187(2).

²⁵⁴ (33482/2016) [2018] ZAGPPHC 12 (19 March 2018).

²⁵⁵ *Singh* para 31.

of *Chegodi v Commissioner for the Companies and Intellectual Property Commission*²⁵⁶ where the court had held that where forged documents are used to effect changes to the Company's Register, such changes should be regarded as legally ineffective and without force. The two cases show that whilst removal of directors occurs when a resolution is taken, the CIPC's rejection of the notice of director removal on the basis of non-compliance with the Act, may have nullifying effects on the director removal.

It is crucial for a higher court to make a final binding ruling on the matter.²⁵⁷ Given the difference in wording between section 71(1) and (2) and section 71 (3), the reasoning in the *Miller* case may ultimately be adopted by other High Courts, the Supreme Court of Appeal and the Constitutional Court. This could be based on the difference between the business relationship between co-directors and between shareholders and directors, necessitating that the rules governing the two distinct relationships differ as well.

Close reading of section 71(1) and 71(2) reveal that the legislature did not intend for the removal of directors by shareholders to be accompanied with 'cause' or reasons thereof, however, the words *'the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive'*²⁵⁸ have rendered this passage ambiguous as its compliance is reliant on sections 62 and 65 of the Act which can provide an expansion to the requirements of section 71(2) and can also be interpreted to be in line with the *audi alteram partem* rule as explained above, because of this, it is submitted that shareholders must provide sufficient information (and reasons) to a concerned director for the purposes of a removal resolution until the ambiguity is remedied by either the legislator or superior courts.

Having examined the contentious issue of reasons for removal, the next section explores uncertainties in court review powers.

²⁵⁶ 42929/2016. 27 June 2016.

²⁵⁷ Cassim 2022 SALJ 747.

²⁵⁸ Section 71(2)(a).

3.3. Issue 2: Uncertainty regarding court powers to review removal decisions

3.3.1. Distinction between an appeal and a review

The Act allows a director who is not satisfied with the board of directors' decision to remove him or her to apply to a court of law within twenty business days to seek a review of the decision.²⁵⁹ This section affords directors a remedy in the form of an absolute right to have a court review the board's decision.²⁶⁰ Section 71(5) states the following:

"If, in terms of subsection (3), the board of a company has determined that a director is ineligible or disqualified, incapacitated, or has been negligent or derelict, as the case may be, the director concerned, or a person who appointed that director as contemplated in section 66 (4) (a) (i), if applicable, may apply within 20 business days to a court to review the determination of the board."

This remedy was discussed in the *Pretorius* case where it was held that, should directors be dissatisfied with the determination of the board for whatever reason, they can avail themselves of the provisions of section 71(5) of the Act.²⁶¹ The court in *Pretorius* applied a wide interpretation of section 71(5) by using the words '*for whatever reason*' as the provision is clear that it applies in instances where the board has made a determination regarding a director's status, thus removing a director either due to their ineligibility, disqualification, incapacity, or evidence of negligence or dereliction in their duties. It is submitted that the basis of the dissatisfaction should not be based on '*whatever reason*' but on the grounds as provided in section 71(5).

South African law distinguishes between a review and an appeal.²⁶² Traditionally, a review focuses on examining the procedural aspects of a decision.²⁶³ On the other hand, an appeal entails a reconsideration and fresh determination of the matter based on its merits but is confined to the evidence or information that formed the basis of the original decision.²⁶⁴ In an appeal, the central issue is whether the decision was correct

²⁵⁹ Section 71(5).

²⁶⁰ *Pretorius* para 48.

²⁶¹ *Pretorius* para 48.

²⁶² Cassim "A critical analysis of the judicial review procedures under section 71 of the Companies Act 71 of 2008" 2018 *SA Merc LJ* 302 at 302.

²⁶³ Cassim 2016 (1) SALJ 133, 153.

²⁶⁴ Cassim 2016 (1) SALJ 133, 153.

or incorrect.²⁶⁵ In contrast, a review does not assess the correctness of the decision but rather evaluates whether the process by which the decision was made was fair and appropriate.²⁶⁶

The distinction between an appeal and a review is rooted in the doctrine of separation of powers. This doctrine maintains that it would be inappropriate for judges to rule on the merits of administrative decisions, as doing so would encroach on the functions assigned by the Constitution.²⁶⁷

3.3.2. Review under the Act

The South African legal framework acknowledges the following types of review: the review of lower court proceedings, automatic review of decisions, judicial review in the constitutional context, judicial review in the administrative law context, and special statutory review.²⁶⁸

Section 71(5) allows a director to apply within twenty business days to a court to review the determination of the board. This section uses the word “review” and not “appeal” and a strict reading of this provision in the Act suggests that a court may only assess the procedural steps of the director’s removal.²⁶⁹ Despite this, it remains unclear whether a court would have the authority to review the substance and merits of the board’s decision or if its power would be limited to reviewing only the procedural aspects of the decision.²⁷⁰

Cassim states that the legal term “review” in the context of section 71(5) creates uncertainty about the court’s role.²⁷¹ She supports her submissions by detailing the two main issues to be considered: Firstly, it is unclear whether the court can assess the actual merits of the board’s decision.²⁷² For instance, can the court independently

²⁶⁵ See *Tikly & others v Johannesburg NO & others* 1963 (2) SA 588 (T) paras 590–591, for a discussion on the difference between an appeal and a review. Hereinafter “*Tikly*”.

²⁶⁶ *Tikly* para 590.

²⁶⁷ Cassim 2018 SA Merc LJ 307.

²⁶⁸ *Jones and Others v Delport and Others* (2023-082594) [2024] ZAGPPHC 846 (28 August 2024) para 32.

²⁶⁹ Cassim “Dismissal of directors: South Africa’s law needs clarity on the role of courts” *The Conversation* 13 August 2019.

²⁷⁰ Cassim “Contesting the removal of a director by the board of directors under the Companies Act” 2016 SALJ 133 at 153 and Cassim (man ed) *et al Contemporary Company Law* 3 ed (2021) 610.

²⁷¹ Cassim *The Conversation*.

²⁷² Cassim *The Conversation*.

determine if the director was truly negligent or derelict in executing his or her duties?²⁷³ Secondly, in the alternative, the court's review might be limited to examining only the procedural aspects of the director's removal.²⁷⁴ This would mean that the court only seeks to satisfy itself on whether proper procedures were followed, such as giving the director a fair opportunity to make representations before a vote is casted.²⁷⁵

This ambiguity in respect of the meaning of “review” raises questions about the extent of the court's authority in removal cases. The interpretation of this term can significantly impact how courts deal with section 71(5) matters in practice.²⁷⁶

Section 71(5) grants the remedy to approach court for a review when a decision to remove a director was taken. Section 71(6) provides a right to review when a decision *not* to remove the director was taken by the board. Section 71(6) states the following:

“If, in terms of subsection (3), the board of a company has determined that a director is not ineligible or disqualified, incapacitated, or has not been negligent or derelict, as the case may be —

(a) any director who voted otherwise on the resolution, or any holder of voting rights entitled to be exercised in the election of that director, may apply to a court to review the determination of the board; and

(b) the court, on application in terms of paragraph (a), may —

(i) confirm the determination of the board; or

(ii) remove the director from office, if the court is satisfied that the director is ineligible or disqualified, incapacitated or has been negligent or derelict.”

Under section 71(6), when a court reviews a decision where the board has elected not to remove a director, it may either uphold the board's decision or remove the director if the court is “satisfied” that the director is ineligible, disqualified, incapacitated, or has been negligent or derelict.²⁷⁷ The use of the term “satisfied” suggests that, in such a

²⁷³ In contrast to section 71(6)(b), section 71(5) does not state that a court may reinstate a director to office if it is “satisfied” that he or she is not ineligible, disqualified, incapacitated, or has been negligent or derelict.

²⁷⁴ Cassim *The Conversation*.

²⁷⁵ Cassim 2016 SALJ 153.

²⁷⁶ Cassim 2018 SA Merc LJ 302.

²⁷⁷ Section 71(6)(b).

review, the court has the authority to examine the merits of the matter, not merely the procedural aspects of the board's decision.²⁷⁸

The term “review” in section 71(6) of the Companies Act does not conform to its traditional meaning and usage, as it emphasizes the decision itself rather than the decision-making process.²⁷⁹ Cassim describes the effect of section 71(6) as that which exemplifies the “blurring of lines” between an appeal and a review. She argues that the “review” referenced in this section can be characterised as a “substantive” or “broad review”.²⁸⁰ Under section 71(6), the power conferred upon the courts is broader than a simple review. It incorporates elements of both a review and an appeal, allowing the court to evaluate the substantive decision made by the board of directors regarding the retention of the director in question rather than merely assessing the procedural aspects of that decision.²⁸¹

Although this is not definitive, one could argue that a court reviewing the board of directors’ decision under section 71(5) of the Companies Act would similarly have the authority to assess both the merits and the procedural aspects of the decision.²⁸²

The difficulty in drawing a distinction between an appeal and a review was again pointed out in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration*,²⁸³ where the Supreme Court of Appeal acknowledged that distinguishing between a review and an appeal can be “notoriously difficult”. The court clarified that this challenge arises “partly because scrutiny related to process cannot ignore the substantive merits of the outcome”.²⁸⁴

3.3.3. *Pityana v ABSA Group Limited and Others*²⁸⁵

The anomaly of the court’s powers to review the board’s decision was discussed in the *Pityana* case. The Court was called upon to decide whether Rule 53 of the Uniform

²⁷⁸ Ncube 2011 SALJ 47. See also Cassim 2016 SALJ 153 on discussion of section 71(6).

²⁷⁹ Cassim 2018 SA Merc LJ 302.

²⁸⁰ Cassim 2018 SA Merc LJ 302.

²⁸¹ Cassim 2018 SA Merc LJ 302.

²⁸² Cassim 2016 SALJ 153.

²⁸³ 2007 (1) SA 576 (SCA). Hereinafter “*Rustenburg Platinum Mines*”.

²⁸⁴ *Rustenburg Platinum Mines* para 31.

²⁸⁵ (64258/2021) [2023] ZAGPPHC 342 (10 May 2023). Hereinafter “*Pityana*”.

Rules of Court is available to an applicant who applies in terms of section 71(5) for the review of a board determination in terms of section 71(3).²⁸⁶

The court noted that the decision to remove a director – section 71(3) as read with section 71(5) – is not an administrative decision nor action.²⁸⁷ It opined that Rule 53 of the Uniform Rules pertains to obtaining the record of a decision made by an entity that performs a judicial, quasi-judicial, or administrative function when such a decision is under review.²⁸⁸ It is important to emphasize that this rule applies exclusively to administrative actions and serves merely as a procedural guideline – it does not establish a substantive right to seek a review.²⁸⁹

In reaching its conclusion on the interpretation of section 71(5), the Court adopted the three principles as outlined in *Tikly*.²⁹⁰ The first principle is that an appeal in the broad sense involves a complete hearing and a fresh determination on the merits of the case, with or without the introduction of additional evidence or information.²⁹¹ The second principle states that an appeal in the strict ordinary sense entails a re-hearing on the merits but is confined to the evidence or information that was available at the time of the original decision, focusing solely on whether that decision was correct or incorrect.²⁹² The third principle states that a review, which constitutes a limited re-hearing with or without additional evidence or information, is not aimed at assessing whether the decision under appeal was accurate, but rather whether the decision-maker exercised his or her powers and discretion honestly and appropriately.²⁹³

The court further noted that it is clear that no indication is given on what procedure applies to a review in terms of section 71(5).²⁹⁴ A court conducting a review of the board of directors' decision would have the authority to investigate the procedural validity of that decision *and* assess whether the factual determination regarding

²⁸⁶ *Henochsberg* commentary on section 71.

²⁸⁷ *Pityana* para 31.

²⁸⁸ *Pityana* para 41.

²⁸⁹ *Pityana* paras 33–35 and 41.

²⁹⁰ In *Rustenburg Platinum Mines* para 30 the judge discussed *Tikly* and stated: “The question on review is not whether the record reveals relevant considerations that are capable of justifying the outcome. That test applies when a court hears an appeal: then the inquiry is whether the record contains material showing that the decision – notwithstanding any errors of reasoning – was correct. This is because in an appeal, the only determination is whether the decision is right or wrong.”

²⁹¹ *Tikly* para 34.1.

²⁹² *Tikly* para 34.2.

²⁹³ *Tikly* para 34.3.

²⁹⁴ *Pityana* para 61.

negligence or dereliction is accurate, as this finding serves as the basis for the review process.²⁹⁵ This inquiry may be limited and not as comprehensive as a review under section 71(6), but it is nevertheless essential for the record to be submitted to the court to enable a proper determination of the matter.²⁹⁶

The legislature was clearly aware that, in drafting the specific sections, the court's powers would be restricted in a standard review process.²⁹⁷ Consequently, it granted the court broader authority under section 71(6).²⁹⁸ In the end, the Constitution requires a purposive approach to statutory interpretation.²⁹⁹

In applying these legal principles, Snyman AJ stated that

“[i]t is clear that the review foreseen in section 71(5) falls into the third category listed in *Tikly v Johannes*, referred to above, i.e. a limited re-hearing with or without additional evidence / information to determine, not whether the decision was correct, but whether the hearing of first instance was properly conducted.”³⁰⁰

The judge concluded that, having regard to the provisions of section 71(5) as compared to section 71(6), a review under section 71(5) is *sui generis* and limited as it is mostly only directed at the procedure followed, where the focus is not on whether the decision itself was correct but rather on whether the hearing at first instance was conducted properly.³⁰¹

Cassim disagrees with this notion and argues that, to maintain consistency with section 71(6) of the Companies Act, a court conducting a review under section 71(5) should be authorised to examine the merits of the board's decision regarding the removal of a director from office.³⁰² I am also in agreement with this argument because, similar to the review powers granted under section 71(6), section 71(5) also

²⁹⁵ *Pityana* para 77.

²⁹⁶ *Pityana* para 77.

²⁹⁷ *Pityana* para 79.

²⁹⁸ *Pityana* para 79.

²⁹⁹ *Pityana* para 52. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* on the technique of paying attention to context in statutory construction as required by the Constitution.

³⁰⁰ *Pityana* para 81.

³⁰¹ *Pityana* para 81-83.

³⁰² Cassim 2018 SA Merc LJ 302.

constitutes a statutory power of review, and these provisions must not be construed differently for the reason articulated below.

The court's task under both these provisions is to review the board's determination regarding a director's eligibility and capacity—to exercise the explicit powers in section 71(6) (to examine the merits of board's determination), should be read as equally applicable to section 71(5) reviews, and this is to ensure consistency in judicial oversight and remedial options regardless of the board's initial determination.

Empowering the court to assess the merits of the board's decision to remove a director during a section 71(5) review can serve as a crucial safeguard against potential abuses of the board's authority in this context.³⁰³

While section 71(5) remains silent on the specific orders a court can make when reviewing a board's determination to remove a director, section 71(6) explicitly limits the court to either confirming the board's decision not to remove or to remove the director if satisfied of their ineligibility, disqualification, incapacity, or negligence/derelection. I am of the view that because the court's essential task in both scenarios³⁰⁴ is to review the correctness of the board's determination regarding a director's eligibility, capacity, or conduct, it follows therefore, that the explicit powers in section 71(6) (to confirm non removal or to remove) should be read as equally applicable to section 71(5) reviews, to ensure consistency in judicial oversight and remedial options regardless of the board's initial determination. The difference in the wording of these sections and what may be seen as a limitation of the court's powers under section 71(5) is not justifiable as in both instances, the court has to review a determination of the board.

In *Langeni and Another v South African Women in Mining Association and Others*,³⁰⁵ the court held that it would represent an unfortunate era in our company law if courts were to overlook the removal of a director based solely on allegations that do not substantiate removal as outlined in section 71(3) of the Companies Act. Allowing such removals without permitting a debate on their merits simply because there were no

³⁰³ See Cassim 2016 SALJ 137 on the potential abuse of section 71(3) by the board. See also Austin & Ramsay *Ford's Principles of Corporations Law* (2010) 263 para 7.240.

³⁰⁴ Section 71(5) and 71(6).

³⁰⁵ (27669/2022) [2023] ZAGPJHC 1309 (10 November 2023).

fundamental or procedural errors would be a disservice to the principles of justice and accountability.³⁰⁶

It is evident that in so far as courts are reluctant to interfere in affairs of a company as seen in *Pretorius*, it may still allow a wider interpretation of the law based on the principle of legality which places a responsibility on decision-makers to give reasons for their decisions and/or the provisions of section 34 of the Constitution³⁰⁷ if it believes it is in the interest of justice to do so.³⁰⁸

3.3.4. *Jones and Others v Delpport and Others*³⁰⁹

In the recently decided case of *Jones*, the court disagreed with the findings of *Pityana* and its inference of the principles found in *Tikly*. Oosthuizen AJ did not support the premise that “*the court will... not lightly interfere with the determination to remove the director as a director of a company is deployed to that position at the behest of the shareholders or other directors*” and stated that directors are not deployed at the behest of other directors.³¹⁰ Oosthuizen AJ went on to state that the *Pityana* findings were contradictory in that

“[t]he finding that a court reviewing the determination of the board ‘would be empowered to enquire not only into the procedural correctness of the decision but also at least whether the factual finding is correct that there was indeed negligence or dereliction’ contradicts the finding that the purpose of a review in terms of section 71(5) is ‘to determine, not whether the decision ... was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly’.”

The statement above demonstrates that the court in *Pityana* reasoned that a court reviewing the determination of the board would also be empowered to enquire into the correctness of the factual findings of the board. However, it did not reach the same

³⁰⁶ *Langeni* para 31.

³⁰⁷ Section 34 of the Constitution states that “*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*”

³⁰⁸ See *Litabe v Di Thabeng Wholesale Fuel Supply (Pty) Ltd and Others* (434/2022) [2023] ZAFSHC 376 (9 October 2023) para 22.

³⁰⁹ (2023-082594) [2024] ZAGPPHC 846 (28 August 2024). Hereinafter “*Jones*”.

³¹⁰ *Jones* para 38.

conclusion in that section 71(5) review should be broadly interpreted to empower the court to also enquire into the correctness of the factual findings of the board.

Had the court in *Pityana* applied its own reasoning that a court reviewing the determination of the board would also be empowered to enquire into the correctness of the factual findings of the board— it follows that it would have applied a wider interpretation of the provisions of section 71(5) and exercised its powers and discretion in determining whether the board’s determination was correct and not only restrict itself to the procedural aspects of the determination.

The court in *Jones* then referred to the scholarship of Cassim. It pointed out that Cassim is not of the opinion that a review in terms of section 71(5) is *sui generis* and therefore does not support a finding that “the review is of limited nature”.³¹¹ The judge stated that, at the time of the judgement in *Pityana*, there was a reported judgement on the interpretation of section 71(5), namely *Wait v Marais and Others*.³¹² The presiding officer in this case came to the opposite conclusion on the scope of a review in terms of section 71(5).³¹³ The judge concurred with the finding in *Wait*, in that the court is entitled, depending on the facts, to “undertake a complete reconsideration, in the wide sense, of the board’s determination”.³¹⁴

The judge in *Jones* concluded the matter by reviewing the determinations of the board to remove the directors and reinstated the directors. This further demonstrates the willingness of the courts to interpret section 71 broadly if it deems it fit and in the interest of justice. However, dissenting views on the matter indicate a need for a superior court’s judgment to provide a binding precedent.

3.4. Issue 3: Removal by a single shareholder

The introductory language of sections 71(1) and 71(2) of the Companies Act outlines the procedure through which shareholders may remove a director from office. The Act provides that, before the shareholders of a company may consider a resolution to remove a director in accordance with section 71(1), the director in question must be

³¹¹ *Jones* para 36.2.

³¹² (1707/2021) [2022] ZAEQBHC 41 (1 November 2022). Hereinafter “*Wait*”.

³¹³ *Jones* para 36.4.

³¹⁴ *Jones* para 40.

given notice of the meeting and the resolution in a manner that is at least equivalent to the notice a shareholder is entitled to receive, regardless of whether the director holds any shares in the company.³¹⁵ The director must be given a reasonable opportunity to present a case, either in person or through a representative, to the meeting before the resolution is submitted for a vote.³¹⁶

Section 71(1) provides that a director may be removed by an *ordinary resolution* adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director. The Act does not provide guidance on what would constitute an “ordinary resolution” for purposes of section 71 and the steps to be taken by shareholders to obtain an ordinary resolution where they wish to remove a director. This indicates that the “ordinary resolution” has to be passed in accordance with sections 61 to 65 of the Act.³¹⁷

The initial step in this process is to convene a shareholders’ meeting. The right to request such a meeting may arise from the company’s MOI or from section 61(3) of the Companies Act. Under section 61(3), the board is obligated to convene a shareholders’ meeting if one or more written and signed demands for the meeting are submitted to the company. These demands must adhere to the requirements set out in section 61(3)(a)–(b):

“Subject to subsections (5) and (6), the board of a company, or any other person specified in the company’s Memorandum of Incorporation or rules, must call a shareholders meeting if one or more written and signed demands for such a meeting are delivered to the company, and —

- (a) each such demand describes the specific purpose for which the meeting is proposed; and
- (b) in aggregate, demands for substantially the same purpose are made and signed by the holders, as of the earliest time specified in any of those demands, of at least 10% of the voting rights entitled to be exercised in relation to the matter proposed to be considered at the meeting.”

³¹⁵ Section 71(2)(a).

³¹⁶ Section 71(2)(b).

³¹⁷ Sections 61–65 provide for steps to be followed to call a shareholder meeting and to pass shareholder resolutions.

The provisions make it clear that a shareholder does not convene a shareholders meeting and that right is reserved for the board of directors.³¹⁸ A shareholder may nevertheless demand such a meeting in writing.³¹⁹ In addition, shareholders are also empowered to propose resolutions for consideration at the shareholders' meeting, as outlined in section 65(3). Section 65(3)(a) states that "[a]ny two shareholders of a company ... may propose a resolution concerning any matter in respect of which they are each entitled to exercise voting rights".

Section 65(3) of the Companies Act enables shareholders to submit resolutions for consideration at shareholders' meetings. This provision serves as a valuable tool for shareholders, particularly in situations where the board is hesitant to propose a resolution addressing issues to be discussed at a shareholders' meeting, such as the removal of a director from the board.³²⁰

In *Foxvest Group (Pty) Ltd and Another v Rocky Park Holdings (Pty) Ltd and Others*,³²¹ the court found that the resolution to remove a director in accordance with sections 71(1) and 71(2) was unlawful and invalid. For the purposes of the following discussion, it is important to note that the company concerned in this matter had more than one shareholder, hence, the provisions of section 65(3) would apply. The resolution to remove the director was proposed by a single shareholder, and the court held that this contravened the provisions of section 65(3) which require that the resolution be proposed by "any two" shareholders of the company.³²²

In reaching its conclusion, the court reiterated that sections 71(1) and 71(2) permit the removal of a director by ordinary resolution. However, this does not negate the requirement that, if the resolution is proposed by a shareholder, it must comply with the provisions of section 65(3).³²³ Failure to meet requirements of section 65(3) renders the removal invalid.³²⁴ Vally J articulated the position as follows:

³¹⁸ Section 61.

³¹⁹ Section 61.

³²⁰ See Nel "Can a single shareholder remove a director?" 2024, available at <https://www.vanhuysssteen.co.za/newsroom/item/154-can-a-single-shareholder-remove-a-director> (accessed on 24 September 2024).

³²¹ (2022/2807) [2023] ZAGPJHC 63 (27 January 2023). Hereinafter "*Foxvest*".

³²² *Foxvest* para 15.

³²³ *Foxvest* para 16.

³²⁴ *Foxvest* para 16.

“Sub-section 65(3) of the Act is an empowering provision. It empowers ‘Any two shareholders of a company’ to propose a resolution on matters where they have voting rights. The provision does not say ‘any shareholder’ may propose a resolution. The word or number ‘two’ and the plural ‘shareholders’ have been specifically mentioned by the legislature. They cannot be ignored. They are not superfluous or insignificant. On the contrary they are most significant. The two words read together are clearly designed to ensure that at least two shareholders propose the resolution. If the legislature intended to empower a single shareholder to propose a resolution, it could have simply said so by not using the word ‘two’ and by referring to ‘shareholder’ in the singular.”

According to the *Foxvest* judgment, in a scenario where a company has two shareholders, a director cannot be dismissed solely by a majority shareholder proposing such a resolution after requisitioning a meeting in terms of section 61(3) of the Companies Act.³²⁵ To comply with section 65(3), the resolution must be proposed and supported by two shareholders. This ensures that the removal process adheres to the necessary legal framework, reinforcing that both shareholders must be involved in proposing any resolution concerning the dismissal of a director.³²⁶

As pointed out above, these provisions apply to a company that has more than one shareholder. A potential anomaly arises in instances of a company with a single shareholder who wishes to remove a director using the provisions of section 71(1) and 71(2). Section 57(2) of the Act is applicable in such an instance:

“If a profit company, other than a state-owned company, has only one shareholder —

(a) that shareholder may exercise any or all of the voting rights pertaining to that company on any matter, at any time, without notice or compliance with any other internal formalities, except to the extent that the company’s Memorandum of Incorporation provides otherwise; and

(b) sections 59 to 65 do not apply to the governance of that company.”

³²⁵ See section 65(3)(b)(i).

³²⁶ *Foxvest* para 16.

According to section 57(2) a profit company, other than a state-owned one may have its sole shareholder pass a resolution by exercising any of his or her voting rights. This power is not limited by time nor notice.³²⁷ However, section 57(2)(b) states that this power is limited in instances where section 65 applies to the governance of the company. Following the conclusion reached by the court the *Foxvest* case, it is clear that for the purposes of director removals in terms of section 71(1) and 71(2), compliance with section 65(3) is important therefore this means that a resolution passed by single shareholder in terms section 57(2)(b) is precluded in director removals (in terms of section 71(1) and 71(2) as section 65(3) is applicable).

Delport submits that, in a case where a company's sole shareholder intends to remove a director of the company, the shareholder must at least comply with section 71(2) in relation to giving the affected director notice of the meeting.³²⁸ The notice must be "reasonable" because there is no prescribed notice period due to the exclusion of sections 59 to 65.³²⁹ Steven agrees with this view and notes that it is not only due to fairness towards the director concerned but also likely to limit litigation against the shareholder and company.³³⁰

Currently, there is no case law that deals with section 71 removals effected in accordance with the provisions of section 57(2). However, as the Act does not explicitly stipulate how such removals ought to be approached, this is a shortcoming in the legal framework pertaining to the process.

Shareholders of companies with only one shareholder may not be certain how to comply with the provisions of section 71(1) and 71(2). I am in agreement with the submissions of Delport in that notice ought to be provided and, in line with section 71, it is advisable that a sole shareholder wanting to remove a director provide "reasonable notice". The shareholder should also comply with all the provisions relating to notice of the meeting and the resolution in a manner that is at least equivalent to the notice that a shareholder is entitled to receive.³³¹ The director should further be granted a

³²⁷ Section 57(2)(a).

³²⁸ *Henochsberg* commentary on section 71, 277.

³²⁹ *Henochsberg* commentary on section 71, 277.

³³⁰ Steven 21.

³³¹ Section 71(2)(a).

reasonable opportunity to present a case.³³² These aspects are not internal formalities, and section 71(2) is not expressly excluded from applying by section 57. This approach would avoid any potential non-compliance with the process entrenched in section 71.

Section 7(i) provides that the purpose of the Companies Act is to balance the rights and obligations of shareholders and directors within companies, this is important and must be borne in my mind when the provisions of this Act are interpreted. Where the Act may not be clear, courts are empowered by the fundamental principles of natural justice and the values of the Constitution to interpret the law in a way that promotes reasonableness and balances the rights and responsibilities of shareholders and directors. This can be seen in the case of *Golden v Quantum Foods Holdings Limited and Others*³³³ where the court agreed with the notion that *'a court is required to have a recourse to the values that underline the Constitution; in particular to apply the values of fairness, reasonableness and justice in the formulation of the relevant approach to public policy.'*³³⁴

3.5. Conclusion

This chapter set out the uncertainties presented by section 71. The first legal challenge examined is the contentious issue of whether shareholders must provide reasons when removing directors under section 71. Three key cases with conflicting interpretations were discussed: *Pretorius*, which held that reasons must be provided based on natural justice principles and audi alteram partem; *Miller*, which ruled that shareholders have no obligation to furnish reasons as directors serve at their pleasure; and *Mathonsi*, which supported Pretorius and extended the interpretation of section 71(2) through sections 62 and 65.

The practical implications of these conflicting decisions on CIPC's administrative processes, noting that CIPC issued Practice Notes requiring reasons for director removal based on Pretorius, creating administrative challenges when shareholders follow Miller's interpretation. Given that these cases were decided in different jurisdictions by single judges, they hold only persuasive value outside their respective

³³² Section 71(2)(b).

³³³ (14827_2024) [2024] ZAWCHC 364 (7 November 2024).

³³⁴ *Golden* paras 50 and 62.

jurisdictions, highlighting the need for a higher court's definitive ruling on whether shareholders must provide reasons when removing directors.

The second legal issue discussed is the issue of court powers to review director removal decisions under section 71 of the Companies Act. The traditional distinction between appeals and reviews in South African law was explored, where reviews typically focus on procedural aspects while appeals examine merits. The chapter also analysed key cases interpreting the scope of court powers under sections 71(5) and 71(6), particularly *Pityana*, which held that section 71(5) reviews are limited to procedural aspects, and *Jones*, which disagreed and supported broader review powers.

The discussion highlights the ambiguity in the Act regarding whether courts can examine substantive merits of board decisions under section 71(5), while section 71(6) explicitly allows courts to examine merits when reviewing decisions not to remove directors. The chapter addresses the inconsistency between these sections and argues for a harmonised interpretation allowing courts to examine both procedural and substantive aspects in all director removal reviews, emphasizing the need for a superior court's definitive ruling on this matter.

Lastly, the complexities surrounding director removal by a sole shareholder, particularly focusing on the requirements for a valid removal resolution. The discussion analyses how the process requires an "ordinary resolution" at a shareholders' meeting, with specific notice requirements under sections 71(1) and 71(2). In the case of *Foxvest*, it was established that a single shareholder cannot propose a removal resolution alone, as section 65(3) requires at least two shareholders to propose such a resolution. This interpretation creates a potential anomaly for single-shareholder companies, where section 57(2) appears to conflict with the two-shareholder requirement.

The discussion delves into the uncertainty surrounding how single-shareholder companies should handle director removals, with scholars suggesting that even single shareholders should follow section 71(2) notice requirements to ensure procedural fairness.

The need to balance shareholder and director rights as per section 7(i) of the Act is highlighted, suggesting courts may interpret provisions through constitutional values of fairness and reasonableness. Throughout the analysis, the chapter highlights a significant gap in the legal framework regarding single-shareholder companies and director removal processes, noting the absence of clear judicial guidance on this issue.

Chapter 4: Comparative analysis of the Australian Corporations Act

4.1. Introduction

This chapter will set out the director removal process in Australia as envisaged in the Australian Corporations Act.³³⁵ It will consider the manner in which the legislation details the framework for the removal of directors and distinguishes between private and public companies. The chapter will further compare this foreign jurisdiction's framework to that of South Africa³³⁶ and consider whether there are any lessons that can be learnt and adopted to minimize challenges highlighted in the preceding chapter.

The removal of directors of Australian companies is governed primarily by the Corporations Act, which provides specific mechanisms for both public³³⁷ and proprietary companies.³³⁸ Section 9 of the Corporations Act describes a **public company** as a company other than a proprietary company or a corporate collective investment vehicle (CCIV) and a **proprietary company** has the meaning given by subsection 45A(1) which states that:

"A proprietary company is a company that is registered as, or converts to, a proprietary company under this Act.

Note 1: A proprietary company can be registered under section 118 or 601BD. A company can convert to a proprietary company under Part 2B.7.

Note 2: A proprietary company needs to be limited by shares or be an unlimited company with a share capital (see subsection 112(1)).

Note 3: A proprietary company needs to:

- (a) have no more than 50 shareholders, although employee shareholders and shareholders connected with CSF offers do not count for this purpose; and
- (b) not do anything to require disclosure to investors under Chapter 6D (except in limited circumstances)."

³³⁵ No. 50 of 2001, as amended. Hereafter "Corporations Act".

³³⁶ Section 71 of the Companies Act.

³³⁷ Section 203D of the Corporations Act.

³³⁸ Section 203C of the Corporations Act.

The underlying philosophy of these statutory procedures centres on shareholder control, ensuring that members of the company have the authority to remove directors and prevent them from becoming entrenched in their positions.³³⁹ This approach grants shareholders ultimate control over the board's composition, thereby reinforcing the separation of ownership and control within the company for effective governance.³⁴⁰

4.2. Public companies

Section 203D(1) of the Corporations Act states the following:

“A public company may by resolution remove a director from office despite anything in:

- (a) the company's constitution (if any); or
- (b) an agreement between the company and the director; or
- (c) an agreement between any or all members of the company and the director.

If the director was appointed to represent the interests of particular shareholders or debenture holders, the resolution to remove the director does not take effect until a replacement to represent their interests has been appointed.”

This provision explicitly applies only to public companies and allows for a resolution to effectively remove a director from office. This remedy is not subject to the company's MOI,³⁴¹ any agreement between the director³⁴² and the company, and between any or all members of the company and the director.³⁴³

This section nevertheless provides for a condition that must be met in order to apply successfully. It states that if a director was appointed to represent the interests of specific shareholders or debenture holders, the resolution to remove that director will not take effect until a new representative for those interests has been appointed.³⁴⁴ In

³³⁹ Du Plessis and McConvill “Removal of company directors in a climate of corporate collapses” 2003 *ABLR* 251 at 252.

³⁴⁰ Austin and Ramsay *Ford's Principles of Corporations* (2013) 7.230.

³⁴¹ Section 203D(1)(a) of the Corporations Act.

³⁴² Section 203D(1)(b) of the Corporations Act.

³⁴³ Section 203D(1)(c) of the Corporations Act.

³⁴⁴ Section 203D(1) of the Corporations Act.

the Australian context, it can be argued that the ability to remove a director is seen as a fundamental right of the shareholders.³⁴⁵ This principle is clear from this provision's content which subjects director removal to the representation of specific shareholder interests in the company.

The statutory removal procedure under section 203D of the Corporations Act explicitly acknowledges the traditional governance right of shareholders to remove company directors, stemming from their role in contributing share capital to the company.³⁴⁶ Darvas argues that the primary role of shareholders is to monitor management and participate in strategic management decisions.³⁴⁷ This role is theoretically rooted in their status as "owners" of the corporation's share capital, with the board of directors serving as a collective body to represent their interests.³⁴⁸ She further opines that shareholders, as a collective group, hold ultimate power within a corporation only to the extent that they can exercise their voting rights at meetings to change management when performance is deemed unsatisfactory.³⁴⁹

The procedural framework governing director removal is delineated in the subsequent provisions of section 203D.³⁵⁰ Section 203D(2) mandates that notice of the intended resolution must be furnished to the company (usually the company secretary)³⁵¹ with a minimum two-month notice period preceding the scheduled meeting. This requirement is subject to a qualification in that, should the company convene a meeting subsequent to receiving the notice of intention to remove a director, the resolution may validly proceed even where the meeting occurs within the prescribed two-month timeframe.³⁵² This provision appears to balance procedural safeguards for director removals with practical corporate operational needs.

Section 203D(3) stipulates that "[t]he company must give the director a copy of the notice as soon as practicable after it is received". The phrase "as soon as practicable"

³⁴⁵ See OECD *Principles of Corporate Governance* (2004) Part 1, Chapter 1.

³⁴⁶ McConvill "Removal of directors of public companies takes centre stage in Australia: an exploration of the corporate law and governance issues" 2005 *The Corporate Governance Law Review* Vol.1 no.1 192 at 206.

³⁴⁷ See Darvas "Section 249D and the 'activist' shareholder: court jester or conscience of the corporation?" 2002 *Company and Securities Law Journal* 392-393.

³⁴⁸ Darvas 2002 CSLJ 392.

³⁴⁹ Darvas 2002 CSLJ 393.

³⁵⁰ Section 204D(2)-(8) of the Corporations Act.

³⁵¹ Du Plessis and McConvill 2003 *ABLR* 253.

³⁵² Section 203D(2) of the Corporations Act.

has not yet been scrutinised by the judiciary or interpreted specifically in relation to the timing requirements for director notification.³⁵³ However, in the case of *Vision Nominees Pty Ltd v Pangea Resources Ltd*,³⁵⁴ it was examined in a comparable context involving the convening of a meeting “as soon as practicable”, a standard that may be applied to interpret the phrase in section 203D(3).³⁵⁵ Bryson J said that the phrase should be interpreted in light of the following considerations:

“The range of facts and circumstances that influence what is considered practicable is broad; the choice of the term ‘practicable’ reflects a deliberate departure from a narrow, restrictive, or purely theoretical interpretation. Requiring that a meeting be held ‘as soon as practicable’ does not mandate that it must occur as quickly as possible or within the shortest feasible timeframe.”³⁵⁶

Applying the principles found in *Vision Nominees*, section 203D(3) thus allows for some flexibility in delaying the issuance of the notice due to the company's other pressing business activities.³⁵⁷ Additionally, there may be instances where the company chooses to have a brief discussion with the proposer of the resolution before formally notifying the director concerned.³⁵⁸

Once notice of intention has been given to the director, the director has the right to present his or her case to the company's members by submitting a written statement for distribution among members.³⁵⁹ However, the director's statement does not have to be circulated to the company's members if it is more than one thousand (1000) words or defamatory.³⁶⁰ Additionally, the director may address the motion for removal at the convened meeting.³⁶¹

Section 203D(5)(a) determines that the company must distribute the director's written statement to members by providing a copy to all who received notice of the meeting, and provided that there is sufficient time to do so. If there is insufficient time, the

³⁵³ Du Plessis and McConvill 2003 *ABLR* 254.

³⁵⁴ (1988) 6 *ACLC* 770.

³⁵⁵ Du Plessis and McConvill 2003 *ABLR* 254.

³⁵⁶ *Vision Nominees* at 775.

³⁵⁷ Du Plessis and McConvill 2003 *ABLR* 254.

³⁵⁸ Du Plessis and McConvill 2003 *ABLR* 254.

³⁵⁹ Section 203D(4)(a) of the Corporations Act.

³⁶⁰ Section 203D(6) of the Corporations Act.

³⁶¹ Section 203D(5)(b) of the Corporations Act.

statement must be made available to members attending the meeting and read aloud before the resolution is voted upon.³⁶²

The Corporations Act provides for a strict word length restriction of one thousand, which means that the director has the right to state his or her case before a vote can be taken albeit in a limited manner.³⁶³ It also restricts defamatory statements from being distributed.³⁶⁴ It must be noted that the burden of proof remains with the company or any aggrieved party to demonstrate the defamatory nature of the director's statement for purposes of section 203D(4)(a).³⁶⁵

The company must, upon the removal of a director, notify the Australian Securities and Investments Commission (ASIC) within 28 days of the fact that the director has been removed.³⁶⁶ The notice must be in the prescribed form.³⁶⁷ ASIC is an Australian body which is equivalent to South Africa's CIPC as it deals with company law matters and operates as an independent government body that enforces the Corporations Act and other related legislation.

Section 205B(5) does not apply if the person was an alternate director who ceased to hold office in accordance with the terms of their appointment as an alternate director³⁶⁸ or if the person provides ASIC with a written notice of his or her retirement or resignation as a director or alternate director of the company in compliance with section 205A.³⁶⁹

Key differences emerge when considering private entities, as discussed next.

4.3. Proprietary companies

Prior to the introduction of the Corporate Law Economic Reform Program Act of 2000 (CLERP), the regulatory framework in Australia lacked statutory provisions governing

³⁶² Section 203D(5)(b).

³⁶³ Section 203D(6) of the Corporations Act.

³⁶⁴ Section 203D(6) of the Corporations Act.

³⁶⁵ Du Plessis and McConville 2003 *ABLR* 255. See also Du Plessis "Some peculiarities regarding the removal of company directors" 1999 *ABLR* 6 at 7.

³⁶⁶ Section 205B(5) of the Corporations Act.

³⁶⁷ Section 205B(5) of the Corporations Act.

³⁶⁸ Section 205B(6)(a) of the Corporations Act.

³⁶⁹ Section 205B(6)(b) of the Corporations Act. See also section 205A which deals with the notification of ASIC by a director who has resigned or retired.

director removal in proprietary (private) companies.³⁷⁰ Consequently, these companies were required to establish their own removal mechanisms within their constitutions.³⁷¹ This was typically achieved through the incorporation of Table A³⁷² from the previous Corporations Law, which provided a general removal provision applicable to public and proprietary company structures.³⁷³

The CLERP Act's introduction in 2000 established section 203C, which permits a company to remove a director through resolution and appoint another individual to fill the vacated position.³⁷⁴ The section states that “*a proprietary company... may by resolution remove a director from office; and... (b) may by resolution appoint another person as a director instead*”.

This section is a replaceable rule, subject to section 135 of the Corporations Act.³⁷⁵ This means that a company may adopt a constitution (MOI) that customises the removal procedures for its directors, instead of following the procedures set forth in section 203C.³⁷⁶

The “resolution” required by section 203C(a) is generally understood as a reference to an ordinary resolution, as the Corporations Act does not provide guidance in this regard. This means it must be passed by more than 50% of the members entitled to vote at the meeting.³⁷⁷

Du Plessis and McConvill argue that the current section 203C makes it easier for proprietary companies without customized removal provisions to remove a director from office.³⁷⁸ Prior to the introduction of a statutory removal provision, a proprietary company that had no specified removal procedures would first have to pass a special resolution³⁷⁹ to amend the company's constitution to include provisions for director

³⁷⁰ Du Plessis and McConvill 2003 *ABLR* 252.

³⁷¹ Du Plessis and McConvill 2003 *ABLR* 252.

³⁷² Former Table A, regulation 62(1) stated that “[t]he company may by resolution remove any director before the expiration of [her or] his period of office”.

³⁷³ Du Plessis and McConvill 2003 *ABLR* 252.

³⁷⁴ Du Plessis and McConvill 2003 *ABLR* 252.

³⁷⁵ Section 135 of the Corporations Act outlines that companies may have a constitution and are governed either by their own constitution, the replaceable rules set out in the Act, or a combination of both. It also provides instances of applicability.

³⁷⁶ Du Plessis and McConvill 2003 *ABLR* 252.

³⁷⁷ Du Plessis and McConvill 2003 *ABLR* 252.

³⁷⁸ Du Plessis and McConvill 2003 *ABLR* 253.

³⁷⁹ Special resolutions require an approval by more than 75% of members entitled to vote at the meeting.

removal before the end of the director's term.³⁸⁰ This would necessitate another resolution (at either a general meeting or by the board, depending on the constitution's outlined procedure) to be passed to remove the director in question.³⁸¹

I am in agreement with this view as the current framework in section 203C(a) provides flexibility to private companies to customise their own director removal processes. This means that only one ordinary resolution needs to be made, making the process easier and less burdensome on private companies.

A resolution by members of a proprietary company to remove a director is void if, at the end of the day when the resolution is intended to take effect, the company would have no directors that remain.³⁸² However, this voidance provision does not invalidate a resolution to remove a director if the resolution is set to take effect on or after the day that the company is deemed to have commenced winding-up under Division 1A of Part 5.6 of the Corporations Act.³⁸³ This ensures operational continuity while protecting against vacancies across the board, except in winding-up scenarios where different considerations apply.

Unlike the removal of directors in public companies,³⁸⁴ which includes procedural requirements such as providing a two-month notice of intention to remove³⁸⁵ and allowing the director to state his or her case at the meeting,³⁸⁶ section 203C does not impose detailed procedures for proprietary companies. While section 203C provides proprietary companies with a practical and streamlined approach to removing directors, the lack of detailed procedural requirements means that companies need to ensure fair and transparent practices in their constitutions or governance rules. Without these, the provision can lead to disputes or claims of unfair treatment, especially if removals appear arbitrary or are carried out without due process.

³⁸⁰ Du Plessis and McConville 2003 *ABLR* 253.

³⁸¹ Du Plessis and McConville 2003 *ABLR* 253.

³⁸² Section 203CA(1) of the Corporations Act.

³⁸³ Section 203CA(2) of the Corporations Act.

³⁸⁴ Section 203D of the Corporations Act.

³⁸⁵ Section 203D(2) of the Corporations Act.

³⁸⁶ Section 203D(1) of the Corporations Act.

4.4. Removal of directors by board of directors and shareholders

4.4.1. Public companies

Section 203E regulates the removal of director by the board of directors of public companies. It determines that “*a resolution, request or notice of any or all of the directors of a public company is void to the extent that it purports to ... remove a director from their office; or ... require a director to vacate their office*”.

This provision prohibits the removal of directors by the board of directors of public companies.³⁸⁷ The Information Release, titled *Removal of Directors of Public Companies* issued by ASIC on 17 August 2004, noted that this provision to “clarify the effect of agreements for the removal of directors of public companies”.³⁸⁸ In its Information Release, ASIC specifically addressed the issue of agreements under the Corporations Act:

“The Corporations Act 2001 provides that only shareholders can remove a director of a public company, and any attempts by directors to remove another director from office are void. Consequently, any agreement or arrangement stipulating that a director can be removed from office by the decision of other directors is ineffective.”³⁸⁹

The above statement by ASIC echoes the provisions of section 203D³⁹⁰ and section 203E which prohibits any attempts by a board of directors to remove a fellow director of a public company. The combined effect of sections 203D and 203E of the Corporations Act renders an agreement (or any other arrangement) ineffective.³⁹¹ Specifically, a director of a public company cannot enforce any part of such an agreement as it conflicts with the removal procedure outlined in section 203D. Additionally, any agreement permitting the board to determine when a director should leave the board would likely be considered void, as it would contravene the prohibition contained in section 203E.³⁹²

³⁸⁷ Du Plessis and McConvill 2003 *ABLR* 260.

³⁸⁸ McConvill 2005 *The Corporate Governance Law Review* 200.

³⁸⁹ McConvill 2005 *The Corporate Governance Law Review* 200.

³⁹⁰ Which provides for the director removal framework for public companies.

³⁹¹ McConvill 2005 *The Corporate Governance Law Review* 353.

³⁹² McConvill 2005 *The Corporate Governance Law Review* 353.

McConvill opines that the board of directors, through their prerogative to manage the affairs of company, may nevertheless ensure that directors meet the required standards by establishing rigorous and transparent performance indicators.³⁹³ These indicators can help demonstrate to shareholders which directors merit continued service as their representatives on the board.³⁹⁴

The Australian Institute of Company Directors expressed concerns that allowing a board of directors to remove one of its members could undermine the essential independence of thought that is a fundamental objective of many corporate governance principles.³⁹⁵ Section 203E of the Corporations Act enshrines the concept of shareholder democracy and control in public companies, emphasizing that the power to remove directors should ultimately rest with the shareholders.³⁹⁶ However, this view is debatable and has been strongly criticised by scholars as being disadvantageous to shareholders.³⁹⁷

Knight argues that section 203E is, at best, redundant and, at worst, potentially detrimental to shareholder interests.³⁹⁸ He deals with two contentions. The first concern is that granting the board power to remove directors would undermine the rightful role of shareholders as active participants in the operation and management of the company in which they are stakeholders.³⁹⁹ The second concern is that such power could have a “chilling” effect on free and open board discussions, ultimately harming the company as a whole.⁴⁰⁰

As to the first concern, viewing board-initiated removals as a mechanism that can infringe on shareholders’ right to remove directors is unfounded as the ability of shareholders to vote on the appointment or removal of directors at a general meeting would remain intact, preserving their basic right to participate in such decisions as

³⁹³ McConvill 2005 *The Corporate Governance Law Review* 353.

³⁹⁴ McConvill 2005 *The Corporate Governance Law Review* 353.

³⁹⁵ Australian Institute of Company Directors *Resignations or Removal of Directors* Position Paper No 6 (May 2007) 2. See also Cassim “The removal of directors by a company’s board of directors under the Companies Act 71 of 2008: Should it be a mandatory or an alterable provision?” 2019 *CILSA* 393.

³⁹⁶ See Austin and Ramsay *Ford, Austin and Ramsay’s Principles of Corporations Law* (2018) 308-309.

³⁹⁷ See Ncube 2011 *SALJ* 40 where she discusses submissions made by Knight and McConvill in favour of director removal by board.

³⁹⁸ Knight “The removal of public company directors in Australia: Time for change?” 2007 *Company and Securities Law Journal* 351 at 362.

³⁹⁹ Knight 2007 *Company and Securities Law Journal* 358.

⁴⁰⁰ Knight 2007 *Company and Securities Law Journal* 358.

outlined in the OECD Principles.⁴⁰¹ Moreover, shareholders could choose to delegate the power to remove directors to the board, potentially enhancing efficiency or accountability.⁴⁰²

I am in agreement with Knight's observation that the power to remove directors can also be delegated by shareholders if desired, and this can reflect a balanced view, offering flexibility without automatically undermining shareholder rights.

As to the second concern, Knight states that directors are typically elected to a board to provide insight and bring experience to the company's operations.⁴⁰³ Courts have consistently emphasised that a director's failure to actively participate in managing a company could lead to liability for negligence.⁴⁰⁴ This highlights the obligation of directors to contribute and to perform to the best of their abilities.⁴⁰⁵ Therefore, it is difficult to identify an incentive for a director to remain on a board while refraining from engaging in board discussions due to fear of dismissal, particularly when such conduct might expose the director to a breach of duty claim.⁴⁰⁶

Whilst I also concur with Knight's position that fears about a "chilling" effect on board discussions may be overstated, I would exercise some caution in completely dismissing the risk of a chilling effect. Even if rare, the perception of possible retaliatory removal by fellow directors could, in specific contexts, stifle dissenting voices and discourage candid debate within the boardroom. This risk may be minimised through careful governance structures stipulated in the company's MOI, but it is not entirely unfounded. The efficacy of any system where the board can remove a director hinges on strong safeguards to ensure that such powers are exercised transparently and in the best interests of the company, without compromising the essential role and influence of shareholders.⁴⁰⁷

⁴⁰¹ *Principles of Corporate Governance*.

⁴⁰² Knight 2007 *Company and Securities Law Journal* 359.

⁴⁰³ Knight 2007 *Company and Securities Law Journal* 361.

⁴⁰⁴ Knight 2007 *Company and Securities Law Journal* 361.

⁴⁰⁵ Knight 2007 *Company and Securities Law Journal* 361.

⁴⁰⁶ Knight 2007 *Company and Securities Law Journal* 361.

⁴⁰⁷ See the *OECD Principles of Corporate Governance* discussions on the importance of clear assignment of responsibilities and accountability among different corporate bodies, including the board and shareholders, to promote transparency and protect shareholder rights.

4.4.2. Private companies

The Corporations Act draws a distinction between public companies and private companies with regard to the removal of directors by the board of directors.⁴⁰⁸ This distinction can be said to reflect and protect the principle of shareholder democracy in public companies, which ensures that shareholders retain the ultimate authority to remove directors.⁴⁰⁹ This is because section 203E which applies to public company director removal specifically prohibits removal of a director by the board of directors, whereas more flexibility is given to private companies in section 203C in that even though the power of the board of directors to remove a fellow board member of a private company is not expressly stated in the Corporation Act, the board of directors can be empowered by section 203C to remove a director from office if the company's constitution expressly allows for such a procedure.⁴¹⁰

Section 203C states that:

“A proprietary company:

(a) may by resolution remove a director from office; and

(b) may by resolution appoint another person as a director instead.”

Section 203C empowers a private company to remove a director, this section does not, however, specify any grounds or procedures on how directors ought to be removed. Notably, section 203C is a replaceable rule for private companies, which means that it can be displaced by a provision in the company's constitution that allows the board of directors to remove a director from office. Thus, in the context of private companies in Australia, the board may exercise this power only if explicitly granted by the company's constitution.⁴¹¹ This flexibility permits companies to establish their own governance rules, tailored to their specific needs and circumstances.⁴¹²

The Corporations Act does not specify any grounds or procedures for the removal of a director of a private company by the board of directors. Instead, this is typically

⁴⁰⁸ Cassim 2019 *CILSA* 393.

⁴⁰⁹ Cassim 2019 *CILSA* 393.

⁴¹⁰ Cassim 2019 *CILSA* 394.

⁴¹¹ Knight 2007 *Company and Securities Law Journal* 352.

⁴¹² Section 203C is a replaceable rule. See also Cassim 2019 *CILSA* 394.

governed by the constitution of the private company, which may empower the board to remove directors from office.⁴¹³ As a result, the requirements and process for board-initiated removal of a director will differ between private companies, depending on the provisions outlined in each company's constitution.⁴¹⁴ There are no specific general principles that apply to the provisions of director removal that ought to be contained in the company's constitution, however, it is mandatory for a private company to have a constitution, and a copy must be kept with the company's records.⁴¹⁵

4.5. Comparative analysis

Section 71 of the Companies Act states that,

“[d]espite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders' meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).”

This provision can be compared to the provisions of section 203D(1) of the Australian Corporations Act which may have influenced South African company law legislation.⁴¹⁶ Section 203D(1) of the Corporations Act states that a public company may remove a director from office by resolution, regardless of any provision to the contrary in the company's constitution,⁴¹⁷ an agreement between the company and the director,⁴¹⁸ or an agreement between any or all members of the company and the director.⁴¹⁹ Both these provisions underscore the principle of shareholder authority in determining director appointments and removals – overriding any conflicting internal or contractual arrangements.

⁴¹³ Section 203D of the Corporations Act only sets out a specific procedure that must be followed if a director of a public company is removed by the shareholders at a general meeting.

⁴¹⁴ Cassim 2019 *CILSA* 395.

⁴¹⁵ ASIC's Information Sheet 23 (INFO 23) accessed via <https://asic.gov.au/for-business/registering-a-company/steps-to-register-a-company/constitution-and-replaceable-rules/>.

⁴¹⁶ Cassim “The division and balance of power between the board of directors and the shareholders: the removal of directors” 2013 *Banking & Finance Law Review* 29 at 156.

⁴¹⁷ Section 203D(1)(a) of the Corporations Act.

⁴¹⁸ Section 203D(1)(b) of the Corporations Act.

⁴¹⁹ Section 203D(1)(c) of the Corporations Act.

In the case of a private or proprietary company, section 203C of the Australian Corporations Act provides that the board of directors may, by resolution, remove a director from office and may also appoint another person as a director.⁴²⁰ This demonstrates that the Corporations Act establishes different procedures for the removal of directors in public and private companies.⁴²¹ For private companies, the statutory provisions for director removal are replaceable, allowing for flexibility in their governance structures.⁴²² Section 71 of the Companies Act on the other hand, makes no distinction between private and public companies.⁴²³ In South Africa, the provisions of this section are mandatory in nature and cannot be replaced by an MOI or any agreement.

In relation to board-initiated removals, under the Australian Corporations Act, removal by the board of directors in public companies is expressly prohibited.⁴²⁴ Private companies may, however, be empowered to remove a director from office if the constitution of the company permits this to be done.⁴²⁵ This, however, is not expressly stated in the Corporations Act but is a consequence of section 203C provision being a replaceable rule which may allow for a provision in the constitution of the company permitting the board of directors to remove a director from office. It is therefore possible that, for some private companies, directors may only be removed by the shareholders.

A comparable provision in the South African legislation is section 71(3) of the Companies Act which is a mandatory and unalterable provision that enables the board of directors to remove any fellow director. Unlike section 71(1) of the Companies Act which states that '*a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director*' thus only allowing '*persons with voting rights in an election of that director*' to be partake in the ordinary resolution, section 71(3) of the Companies Act does not differentiate between directors appointed by the board itself and those

⁴²⁰ Section 203D(1) of the Corporations Act.

⁴²¹ Sections 203C (private companies) and section 203D (public companies) of the Corporations Act.

⁴²² See the heading to section 203C of the Corporations Act which expressly states that it is a replaceable rule.

⁴²³ Section 71 of Companies Act only makes mention to the word "company".

⁴²⁴ Section 203E of the Corporations Act.

⁴²⁵ Cassim 2019 *CILSA* 395.

elected by shareholders, indicating that the board's power to remove directors is comprehensive.

The provision states, without qualification, that the board "may remove a director" from office. As such, the removal rights under this section do not correlate with appointment rights. Therefore, the board of directors is authorised to remove any director from office, regardless of who initially appointed that director.⁴²⁶

4.5.1. Issue 1: The right to reasons

Cassim argues that section 71(3) of the Companies Act should not be mandatory but replaceable – similar to section 203C of the Corporations Act. She is of the opinion that if section 71(3) of the Companies Act were considered an alterable provision, it would grant companies the option and flexibility to assess the merits and drawbacks of authorising their board of directors to remove other directors.⁴²⁷

She further asserts that this would enable companies to decide whether to adhere to the default provision under the Companies Act, which empowers the board to remove board members, or to modify or restrict this provision to better align with their specific governance needs and corporate structure. Such flexibility would allow companies to tailor their internal governance framework, potentially balancing board autonomy with shareholder interests or other considerations unique to their circumstances.

I believe her arguments are valid and important particularly when one looks at the challenge that is presented by section 71 of the Companies Act in relation to the director's right to reasons for dismissal as outlined in Chapter 3 of this research. At close reading of section 71(1), (2) and (3) it is apparent that South Africa may have adopted the Australian stance that shareholders ultimately have the primary authority in determining director removals. It appears that the South African legislature's intention in not providing for a section 71(4)(a)⁴²⁸ equivalent for shareholder removal

⁴²⁶ Cassim 2019 *CILSA* 403.

⁴²⁷ Cassim 2019 *CILSA* 409.

⁴²⁸ Section 71(4)(a) of the Companies Act states that a director who is up for a removal vote must be given a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response.

is a poor attempt to adopt the Australian practice to protect the shareholder's primary right to remove directors in two ways:

- Removal without cause: The Corporations Act allows companies to remove a director without giving any reasons for such a removal, all that is required is compliance with the statutorily prescribed procedure.⁴²⁹ The Companies Act's omission to require a "statement setting out reasons for dismissal" in shareholder removal seems to be an adoption of the Australian stance that shareholder removals do not need "cause" to be effected.
- By introducing stricter rules for board removal: An obvious contrast between these two jurisdictions is that Australia does not provide for board-initiated director removals. South African's introduction of section 71(3) may be seen as a step in the right direction, the Act draws a clear distinction between removal by shareholders and removal by the board— in that, shareholders may remove directors for any reason⁴³⁰ whereas stricter rules apply to removal by board in that the board may only remove a director if there has been allegations against that director— which the board is statutorily obliged to consider and determine by resolution.⁴³¹ The allegations may include complaints that the concerned director has become ineligible or disqualified,⁴³² incapacitated to the extent that the director is unable to perform the functions of a director,⁴³³ or has neglected the performance of the functions of director.⁴³⁴ It may also seem that mandating "cause" or reasons for director removals is an attempt to avoid potential abuse of power or victimisation amongst the board of directors.⁴³⁵ It is submitted that the provisions of section 71(3) read with section 71(4) ensure that having 'grounds' to remove the director is not enough but that these grounds must also be valid. The words '*may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict*' in section 71(3) clearly indicate that the board has to ascertain or establish exactly if the

⁴²⁹ Du Plessis and McConvill 2003 *ABLR* 263.

⁴³⁰ Section 71(1).

⁴³¹ Section 71(3).

⁴³² Section 71(3)(a)(i).

⁴³³ Section 71(3)(a)(ii).

⁴³⁴ Section 71(3)(b).

⁴³⁵ See Knight's discussions on the concerns that may arise with board-initiated removals.

allegations against the concerned director are valid. Section 71(4) provision for *'a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response'* to be provided to the concerned director, also indicates that the allegations must be explained to the concerned director to allow them to respond.

However, this confusion could be avoided by adopting a provision similar to section 203E which would explicitly state that a statement of reasons is not required for shareholder removals. A provision under section 71(2) that would state that a statement setting out reasons for the resolution is not required for the purposes of sections 71(1) and (2).

Such a passage would explicitly clarify the matter and effectively protect shareholders in granting them powers to remove directors without cause as seen in the Corporation Act. It is indisputable that the provisions of section 71(1) and (2) do not require any allegations to be made against a director before they can be removed, however, the legislature's omission to clarify what the words *'reasonable opportunity to make a presentation'* mean has led to confusion and different interpretations of this provision—and an addition of such passage may eliminate doubt for companies and courts.

4.5.2. Related issue: Removal by the board as an alterable provision

Cassim argues that section 71(3) of the Companies Act should not be mandatory but alterable, thereby allowing companies the flexibility to decide whether to follow the provisions of section 71(3) or to supplement them with their own provisions in the company's MOI. This would also ensure that shareholders' representatives on the board of directors are protected without mandating section 71(3) removals which do not distinguish between directors appointed by the board and directors elected by shareholders.⁴³⁶

Cassim submits that the board's power to remove a shareholder-appointed director carries significant implications for corporate power dynamics in that it fundamentally affects the balance of power between the board and shareholders while

⁴³⁶ Cassim 2019 *CILSA* 408.

simultaneously impacting the internal power relations among shareholders themselves.⁴³⁷

By making this provision alterable, it may be beneficial in that companies would have the flexibility to evaluate the advantages and disadvantages of granting their board of directors the authority to remove directors.⁴³⁸ This would allow each company to decide whether to uphold the default provision enabling the board to remove directors or to modify or restrict this provision to align with its specific requirements.⁴³⁹

However, one advantage that section 71(3) offers in empowering the board of directors to remove any director from office, including those directors elected by the shareholders—is that mechanism circumvents the potential reluctance of shareholders to remove their nominated representative, thereby providing an alternative pathway for director removal when warranted by misconduct or dereliction of duty.⁴⁴⁰

4.5.3. Issue 2: Uncertainty regarding court powers to review removal decisions

Section 71(5) of the Companies Act allows a director who is not satisfied with the board of directors' decision to remove them to apply to a court within twenty business days to seek a review of the decision. Under section 71(6), when a court reviews a decision where the board has elected not to remove a director, it may either uphold the board's decision or remove the director if the court is “satisfied” that the director is ineligible, disqualified, incapacitated, or has been negligent or derelict.⁴⁴¹ Comparatively, the Australian Corporations Act does not expressly provide for the right to a judicial review (or appeal) flowing directly from a director removal mechanism being adopted. In this jurisdiction, an unsatisfied director or any interested party (voting member of the company) may bring an application to court in terms of section 1322 of the Corporation Act which accounts for a vast issues of procedural irregularities in corporate proceedings.

⁴³⁷ Cassim 2019 *CILSA* 406.

⁴³⁸ Cassim 2019 *CILSA* 409.

⁴³⁹ Cassim 2019 *CILSA* 409.

⁴⁴⁰ Cassim 2019 *CILSA* 407.

⁴⁴¹ Section 71(6)(b) of the Companies Act.

4.5.4. Issue 3: Removal by a single shareholder

Section 65(3)(a) states that “[a]ny two shareholders of a company ... may propose a resolution concerning any matter in respect of which they are each entitled to exercise voting rights”.

Section 65(3) of the Companies Act enables shareholders to submit resolutions for consideration at shareholders’ meetings. This provision serves as a valuable tool for shareholders, particularly in situations where the board is hesitant to propose a resolution addressing issues to be discussed at a shareholders’ meeting, such as the removal of a director from the board.⁴⁴²

The court in *Foxvest* held that failure to meet requirements of section 65(3) renders removal of a director in terms of sections 71(1) and 71(2) invalid.⁴⁴³ It further held that to comply with section 65(3), the resolution must be proposed and supported by two shareholders.

Section 57(2) allows for a profit company, other than a state-owned one, to have its sole shareholder pass a resolution by exercising any of his or her voting rights. This power is not limited by time nor notice.⁴⁴⁴ However, section 57(2)(b) restricts this power when section 65 governs the company's operations. As established in the *Foxvest* case, compliance with section 65(3) is critical for director removals under sections 71(1) and 71(2). This implies that a resolution passed by a sole shareholder under section 57(2)(b) is not permitted for director removals, as section 65(3) applies.

A comparable provision for the Australian jurisdiction is section 1.9 of the Corporations Act which dictates that shareholders can pass resolutions and stipulates how these resolutions can be passed. It states that “[t]he sole shareholder of a company may pass a resolution by recording and signing their decision. A company must keep a written record (minutes) of the members’ resolutions and meetings”.

⁴⁴² See Nel “Can a single shareholder remove a director?” 2024, available at <https://www.vanhuysssteen.co.za/newsroom/item/154-can-a-single-shareholder-remove-a-director> (accessed on 05 October 2024).

⁴⁴³ *Foxvest* para 16.

⁴⁴⁴ Section 57(2)(a).

Section 1.9 of the Corporations Act, unlike section 65(3) of the Companies Act which requires that for a resolution to be passed for the purposes of director removal, the resolution must be proposed and supported by two shareholders – grants a sole shareholder of a company to pass a resolution subject to the resolution being written and recorded in minutes.⁴⁴⁵ The words ‘sole shareholder’ indicates that this is applicable for companies that only have one shareholder and would not otherwise be applicable for companies with more than one shareholder.

Currently, in the South African jurisdiction, the Companies Act does not explicitly stipulate how such ‘sole shareholder’ removal of directors ought to be approached, which presents a shortcoming in the legal framework pertaining to the process. It is submitted that the legislature can provide clarity in one of the two ways:

- A passage similar to section 1.9 of the Corporations Act explicitly allowing sole shareholders to exercise their powers as afforded by section 71, the passage could be expanded to provide for a mechanism to be adopted by sole shareholders for the purposes of section 71. Perhaps, this passage could also state grounds in which a sole shareholder can successfully pass a resolution to remove a director. Such expansion of section 71(1) provision can aid in eliminating any confusion for companies with sole shareholders and can provide specific grounds for compliance.⁴⁴⁶
- Similarly to section 71(8) which allows for board-initiated removal for a company that has fewer than three directors, which in the literal interpretation of section 71(3) is excluded, section 71(8) grants such companies power to approach the Tribunal. The Act does not, however, provide for the right to approach the Tribunal to shareholders who may wish to remove directors but do not comply with the provisions of section 71(1) (and section 65(3)) in this instance. It is submitted that adding a passage which purports to extend powers of the Tribunal to determine matters relating to director removals of companies with

⁴⁴⁵ Section 1.9 of the Corporations Act.

⁴⁴⁶ Grounds found in section 71(2) could be adopted in that the sole shareholder could also comply with all the provisions relating to notice of the meeting and the resolution in a manner that is at least equivalent to the notice that a shareholder is entitled to receive. The director should further be granted a reasonable opportunity to present a case by the sole shareholder.

sole shareholders may also provide the necessary clarification to sole shareholders and companies.

4.6. Conclusion

Australia remains the only common law jurisdiction that differentiates between the removal of directors in public and proprietary companies. This chapter set out director removal mechanism that is applicable in Australia under the Corporations Act which differentiates between a private and public company, providing specific strict rules for public companies;⁴⁴⁷ and flexible and non-mandatory rules for private companies.⁴⁴⁸ Section 203D clearly serves as the exclusive method for the removal of directors from public companies.⁴⁴⁹

Section 71(1) which relates to removal by shareholders, can be compared to the provisions of section 203D(1) of the Australian Corporations Act which may have influenced South African company law legislation.⁴⁵⁰ Section 203D(1) of the Corporations Act allows a public company to remove a director by resolution,⁴⁵¹ overriding any conflicting provisions in the company's constitution or agreements with the director or members.⁴⁵² Both these provisions underscore the principle of shareholder authority in determining director appointments and removals – overriding any conflicting internal or contractual arrangements.

A comparison was drawn between the regulations of the Corporations Act and those of the South African Companies Act, particularly in relation to board-initiated director removal and the debated right of reasons to director removal by shareholders. The Australian jurisdiction provides for a director removal without cause, similarly to the provisions of section 71(1) and (2) that do not require any allegations to be made against a director before they can be removed (unlike the provisions of section 71(3) of the Companies Act). Shareholders do not need to furnish an affected director with a statement stating out reasons for dismissal. A submission was, however made, that, further clarity on this stance could be achieved by adopting a provision similar to

⁴⁴⁷ Section 203D of the Corporations Act.

⁴⁴⁸ Section 203C of the Corporations Act.

⁴⁴⁹ Du Plessis and McConvill 2003 *ABLR* 264.

⁴⁵⁰ Cassim 2013 *Banking & Finance Law Review* 29 at 156.

⁴⁵¹ Section 203D(1)(a) of the Corporations Act.

⁴⁵² Section 203D(1)(b) of the Corporations Act.

section 203E which would explicitly state that a statement of reasons is not required for shareholder removals.

In Australia, board-initiated removals can only be achieved for private companies under section 203C, which is replaceable and allows for companies to write out their own removal mechanism in the company's MOI.

The legal issue concerning the courts powers to review, a comparison was drawn between the South African provisions of section 71(5) and section 71(6), which provides that a court reviewing the board's decision not to remove a director can either uphold the decision or remove the director if it is satisfied that the director is ineligible, disqualified, incapacitated, negligent, or derelict. In contrast, the Australian Corporations Act does not expressly provide for the right to a judicial review (or appeal) flowing directly from a director removal mechanism being adopted. However, an unsatisfied director or any interested party (voting member of the company) may bring an application to court.

Lastly, Section 65(3) of the Companies Act empowers any two shareholders to propose resolutions for consideration at shareholders' meetings, including resolutions for director removal. The *Foxvest* case clarified that compliance with section 65(3)—requiring a resolution to be proposed and supported by two shareholders—is essential for valid director removals under sections 71(1) and 71(2). While section 57(2) allows a sole shareholder to pass resolutions without notice or time restrictions, section 57(2)(b) limits this power when section 65 governs the company. This makes sole shareholder resolutions invalid for director removals, emphasising the need for compliance with section 65(3). Comparatively, Australia's Corporations Act section 1.9 permits a sole shareholder to pass resolutions, provided they are written and recorded, but this applies only to companies with one shareholder. The South African Companies Act lacks a clear framework for sole shareholders removing directors. To address this gap, the legislature could either explicitly allow sole shareholders to remove directors under section 71 or provide mechanisms, like Tribunal recourse, for sole shareholders unable to meet section 65(3) requirements.

Chapter 5: Conclusion

5.1. Introduction

Drawing from both the South African and Australian frameworks, this final chapter synthesises the findings and presents recommendations. In the preceding chapters this paper demonstrated an analysis of the legal framework and procedures for removing directors and the key challenges presented by the framework. It firstly looked into the legal framework for director removal in South Africa, secondly, it delved into the challenges and/or uncertainties presented by this process, and further explored any possible learnings South Africa can learn from foreign jurisdiction.

5.2. An analysis of section 71 of the Companies Act 71 of 2008

This paper examined the removal mechanisms under section 71 of the Companies Act, revealing the complex interplay between shareholder rights, director protections, and corporate governance requirements. The research demonstrated a fundamental shift from the 1973 Act, where directors' powers were delegated by shareholders, to the 2008 Act, where powers derive directly from section 66, marking a significant evolution in South African corporate governance.

The analysis of shareholder removals reveals multifaceted challenges in practical implementation. The Act does not prescribe specific grounds for the removal of directors by shareholders.⁴⁵³ However, the Act provides detailed grounds for removal by the board and the Tribunal. These grounds encompass issues such as ineligibility to serve as a director, disqualification from holding the position, and a failure to perform in accordance with the director's duties.⁴⁵⁴ Under shareholder removals, while shareholders retain fundamental power to remove directors through ordinary resolution, procedural safeguards must be followed.⁴⁵⁵

Conflicting judicial interpretations in *Pretorius*, *Miller*, and *Mathonsi* regarding the provision of reasons for removal highlight a significant area of uncertainty. *Pretorius* which requires shareholders to provide reasons to enable meaningful representation;

⁴⁵³ See sections 71(2)(a) and (b).

⁴⁵⁴ Section 71(3)(a)-(b).

⁴⁵⁵ Section 71(1)-(2).

Miller where the court held that shareholders need not provide reasons as directors serve at shareholders' pleasure, and *Mathonsi* supporting *Pretorius*, requiring detailed information in the resolution. Notably, the approach of the courts suggests that decisions about providing reasons may need to be determined on a case-by-case basis, considering the specific circumstances of the removal and the relationship between the affected director and shareholders. This nuanced approach acknowledges the unique dynamics within different companies while potentially creating challenges for consistent application.

Regarding board-initiated removals, this paper demonstrated a more structured procedural requirements and specific grounds for removal compared to shareholder removals.⁴⁵⁶ Companies with more than three directors may remove a director for specified grounds under this mechanism..⁴⁵⁷ The process is initiated by allegations from a shareholder or director regarding ineligibility, disqualification, incapacity, or negligence/dereliction.⁴⁵⁸ The board must provide the affected director with notice containing the proposed resolution and detailed reasons with "sufficient specificity" to permit response preparation.⁴⁵⁹ In *Pretorius*, the court adopted Ncube's interpretation of "sufficient specificity" as requiring "sufficiently detailed reasons to mount a response," emphasizing that each case depends on its specific facts. The director concerned must be excluded from voting, maintaining impartiality in the decision-making process.⁴⁶⁰

The Tribunal serves as an alternative removal mechanism for companies with fewer than three directors.⁴⁶¹ The procedure mirrors board removals, requiring notice with reasons and opportunity for representation. However, only board-initiated removals can be referred to the Tribunal, preserving direct shareholder removal rights.

Regarding judicial oversight, courts cannot be approached directly for removals but may review board or Tribunal decisions. Under section 71(5), affected directors have twenty business days to challenge their removal. Section 71(6) allows review of

⁴⁵⁶ These requirements are laid out in sections 71(3) and 71(4).

⁴⁵⁷ Section 71(3).

⁴⁵⁸ Section 71(3).

⁴⁵⁹ Section 71(4).

⁴⁶⁰ Section 71(3).

⁴⁶¹ Section 71(8).

decisions not to remove directors, though notably lacking a time limit. While shareholder removals have no explicit review provision, *Litabe* established that courts may review these based on constitutional principles and common law.⁴⁶²

5.3. An analysis of selected problem areas associated with section 71

While section 71(3) explicitly requires boards to provide reasons, sections 71(1) and 71 (2) remain silent on shareholder obligations. The first legal challenge explored in this paper focuses on this legislative ambiguity that has sparked conflicting judicial interpretations, with *Pretorius* mandating reasons based on natural justice principles, while *Miller* held that shareholders need not provide reasons as directors serve at their pleasure. *Mathonsi* later rejected Miller's approach, interpreting sections 71(2), 62, and 65(4)(b) collectively as requiring sufficient information, with reasons for removal, to enable the director to respond. These conflicting decisions have practical implications, particularly evidenced in CIPC's Practice Notes, which was published based on *Pretorius*' findings, requiring reasons based on Pretorius, creating administrative challenges when shareholders follow Miller's interpretation.

Close reading of section 71(1) and 71(2) reveal that the legislature did not intend for the removal of directors by shareholders to be accompanied with 'cause' or reasons thereof, however, the phrase *'the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive'*⁴⁶³ have rendered this passage ambiguous as its compliance is reliant on sections 62 and 65 of the Act which can provide an expansion to the requirements of section 71(2) and can also be interpreted to be in line with the *audi alteram partem* rule as explained above. Due to this anomaly, it is submitted that shareholders must provide sufficient information (and reasons) to a concerned director for the purposes of a removal resolution until the ambiguity is remedied by either the legislator or superior courts.

The second issue explored pertains to the uncertainty regarding court powers to review director removal decisions.⁴⁶⁴ Case law has provided conflicting interpretations of these provisions, in *Pityana*, the court held that section 71(5) reviews are limited to

⁴⁶² See *Litabe* para 22.

⁴⁶³ Section 71(2)(a).

⁴⁶⁴ Sections 71(5) and 71(6).

procedural aspects, while in *Jones*, the court supported a broader review of the merits under section 71(5).

The practical implications of this inconsistency between sections 71(5) and 71(6) are significant as each mechanism calls for a different approach in how removal matters may be reviewed by the courts. Cassim argues that, to maintain consistency with section 71(6) of the Companies Act, a court conducting a review under section 71(5) should be authorised to examine the merits of the board's decision regarding the removal of a director from office.⁴⁶⁵ I am in agreement with this argument. Since the court's essential task under both these provisions is to review the board's determination regarding a director's eligibility and capacity— to exercise the explicit powers in section 71(6) (stemming from non-removal), should be read as equally applicable to section 71(5) reviews, and this is to ensure consistency in judicial oversight and remedial options regardless of the board's initial determination. The difference in the wording of these sections and what may be seen as a limitation of the court's powers under section 71(5) is not justifiable, as in both instances, the court has to review a determination of the board.

The judge in *Jones*, which was decided after *Pityana* concluded the matter by reviewing the determination of the board to remove the directors and reinstated the directors. This demonstrates the willingness of the courts to interpret section 71 broadly if it deems it fit and in the interest of justice. However, dissenting views on the matter indicate a need for a superior court's judgment to provide a binding precedent.

The third legal challenge pertains to the complexities surrounding director removal in a company with a sole shareholder, particularly focusing on the procedural requirements for a valid removal resolution.⁴⁶⁶ Shareholders are empowered to propose resolutions for consideration at the shareholders' meeting, as outlined in section 65(3)(a). This provision states that “[a]ny two shareholders of a company ... may propose a resolution concerning any matter in respect of which they are each entitled to exercise voting rights”.

Section 57(2) allows a sole shareholder of a profit company (excluding state-owned

⁴⁶⁵ Cassim 2018 SA Merc LJ 302.

⁴⁶⁶ Sections 57(2), 61 and 65.

entities) to pass resolutions without restrictions on time or notice. However, under section 57(2)(b), this power is limited when section 65 applies.

In *Foxvest*, the court held that a single shareholder cannot propose a removal resolution alone under section 65(3), which requires at least two shareholders. This interpretation creates a potential conflict between section 65(3) and section 57(2)⁴⁶⁷ for single-shareholder companies.

Delpont suggests that even single shareholders should follow the notice requirements of section 71(2) to ensure procedural fairness.⁴⁶⁸ The practical implications of this uncertainty are significant, as single-shareholder companies may be unsure of how to comply with the provisions of sections 71(1) and 71(2). I agree with the submissions of Delpont in that notice ought to be provided and, in line with section 71, it is advisable that a single shareholder wanting to remove a director provide "reasonable notice". The shareholder should also comply with all the provisions relating to notice of the meeting and the resolution in a manner that is at least equivalent to the notice that a shareholder is entitled to receive.⁴⁶⁹ The director should further be granted a reasonable opportunity to present a case.⁴⁷⁰ These aspects are not internal formalities, and section 71(2) is not expressly excluded by section 57. This approach would avoid any potential non-compliance with the process entrenched in section 71.

The *Foxvest* case confirms that compliance with section 65(3) is essential for director removals under sections 71(1) and 71(2), meaning a sole shareholder cannot circumvent these requirements for such removals. However, case law and/or amendments by the legislature is still needed to provide clear direction on this gap.

5.4. Comparative analysis of the Australian Corporations Act

This chapter conducted a comparative analysis of the director removal process in Australia as outlined in the Australian Corporations Act, contrasting it with the South African framework under the Companies Act. The analysis has highlighted key

⁴⁶⁷ Section 57(2) allows for sole shareholders to pass resolutions except for matters where section 65 is applicable.

⁴⁶⁸ *Henochsberg* commentary on section 71, 277.

⁴⁶⁹ Section 71(2)(a).

⁴⁷⁰ Section 71(2)(b).

differences and potential lessons that could be adopted to address the challenges identified in the South African context.

The detailed legal frameworks for director removal in Australia differentiate between public and proprietary companies. For public companies, section 203D of the Corporations Act provides a comprehensive procedure, emphasizing shareholder control and the ability to remove directors without cause. In contrast, section 203C offers more flexibility for proprietary companies, allowing them to customize their removal processes through their constitutions.

Comparing these frameworks to the South African provisions, the analysis has focused on three main legal issues: the right to reasons for removal, uncertainty regarding court powers to review removal decisions, and removal by a single shareholder.

Regarding the right to reasons, the Australian approach allows for director removal without cause, similar to the provisions of sections 71(1) and 71(2) of the South African Companies Act. However, it is submitted that adopting a provision akin to section 203E, explicitly stating that reasons are not required for shareholder removals, could provide further clarity and avoid the confusion seen in South African case law.

On the issue of court powers to review removal decisions, the Australian Corporations Act does not expressly provide for a right to judicial review flowing directly from the removal mechanism. In contrast, sections 71(5) and 71(6) of the South African Companies Act outline specific court powers, although their scope remains subject to debate and conflicting interpretations.

Lastly, the analysis has highlighted the potential anomaly in the South African framework regarding removal by a sole shareholder. While section 65(3) requires two shareholders to propose a removal resolution, section 57(2) appears to grant sole shareholders the power to pass resolutions unilaterally. The Australian Corporations Act addresses this issue more directly in section 1.9, permitting sole shareholders to pass resolutions, provided they are written and recorded.

To address these challenges, the chapter has made several submissions and recommendations. These include adopting provisions similar to section 203E to clarify that reasons are not required for shareholder removals; considering the potential

benefits of making board-initiated removals an alterable provision instead of the provision being mandatory; and either explicitly allowing sole shareholders to remove directors under section 71 or providing alternative mechanisms, such as Tribunal recourse, for sole shareholders unable to meet the requirements of section 65(3).

In conclusion, the comparative analysis has revealed both similarities and differences between the Australian and South African approaches to director removal. While the South African framework has drawn inspiration from the Australian model, particularly in emphasizing shareholder control,⁴⁷¹ there remain areas where greater clarity and flexibility could be beneficial. By examining the detailed legal frameworks, conflicting case law, scholarly opinions, and practical implications, this paper has identified specific issues and provided recommendations to address them, intending to balance shareholder and director rights, and effective corporate governance in South Africa.

⁴⁷¹ These relate to the similarities seen between section 71(1) and section 203D.

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