UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG | WITS SCHOOL OF LAW

AN ANALYSIS OF THE FAIRNESS, SUFFICIENCY, AND CLARITY OF SECTION 71 OF THE COMPANIES ACT 2008 FOR THE REMOVAL OF DIRECTORS

By

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DECLARATION

I declare that this report is my own, unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws in the field of Corporate Law at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

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DEDICATION

I dedicate this work to God, whose guidance and strength have been my anchor throughout this journey. To my mother, whose unwavering prayers, love, and belief in me have been a constant source of inspiration—I am deeply grateful.

To my brother, whose support and encouragement have helped me persevere, and to my friends, for their companionship and motivation along the way.

Finally, to my supervisor, for her invaluable guidance, patience, and insight, which have enriched this work and helped bring it to completion. Thank you all for being part of this journey with me.

ABSTRACT

The removal of directors in corporate governance is a subject of paramount importance, as it pertains to the dynamic equilibrium of power within a company. This research report delves into the intricate landscape of director removal by shareholders under section 71 of the South African Companies Act.[1] Specifically, it scrutinises the contested view that shareholders are not obligated to supply motives for their removal decisions, relying solely on an ordinary resolution.

This report examines the implications of the above provision on the delicate balance of power shared between directors and shareholders within the corporate structure. It traverses the historical evolution of director removal laws in South Africa, offering a comprehensive analysis of the legislative framework and its historical context.

Furthermore, this report aims to critically assess the recent *Miller v Natmed Defence (Pty) Ltd*[2] case, a landmark judgment, which like the case of *Pretorius v Timcke*[3] challenges the conventional understanding of director removal. While *Miller* is currently binding only within a specific province, its dissent from the *Pretorius case* on the requirement for shareholders to provide reasons for director removal sparks debate and calls for further exploration by the higher courts.

The findings of this research report aim to contribute to a nuanced understanding of the legal intricacies surrounding director removal and its implications for corporate governance in South Africa. The conclusions drawn shed light on the evolving dynamics of power, underscore the need for legal clarity, and beckon for potential legislative adjustments in pursuit of a balanced and transparent corporate landscape.

[1] Companies Act 71 of 2008 (hereafter referred to as “the Act” or “the 2008 Act”).
[2] *Miller v Natmed Defence (Pty) Ltd* [2022] ZAGPJHC 2 SA 554 (hereinafter “*Miller* case”).
[3] *Pretorius v Timcke* [2015] ZAWCHC 215 (hereinafter “*Pretorius* case”).

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I. INTRODUCTION

Corporate governance forms the bedrock of modern business structures, wherein the allocation and exercise of power among key stakeholders are pivotal for sustained growth and stability.[4] A fundamental aspect of this governance paradigm is the process around the removal of directors, a process that implicates the intricate division of authority within a company. Within the South African corporate landscape, this process is governed by section 71 of the Act. This report will specifically consider the wording of that section, which does not require shareholders to furnish reasons when removing directors through an ordinary resolution. It will contrast this with the removal of directors by the board, where the provision explicitly mandates the provision of reasons.[5] Additionally, the report will also examine the contradictory interpretations of the section by the courts.

The significance of this provision cannot be understated. It presents a departure from conventional expectations where reasons for such crucial actions are generally anticipated. This novel approach raises pertinent questions concerning transparency, accountability, and the balance of power within companies. As such, this report embarks on an exploration of section 71, aiming to elucidate its intricacies and assess its implications within the broader corporate governance landscape.

The research report undertakes an in-depth examination of section 71, with a specific focus on director removal by shareholders, to determine whether this provision is fair, clear, justifiable and promotes good corporate governance, before tackling the contested case law. Therefore, the primary objectives will be to first analyse the provisions, focusing on director removal by

[4] Henry Hansmann & Reinier Kraakman 'Agency problems and legal strategies' in Reinier Kraakman, Paul Davies, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hideki Kanda & Edward Rock (eds) *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2004) at 26.

[5] Sections 71(1) and (2) state that 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. Further, 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. It is interesting to note that while the provisions for shareholders and directors are almost identical, a distinct and intentional difference exists in that the legislature does not require shareholders to provide reasons for their decisions. In contrary in subsection 4 when speaking to director removal by the board the Act explicitly states "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. This will be discussed in more detail in the next section of this report.

shareholders. In doing that it will investigate the legal requirements and procedures involved in director removal by shareholders as well as, briefly, the board while focusing on the absence of an explicit requirement for shareholders to provide reasons and the implications thereof. Secondly, it aims to critically examine the recent legal developments, particularly the *Pretorius* as well as the *Miller* cases, and their significance in redefining the removal of directors by shareholders. Lastly, it aims to assess the impact of section 71 on the division and balance of power between directors and shareholders.

II. LEGAL FRAMEWORK OF DIRECTOR REMOVAL

(a) Director Removal in the 1973 Act

The removal of directors according to the 1973 Companies Act[6] was regulated by section 220[7] of same. The introduction of section 220 in the 1973 Act marked a pivotal moment, granting shareholders the authority to dismiss directors through an ordinary resolution.[8] The consideration of this section is relevant to identify changes, interpretive principles, and policy considerations that have shaped the current legal framework. Section 220 bears similarities to sections 168 and 169 of the English Companies Act, 2006[9], as well as its precursor, section 303[10] of the Companies Act, 1985.[11] Both the English and South African regulations (in both the 1973 and 2008 Acts) stipulate that shareholders during a general meeting, have the authority to remove directors through an ordinary resolution. This is contingent upon providing special notice of the removal and ensuring that the concerned director has the opportunity to present their case during the meeting where the resolution is subjected to a vote. Notably, this method of removal remains valid irrespective of any conflicting provisions in an agreement between the company and the director in question.

The introduction of section 220 in the 1973 Act aimed to empower shareholders and underscored a fundamental right to shape the composition of company boards.[12] Notable legal cases[13] and precedents during this period may have influenced the legislature, shaping the narrative of shareholder activism and corporate governance.

Section 220(1) of the 1973 Act significantly empowered shareholders to dismiss directors, granting them the authority to override any conflicting provisions in the company's memorandum or articles of association.[14] This expansive provision seemingly facilitated an

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[6] Companies Act 61 of 1973 (hereafter referred to as "the 1973 Act").
[7] Section 220(1) states that a company may, notwithstanding anything in its memorandum or articles or in any agreement between it and any director, by resolution remove a director before the expiration of his period of office.
[8] Caroline B Ncube 'You're fired! The removal of directors under the Companies Act 71 of 2008' (2011) 128 *SALJ* at 36.
[9] Section 168 allows a company to remove a director before the end of their term by ordinary resolution at a meeting, regardless of any agreements in place. Section 169 grants a director the right to protest against their removal by requiring the company to send them a copy of the removal notice and allowing the director to be heard at the meeting where the removal is discussed.
[10] Sec 303 dealt with resolutions to remove directors.
[11] Caroline Ncube op cit note 8 at 34.
[12] H Hansmann and R Kraakman op cit note 4 at 27.
[13] See *Stewart v Schwab* 1956 (4) SA 791 (T); *Barlows Manufacturing Co Ltd v RN Barrie (Pty) Ltd* 1990 (4) SA 608 (C) at 611–12 and *Amoils v Fuel Transport (Pty) Ltd* 1978 (4) SA 343 (W) at 347.
[14] Caroline Ncube op cit note 8 at 35.

uncomplicated process for shareholders to exercise their right to remove a director.[15] Under the 1973 Act, shareholders could, through a shareholders' agreement, exclude the application of section 220, effectively streamlining the removal procedure. Courts consistently recognised and upheld the validity of such agreements, affirming the shareholders' ability to make the removal process more straightforward. [16] The endorsement of this approach is evident in section 220(7) of the 1973 Act, which explicitly stated that nothing in the section should be construed as limiting any existing power to remove a director. [17]

(b) Comparison of the 1973 Act with the 2008 Act

It is crucial to underscore that the provisions outlined in section 71 of the Act, which emerged from section 220 of the 1973 Act, bring about two significant changes to the process of director removal from that of section 220.[18] First, unlike the previous section 220 of the 1973 Act, which allowed shareholders to remove any director through an ordinary resolution, the 2008 Act restricts shareholders to removing only those directors who have been elected to the board by shareholders.[19] Ex-officio directors and those appointed in accordance with the memorandum of incorporation are exempt from shareholder removal.[20] This represents a notable reduction in the power of the shareholders' franchise to exert control over a company through director removal.

Secondly, the introduction of two novel removal methods is noteworthy, being removals initiated by the board and removals facilitated by the Companies Tribunal ('the Tribunal').[21] Beyond its impact on shareholders, these new removal mechanisms also affect directors who concurrently hold a majority of shares. Under the 1973 Act, such directors, wielding a majority of shareholders' votes, were essentially immune, able to thwart any resolution aiming at their removal.[22] This immunity was derived from their ability to use their majority of shareholders' votes to counter any resolution seeking their removal. The 1973 Act did not provide alternative

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[15] Ibid.
[16] Jennifer A Kunst, Piet Delport & Quintus Vorster (eds) Henochsberg on the Companies Act 5 ed vol 1 (Issue 24) 422(2)–423 (hereafter "Henochsberg"); Commentary 8-282.
[17] Section 220(7) states that nothing in this section shall be construed as depriving a person removed thereunder of compensation or damages which may be payable to him in respect of the termination of his appointment as director or of any appointment terminating with that of director or as derogating from any power to remove a director which may exist apart from this section.
[18] Caroline Ncube op cit note 8 at 34.
[19] Ibid; Lucian A Bebchuk 'The myth of the shareholder franchise' (2007) 93 *Virginia* LR at 675; and John F Olson 'Professor Bebchuk's brave new world: A reply to the myth of the shareholder franchise' (2007) 93 *Virginia* LR at 773.
[20] Caroline Ncube op cit note 8 at 34.
[21] Ibid.
[22] Ibid.

mechanisms to address such situations, leaving shareholders with limited recourse. However, the 2008 Act introduces the possibility of removing such directors through a board resolution or a decision by the Tribunal. This represents a departure from the shareholder-centric approach of the 1973 Act, providing boards with a mechanism to address situations where shareholder resolutions may be impractical or ineffective.

The Act took inspiration from various jurisdictions, notably Canada, Australia, and the United States of America[23]. However, due to the lack of a comprehensive descriptive memorandum, there is no certified validation of the origins or motivations behind its provisions.[24]

The choice of removal method depends on the type of director under consideration, the number of directors on the relevant company's board, and the grounds for removal.[25] Directors are categorised based on their method of appointment to the board. The Act delineates three methods of appointing directors.[26] Firstly, according to section 66(4)(a)(i), directors can be directly appointed and removed by individuals specified in the company's memorandum of incorporation. Secondly, section 66(4)(a)(ii) addresses ex officio directors, who become directors by holding another office or similar status. Thirdly, section 68(1) preserves shareholder appointment of directors through elections.

Therefore, directors appointed to the board by specific individuals can only be removed by those persons, the board, or the Tribunal, as specified in s 66(4)(a)(i). Shareholder-appointed directors, on the other hand, can be removed through any of the three modes namely by the shareholders, the board, or the Tribunal. Ex officio directors can only be removed by the board or the Tribunal.

Moreover, section 71(1) of the 2008 Act specifically addresses agreements between shareholders and a director, stating that such agreements cannot prevent removal from office by ordinary resolution. This inclusion of such agreements in the context of removal is not found in section 220(1)(a) of the 1973 Act.

Interestingly, agreements between shareholders and directors are explicitly covered in section 203D(1) of the Australian Corporations Act, 2001[27]. This provision may have influenced the

[23] Caroline Ncube op cit note 8 at 36.
[24] Ibid.
[25] Caroline Ncube op cit note 8 at 37.
[26] See sections 66(4)(a)(i), (ii) and s 68(1) of the Act.
[27] Section 203D1 states that a public company may by resolution remove a director from office despite anything in the company’s constitution (if any); or an agreement between the company and the director; or an agreement between any or all members of the company and the director. If a director was appointed to represent the interests

inclusion of similar provisions in the 2008 Act. Section 203D of the Australian Corporations Act allows a public company to remove a director by resolution, notwithstanding anything in the company's constitution, an agreement between the company and the director, or between any members of the company and the director. Provisions of the Act that cannot be altered, as they do not allow for their effect to be negated, altered, limited, or qualified by a company's memorandum of incorporation, cannot of course be altered.

The second disparity between the 1973 and 2008 Acts, which limits the shareholders' authority to remove directors by ordinary resolution to elected directors bears resemblance to section 8(b) of the Model Business Corporation Act[28], stating that "if a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove him." Similarly, it reflects the provision in section 109(2) of the Canada Business Corporations Act.[29] This section outlines that if a particular class of shares in a corporation holds the exclusive privilege to elect one or more directors, those directors can only be dismissed through an ordinary resolution at a shareholders' meeting of that specific class.

The significance of these limitations in section 71(1) of the Act is that shareholders are precluded from removing ex-officio or directly appointed directors through ordinary resolution. In such cases, shareholders must resort to the board or the Tribunal for the removal process. The transition to the 2008 Act reflects a response to changing dynamics in corporate governance. The global landscape, particularly practices observed in jurisdictions like Canada, Australia, and the US, likely played a role in shaping South Africa's approach to director removal.[30]

This alignment is noteworthy for several reasons. First, it enhances the credibility and attractiveness of South Africa's corporate environment to international investors and stakeholders who value transparency, accountability, and adherence to recognised standards. By harmonising its regulations with global norms, South Africa positions itself as a favourable destination for investment and business operations.

Secondly, aligning with global practices promotes interoperability and facilitates cross-border transactions and collaborations. Businesses operating across multiple jurisdictions benefit from

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of specific shareholders or debenture holders, the resolution for their removal will only become effective once a replacement representing those interests has been appointed.

[28] Caroline Ncube op cit note 8 at 36.

[29] Canada Business Corporations Act, RSC, 1985.

[30] John F Olson 'South Africa moves to a global model of corporate governance but with important national variations' (2010) 219 *Acta Juridica* at 237–9.

standardised governance procedures, reducing complexities and uncertainties associated with compliance requirements.[31] Furthermore, international alignment fosters knowledge sharing and peer learning opportunities, allowing South Africa to draw insights from the experiences and innovations of other jurisdictions.[32]

The above-discussed amendments introduced in the 2008 Act significantly impact shareholder rights concerning director removal. Specifically, by restricting the scope of shareholder removal to only elected directors, the legislature may have shifted the balance of powers between shareholders and directors in corporate governance as will be discussed in more detail below. Evaluating the impact on shareholder rights offers a nuanced perspective on the delicate equilibrium sought between corporate governance principles and shareholder influence. This will be discussed in more detail.

III. ANALYSIS OF SECTION 71 OF THE ACT

(a) Removal by Shareholders

Section 71(1) of the Act establishes the right for shareholders to remove a director through an ordinary resolution passed at a shareholders' meeting by those entitled to exercise voting rights in the election of that director.[33] As mentioned above, the authority granted prevails over any conflicting provisions in a company's memorandum of incorporation or rules, as well as in any agreements between the company and a director or between shareholders and a director.[34]

It is important to take note of the fact no specific grounds for removal are outlined concerning shareholder-initiated removals as this has become a point for debate and also plays a role when it comes to the balance of powers between directors and shareholders. It is contended that the rationale behind this absence is rooted in the principle that directors serve at the pleasure of shareholders[35], reflecting the core principle of shareholder primacy in corporate governance.[36] The principle of shareholder primacy suggests that the primary objective of a company is to maximise shareholder value.[37] As such, shareholders, as the ultimate owners of the company,

[31] Thabane T & Snyman E-van Deventer 'Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies: A Critical Reflection' (2018) 21 *PER / PELJ* at 3.
[32] Ibid at 4.
[33] See footnote 5.
[34] Section 71(1) of the Act,
[35] Judd F. Sneirson, 'The History of Shareholder Primacy, from Adam Smith through the Rise of Financialism' in Beate Sjåfjell & Christopher M. Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (2019) at 73 – 85.
[36] Ibid.
[37] Smith D. G, 'The Shareholder Primacy Norm' (1988) 23 *Journal of Corporation Law* 277 at 290–291.

have the right to appoint and remove directors who manage the company on their behalf.[38] This right is considered essential for ensuring that directors act in the best interests of the shareholders and the company as a whole.

The absence of specific grounds for removal can be seen as a reflection of this principle, as it gives shareholders broad discretion to remove directors for reasons they deem fit, without being constrained by predetermined criteria. This flexibility is important for shareholders to exercise their oversight role effectively and hold directors accountable for their actions. The prospect of being removed from office by shareholders acts as a deterrent for directors, making them aware that shareholders retain the right to remove them if they exhibit incompetence or engage in self-serving and opportunistic behaviour.[39]

Given that directors wield substantial discretion in managing the company, having a tangible incentive to put into focus the interests of shareholders becomes imperative. While this report does not delve into the debate on whether shareholder interests should be the top priority, it is important to note that directors owe their duties to the company and all its stakeholders, not just shareholders.[40] The prospect of removal by shareholders does however serve as a powerful motivator for directors to align their actions with shareholders' best interests, fostering a culture of accountability and responsible governance within the company.[41]

According to section 71(2) of the Act, notice of the meeting where a resolution for the removal of a director will be discussed must be given to the director facing potential removal.[42] Subsequently, the concerned director must be provided with an opportunity to make representations to the general meeting before any removal decision is reached.[43]

While the 1973 Act, along with the English and Australian companies legislation, allowed for the possibility of preparing and circulating written representations to shareholders before a meeting, the Act does not explicitly include provisions for written representations or their distribution.[44] Nonetheless, this absence does not prohibit the director in question from drafting

[38] Farouk H I Cassim 'The division and balance of power between the board of directors and the shareholders: The removal of directors' (2013) 29 *Banking and Finance LR* at 151.
[39] Mongalo T 'The Social and Ethics Committee Innovating Corporate Governance in South Africa' in Sjåfjell, B. & Bruner, C.M. (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (2019) at 260 – 272.
[40] Ibid.
[41] Farouk H I Cassim op cit note 38 at 151.
[42] See footnote 5.
[43] Caroline Ncube op cit note 8 at 39.
[44] Ibid.

a written response and requesting its circulation to shareholders ahead of the meeting.[45]The company retains the right to refuse such a request.

It is argued by some that the provisions related to written representations, as outlined in the previous Acts, should have been incorporated into the 2008 Act and made applicable to all types of removals.[46] Although directors must be afforded a reasonable opportunity to make a presentation, in person or through a representative,[47] others argue that written representations would have ensured that directors continue to benefit from the opportunity to provide written input before a decision on their removal is made.[48] However, mandating shareholders to consider written representations could potentially restrict their power to remove directors. This is because for directors to make a proper written representation against their removal, they would need to know the reasons why they are being removed. This would imply that shareholders would have to explicitly state their reasons.[49] This requirement would contradict the current provisions of the Act, which allow shareholders to remove directors with ordinary resolutions without providing reasons. Requiring shareholders to provide reasons would limit their rights and discretion in making removal decisions, potentially affecting the balance of powers between shareholders and directors as will be discussed below.

It is important to note that if the legislation intended for written presentations and reasons to be required, it would have explicitly mentioned it, as it did in the provisions dealing with removals of directors by the board as discussed below.

(b) Removal by the Board of Directors

Section 71(4) of the Act outlines the procedural requirements for board removal, specifying that a director facing potential removal must be given notice of the meeting, along with a copy of the relevant resolution.[50] Importantly, the notice must be accompanied by a *statement of reasons* for the resolution[51], detailed enough to enable the director to formulate a response. This provision goes beyond the English and Australian companies' legislation, which, while

[45] Caroline B Ncube op cit note 8 at 39 – 40.
[46] Caroline Ncube op cit note 8 at 50.
[47] Section 71(2)(b) of the Act.
[48] Ibid.
[49] *Pretorius* supra note 3 paras 10 and 11.
[50] See footnote 5.
[51] Section 71(4)(a) of the Act.

providing for notice to be given to directors, does not explicitly mandate sufficiently detailed reasons to accompany the notice.[52]

The inclusion of detailed reasons from the board to the director being removed in the notice under the Act serves to protect directors by ensuring they have the necessary information to prepare a response.[53] This is particularly important when the director in question is also an employee, as these provisions contribute to the fairness of a hearing that may lead to dismissal.[54] Consequently, the legislation not only safeguards directors but also ensures fairness in the removal process, thereby protecting companies by requiring them to conduct hearings in a just manner.[55] Additionally, the director seeking removal must be afforded a reasonable opportunity to make a personal presentation or use a representative at the board meeting before the resolution for removal is put to a vote[56].

The procedural disparities between board removal and shareholder removal of directors can be viewed as a deliberate mechanism to keep the balance of powers between shareholders and directors. While the board is subjected to stringent requirements, including detailed provision of reasons for potential removal and allowing the opportunity to make a personal presentation or use a representative at the board meeting, shareholders are not explicitly mandated to provide such detailed justifications.

This distinction in procedural requirements reflects the legislature's intent to acknowledge the different roles and responsibilities of shareholders and directors in the corporate hierarchy. Directors, as individuals responsible for the day-to-day operations and strategic decision-making of the company, are vested with more restrictive procedures during the removal process. On the other hand, shareholders, while vested with ultimate decision-making authority, are generally not as involved in the day-to-day management of the company. Therefore, the legislature may have intended to provide shareholders with a more straightforward and less restrictive process for the removal of directors, aligning with the principle of shareholder democracy and the practicalities of corporate governance.

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[52] Stephen Knight 'The removal of public company directors in Australia: time for Change?' (2007) 351 *C&S LJ* at 353; and Jean J du Plessis & James McConvil 'Removal of company directors in a climate of corporate collapses' (2003) 31 *Australian Business LR* at 251.

[53] Caroline Ncube op cit note 8 at 41.

[54] MS Blackman, R D Jooste, G K Everingham et al Commentary on the Companies Act (2011) 2 *Revision Service* at 8-26.

[55] Ibid.

[56] Section 74(4)(1)(b) of the Act.

By maintaining this distinction in procedural requirements, the Act upholds the balance of power between shareholders and directors, recognising the different levels of involvement and responsibility each group bears in the governance of the company.

The absence of a requirement for shareholders to furnish comprehensive justifications may be perceived as a potential source of unfairness in the removal process by some observers. Unlike the protective measures afforded to directors facing removal by the board, directors subjected to removal by shareholders may not receive the same level of information transparency, potentially limiting their ability to prepare a robust response. This asymmetry in procedural requirements may be viewed through different lenses being that it may be argued that it keeps the balance of power between directors and shareholders.[57]

[57] Rehana Cassim 'The Power to Remove Company Directors from Office: Historical and Philosophical Roots' (2019) 25 *Fundamina* at 50.

(c) Precedent-setting Cases: A Focus on Miller and Pretorius

The recent case of *Miller* in 2022, addressed the validity of removing a director by the company's shareholder. The Gauteng Local Division, Johannesburg court deliberated on three key issues.[58]

In this case, Mr Miller was appointed as a non-executive director of Natmed Medical Defence (Pty) Ltd ("Natmed") and Chalcid Pty Ltd ("Chalcid") in 2017. In October 2018, he resigned from Chalcid by agreement, and Natmed took over the director's fees that Chalcid was paying him. Disputes arose regarding outstanding director's fees and a discretionary bonus for the financial year ending February 2018. On 24 April 2019, Miller was notified of a telephonic shareholders' meeting scheduled for 30 April 2019, where his removal as a director of Natmed was proposed.[59]

The notice explicitly mentioned the waiver of the statutory notice period dictated by the Act and afforded Miller the chance to make representations, either personally or through a representative.[60] On April 29, 2019, Miller's attorney sent a letter alleging defects in the notice, pointing out Miller's challenges with conference calls.[61] The letter outlined several issues with the notice, indicating that it was flawed and violated specific provisions of the Act.[62] Additionally, it noted Miller's challenges with conference and video calls, citing occasional difficulties in hearing participants and experiencing communication interruptions.[63] Natmed responded on April 30, 2019, denying any breach and confirming the meeting's continuation.[64] Despite this, Miller did not attend the telephonic meeting, leading to the passing of a resolution for his removal.[65]

Miller contended that his removal violated section 71(2)(b) of the Act. He contended that he should have been provided with reasons for his removal in advance, which would have allowed him to prepare his response before the vote.[66] Additionally, he claimed that the notice period for the shareholders' meeting was shorter than the ten day as required by section 62(1)(b) of

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[58] Rehana Cassim 'Confusion in the removal of directors by shareholders under the Companies Act 71 of 2008: *Miller v Natmed Defence (Pty) Ltd*' (2022) 139 *SALJ* at 741.
[59] *Miller* supra note 2 para 25.
[60] Ibid.
[61] Ibid at para 26.
[62] Ibid.
[63] Ibid.
[64] Ibid at para 27.
[65] Ibid.
[66] Ibid at para 28.

the Act.[67] Lastly, he argued that the telephonic nature of the meeting breached section 63(2) of the Act. He sought an order nullifying the resolution and reinstating him with retrospective director's fees.[68]

First, the court considered whether a shareholder is required to provide reasons for the proposed resolution to remove a director under section 71 of the Act.[69] Secondly, the court considered whether a shorter notice period for the shareholders' meeting was legally acceptable.[70] Thirdly, the court examined the validity of a meeting that was conducted telephonically.[71]

The court determined that shareholders were not obligated to provide reasons in advance for a director's proposed removal.[72] It deemed the short notice period irrelevant, as Miller would not have taken the opportunity to make representations even with a longer notice.[73] The court also ruled that the telephonic meeting did not prejudice Miller, given his entitlement to instruct his attorney for participation.[74] Emphasising the breakdown of trust between Miller and the company, the court considered damages as the appropriate remedy for loss of office as a director, as per section 71(9) of the Act.[75] Consequently, Miller's request for reinstatement as a director with retrospective director's fees was dismissed by the court.

In the context of this report, our focus will be on the initial point addressed by the court, which emphasises that shareholders are not obligated to provide a reason when removing directors through an ordinary resolution.

As discussed under the previous heading, several procedural distinctions exist between the removal of a director by shareholders and removal by the board of directors. The authority wielded by shareholders, acting through a shareholders' meeting, in removing directors is notably broader and more discretionary compared to the company itself, acting through its board of directors.[76]

[67] Ibid at para 27,
[68] Rehana Cassim op cit note 58 at 743.
[69] Ibid at 741.
[70] Ibid.
[71] Ibid.
[72] Miller supra note 2 para 39.
[73] *Miller* supra note 2 para 40.
[74] *Miller* supra note 2 para 43.
[75] *Miller* supra note 2 para 44.
[76] Rahana Cassim op cit note 58 at 744.

As underscored by the court in *Miller*, directors essentially serve at the pleasure of the shareholders who elected them.[77] Consequently, shareholders retain the prerogative to remove directors at their discretion, particularly when the shareholders' support for the directors diminishes. In essence, section 71 aims to encapsulate the principles of shareholder democracy wherein shareholders have the prerogative to remove directors when their support wanes or when directors fail to align with shareholders' interests.[78] Section 71 of the Act, as highlighted in *Miller*, embodies these principles by providing a framework for the easier removal of directors by shareholders, ensuring that the governance of a company reflects the will of its shareholders.[79] This underscores the fundamental principle that directors are accountable to shareholders, and their tenure is subject to the shareholders' collective will.

While section 71(2) does not explicitly mandate shareholders to furnish directors with reasons for their proposed removal from office, it is noteworthy that in a precedent preceding the *Miller* case, specifically in the *Pretorius* case, the Western Cape Division, Cape Town, ruled that providing reasons for removal remains a requisite practice.[80]

In the *Pretorius* case, the applicants sought a declaration that the respondents unlawfully removed them as directors of PB Meat (Pty) Limited, violating the correct procedure under sections 71(1) and (2) of the Act.[81] The applicants, having built a meat business, sold it to the first respondent and partners. A loan agreement between the partnership and the company stipulated that the applicants would remain as directors until a loan was repaid. However, disputes arose, leading to attempts to remove the applicants and legal battles ensued. The shareholders' meeting to remove the applicants eventually took place, but the applicants contested the lack of reasons for their removal.[82]

The key question was the interpretation of section 71(2)(b) in that the court had to consider what was entailed by “affording a reasonable opportunity to make a presentation".[83] The court had to decide whether the shareholders provided a reasonable opportunity for the affected directors to be heard.

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[77] *Lee v Chou Wen Hsien* 1984 (1) WLR 1202 (PC) at 1206; *Jackson v Dear* 2014 (1) BCLC 186 para 33; see further Rehana Cassim 'An analysis of directors' fiduciary duties in the removal of a director from office' (2019) 30 *Stellenbosch LR* at 212.
[78] Farouk Cassim op cit note 38 at 154.
[79] *Steenkamp and Another v Central Energy Fund Soc Ltd and Others* 2017 SA 311 (WCC) para 31.
[80] *Pretorius* supra note 3 para 11.
[81] *Pretorius* supra note 3 para 2.
[82] *Pretorius* supra note 3 paras 3 and 4.
[83] *Pretorius* supra note 3 para 6.

The court observed that the attempts to remove the applicants were first through directors' meetings and later through shareholders. The argument was made that the shareholders need not provide reasons, but the court disagreed, asserting that affected directors have a statutory right to be heard and must be furnished with reasons for their removal.[84]

The court found that the respondents planned the removal without proper compliance with section 71 of the Act, acting in bad faith.[85] As a result, the resolutions to remove the applicants as directors were declared invalid and set aside.[86]

The court's rationale in *Pretorius* was founded on the interpretation of section 71(2)(b) of the Act. According to the court, the provision stipulating that the director must be given a reasonable opportunity to make a presentation should be construed as necessitating shareholders to furnish the director with reasons for the proposed removal resolution in advance.[87] It was stated that this pre-emptive provision serves the purpose of enabling the director to make representations and become aware of the information pertinent to the reasons for their intended removal, ensuring a fair and informed process.[88]

In *Miller*, the court expressly diverged from the decision in *Pretorius*. Contrary to the ruling in *Pretorius*, the court in *Miller* held that given section 71(1) does not mandate shareholders to provide a reason for desiring the removal of a director, shareholders cannot be compelled to furnish such reasons to directors in advance.[89] The court argued that this was not the legislative intent behind section 71(1).[90] Moreover, the court concluded that *Pretorius* had improperly employed the remedy of reading-in circumstances where the Act is clear, emphasising that such reading-in was unwarranted.[91]

It is argued that the court in *Miller* correctly interpreted the section by ruling that shareholders are not obligated to provide directors with reasons in advance for their removal, as it is not a legislative requirement. Arguably, imposing such a requirement could restrict the powers of shareholders and potentially upset the balance of power between directors and shareholders. Removal of directors is one of the key powers of shareholders and requiring them to provide reasons could hinder their ability to exercise this power effectively. Additionally, it is unlikely

[84] *Pretorius* supra note 3 paras 10 and 11.
[85] Ibid.
[86] *Pretorius* supra note 3 para 12.
[87] *Pretorius* supra note 3 para 10.
[88] *Pretorius* supra note 3 para 13,
[89] *Miller* supra note 2 para 39.
[90] Ibid.
[91] *Miller* supra note 2 para 33 and Rahana Cassim op cit note 58 at 746.

that the legislature intended to make it a requirement for shareholders to provide reasons, as it would impose additional burdens on shareholders without clear legislative mandate. Therefore, it is arguable that such a requirement would not align with the principles of shareholder democracy and the intended balance of powers between directors and shareholders.

While there is no statutory obligation, shareholders are not precluded from voluntarily offering reasons for the proposed removal.[92] This aligns with the court's ruling in *Miller*, which emphasised the principle that directors serve at the pleasure of shareholders.

When considering the precedential value of the cases, the distinction between the *Miller* and *Pretorius* cases arises from the fact that *Miller* was adjudicated by a single judge in the Gauteng Local Division, Johannesburg, while *Pretorius* was presided over by a single judge in the Western Cape Division, Cape Town.[93] According to the doctrine of judicial precedent, since both decisions were made by a single judge, the ruling in *Miller* does not automatically overrule that in *Pretorius*.[94] Consequently, *Miller* is binding in the Gauteng Local Division, Johannesburg, while *Pretorius* retains its binding status in the Western Cape Division, Cape Town. Resolving this inconsistency would necessitate a decision from a superior court.[95]

(d) The Division of Power between Directors and Shareholders

The importance of the roles of shareholders and directors in corporate governance, and the delicate balance of power between them, are crucial factors to consider when analysing the removal of directors from office. These aspects deserved more attention from the above courts in reaching their decisions.

Up until the close of the nineteenth century, a prevailing view held that the general meeting epitomised the company and served as its supreme organ.[96] During this era, directors were perceived merely as agents, accountable to the overarching authority of the company, embodied by the shareholders in a general meeting.[97]

[92] *Steenkamp* supra note 79 at para 4; also see Rehana Cassim 'Governance and the board of directors' in Farouk H I Cassim (eds) et al *Contemporary Company Law* 3 ed (2021) at 595.
[93] Rehana Cassim op cit note 58 at 746.
[94] Ibid.
[95] Ibid.
[96] *Isle of Wight Railway Co v Tahourdin* 1883 (25) ChD 320 (CA); Cilliers, HS & ML Benade *Corporate Law* 3 ed (2002) at 85; Keay 'A Company directors behaving poorly: Disciplinary options for shareholders' (2007) 6 *Journal of Business Law* at 657; and Davies PL & S Worthington Gower *Principles of Modern Company Law* 10 ed (2016) at 358.
[97] Rehana Cassim op cit note 57 at 39 – 40.

The powers bestowed upon directors were seen as a delegation from the shareholders, positioning them as agents subject to the control of the company's principals, namely the shareholders.[98] This conceptualisation led to the inference that directors operated under the direct oversight of shareholders during general meetings.[99] Consequently, it was believed that shareholders, through ordinary resolutions, retained the prerogative to issue instructions to directors on the exercise of their managerial powers.[100] This historical context reflects a paradigm in which shareholder authority was paramount, positioning the general meeting as the ultimate decision-making body within the company's governance structure.

Following the nineteenth century, a substantial transformation occurred in the perception of the dynamic between the general meeting and the directors.[101] Contrary to the earlier belief that shareholders possessed the authority to override management decisions and that the company operated exclusively for their benefit, a paradigm shift transpired.[102] The prevailing notion evolved to assert that, unless explicitly granted such authority by the company's constitution, shareholders in a general meeting could not wield control over the directors' exercise of their powers or engage in the exercise of powers specifically conferred upon the directors.[103] This marked a departure from the earlier understanding, rejecting the idea of unfettered shareholder control and emphasising a more nuanced and constitutionally bound distribution of powers.[104]

The introduction of section 66(1) in the current Act signified a profound shift in the foundational philosophy governing the distribution of power between directors and shareholders. This section emphasises a key principle that a company's business and affairs must be overseen by its board, which has the authority to exercise all the powers and perform the functions of the company, unless the Act or the company's memorandum of incorporation states otherwise.[105]

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[98] Aickin, KA ‘Division of power between directors and general meeting as a matter of law, and as a matter of fact and policy’ (1967) 5(4) *Melbourne University LR* at 449; and Rehana Cassim ‘op cit note 57 at 40.

[99] Davies & Worthington op cit note 96 at 358-359. Rehana Cassim ‘op cit note 57 at 41.

[100] Ibid.

[101] See Grantham, R ‘The doctrinal basis of the rights of company shareholders’ (1998) 57(3) *Cambridge LJ* at 560-578.

[102] Ibid.

[103] *Automatic Self-cleansing Filter Syndicate Company Limited v Cuninghame* 1906 (2) Ch 34 (CA); *The Gramophone & Typewriter Ltd v Stanley* 1908 (2) KB 89(CA); *Salmon v Quin and Axtens* Ltd 1909 (1) Ch 311 (CA); and *John Shaw & Sons (Salford) Ltd v Peter Shaw & John Shaw* 1935 KB 113 (CA) at 134.

[104] Goldberg, GD ‘Article 80 of Table A of the Companies Act 1948’ (1970) 33(2) *Modern LR* at 177; Blackman op cit note 54 at 286; Sullivan, GR ‘The relationship between the board of directors and the general meeting in limited companies’ (1977) 93 *Law Quarterly Review* at 569.

[105] Section 66(1) states that 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 the Act or the company’s Memorandum of Incorporation provides otherwise.

This provision marks a departure from previous understandings where the authority to manage was presumed to rest more implicitly within the general meeting of shareholders.[106] It establishes a clear statutory foundation for the authority of the board to exercise powers and perform functions on behalf of the company.

The ongoing delineation of powers between the board of directors and shareholders remains a fundamental aspect of contemporary company law. Since the inception of these principles in early common law, there has been a discernible erosion of shareholder rights.[107] Shareholders, over time, have witnessed a diminution of their control over the company's economic surplus. Furthermore, with the abolition of the ultra vires doctrine, they have relinquished control over the core business activities of the company.[108]

Furthermore, when considering the dilution of the powers of shareholders in a company we discussed above, that section 71 in the Act limits the kind of directors which may be removed by shareholders as well as introduces two new parties which also have that same power, the board and the Tribunal.

High-profile corporate collapses have highlighted a compelling need to reinforce shareholder democracy. The diminished control experienced by shareholders raises concerns about the potential consequences for corporate governance.[109]

This scenario underscores the delicate balance that modern company law strives to achieve between empowering boards for efficient management and preserving a meaningful role for shareholders in the democratic governance of corporations. Striking this balance is essential to mitigate the risks associated with attenuated shareholder control and to ensure that corporate decision-making aligns with the overarching goal of maximising shareholder value.

In contemporary company law, shareholders wield two pivotal powers that serve as the cornerstone of their influence. First, a fundamental and intrinsic right afforded to shareholders

[106] *Pretorius v PB Meat (Pty) Ltd* 2013 (83) ZAWCHC para 25; *Kaimowitz v Delahunt* 2017 (3) SA 201 (WCC) paras 12-13; Delport, P Henochsberg on the Companies Act 71 of 2008 (2011) Loose-leaf publication at 250(1)–262(5); Esser, I-M & P Delport 'Shareholder protection philosophy in terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* at 8-10; and Oosthuizen, JS & PA Delport 'Rectification of the securities register of a company and the oppression remedy' (2017) 80 *THRHR* at 244.
[107] Esser, I & M Havenga 'Shareholder participation in corporate governance' (2008) 22(1) *Speculum Juris* at 76.
[108] Jensen, MC & WH Meckling 'Theory of the firm: Managerial behaviour, agency costs and ownership structure' (1976) 3(4) *J of Financial Economics* at 308; and Rehana Cassim op cit note 57 at 52.
[109] Rehana Cassim op cit note 57 at 58.

is the ability to alter the company's constitution through a special resolution.[110] This power provides shareholders with a foundational mechanism to shape the fundamental principles and rules governing the company, offering a robust tool for expressing their collective will and steering the corporate direction. Secondly, an even more fundamental right vested in shareholders is the power to remove directors from office at any point.[111] Unlike some jurisdictions where such a power may be left to common law, in our statutory framework, this authority is expressly granted. This statutory provision empowers shareholders to exercise direct control over the composition of the board, reinforcing their influence in shaping corporate policies and activities.[112]

Both of these powers are strategically designed to be potent shareholder tools, providing effective means to oversee and influence the decisions made by the directors. The philosophy underpinning our corporate law regime emphasises that the shareholders' right to remove a director is not just elementary but also necessary for robust corporate governance.[113] The autonomy to remove a director should be regarded as an inherent and essential shareholder right, reinforcing the core principles of transparency, accountability, and democratic governance within the corporate structure.[114]

Section 71 is crafted to establish a fundamental and unassailable rule, rooted in the essential principle of separating ownership and control within public companies.[115] According to this provision, shareholders possess the authority to remove a director from office without cause, utilising the straightforward mechanism of an ordinary resolution. In essence, section 71 strives to encapsulate the very essence of shareholder democracy, recognising the importance of enabling shareholders to exercise their influence over corporate governance.

However, upon closer examination of the intricacies within section 71 of the Act, it becomes evident that the section may not be as robust or effective as its initial presentation suggests. Despite its purported intentions, section 71 is critiqued for potentially representing a further erosion of the fundamental rights of shareholders.[116]

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[110] Section 16(1) of the Act empowers shareholders to amend a company's constitution by way of a special resolution. This section states that "the memorandum of a company may be amended only by way of a special resolution of the shareholders of the company.
[111] Section 71 of the Act.
[112] Rehana Cassim op cit note 57 at 56.
[113] Ibid at 57
[114] Ibid.
[115] Ibid at 56 - 57
[116] Ibid.

The question of whether it is possible to maintain the delicate balance of powers between directors and shareholders becomes a significant consideration, particularly in light of the redistribution of power brought about by conferring the removal power on the board of directors as well as the Tribunal. It is argued that, following this shift, maintaining the power equilibrium between these organs may not be feasible in the same manner as it existed prior to the delegation of removal authority to the board.[117]

This influence is not solely contingent on the exercise of the removal power; rather, the mere presence of this authority can alter the balance of power.[118] While there may be merits in conferring the power of removal on the board, this delegation is not entirely aligned with the original rationale for empowering shareholders with the right to remove directors – a mechanism intended to provide shareholders with greater control over directors.[119]

There are instances wherein the exercise of the power of removal by the board of directors may be deemed beneficial. However, while there may be merits to conferring the power of removal on the board, this approach does not align with the original rationale for granting shareholders the right to remove directors.[120] The separation of ownership and control has led to attenuated shareholder control, and granting removal power to the board dilutes the incentive for directors to focus on the interests of shareholders. There is a delicate balance to strike between empowering the board to act in the best interests of the company and ensuring that shareholders retain a meaningful level of control and influence in the corporate governance structure.

Furthermore, the removal of a director appointed by shareholders, especially when seen as a representative of their interests, can have significant implications for the balance of power within a company. Directors appointed by shareholders often serve as a direct link between the shareholders and the board, acting as representatives of the shareholders' collective will and interests.[121] If the board of directors were to exercise the power of removal against a shareholder-appointed director, it could be perceived as diminishing shareholder control over the board. This action may be viewed as a shift in the delicate balance of power, potentially eroding the influence that shareholders exert through their appointed representatives on the board. To address this shift and strive for the proper balance between directors and

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[117] Ibid.
[118] Sirodoeva-Paxson, 'Judicial removal of directors: Denial of directors' license to steal or shareholders' freedom to vote?' (1999) 50(1) *Hastings LJ* at 48.
[119] Cartoon, BJ 'The removal of company directors' (1980) *The Journal of Business Law* at 17.
[120] Rehana Cassim op cit note 57 at 57.
[121] Ibid at 58; and Sirodoeva-Paxson op cit note 118 at 48.

shareholders, as mandated by section 7(i) of the Act[122], there is a need to carefully consider and assess the effectiveness and sufficiency of the provisions relating to director removal to prevent potential abuses of power while safeguarding the interests of shareholders.[123] Maintaining a harmonious balance between the board and shareholders is essential for effective corporate governance,[124] and actions that attenuate shareholder control could have broader implications for the overall governance structure and the trust between directors and shareholders.[125]

One significant feature of empowering shareholders lies in the absence of a mandate requiring them to provide explicit reasons for the removal of directors. By allowing shareholders to act without the need for exhaustive explanations, the provision introduces a measure of expediency into the process, enabling shareholders to swiftly respond to evolving circumstances or concerns without being unduly encumbered by procedural constraints.[126] This discretion not only streamlines the shareholder decision-making process but also serves as a potent tool, reinforcing shareholders' ability to assert their influence over the composition of the board.[127] It reflects a deliberate legislative choice to enhance the efficacy of shareholder democracy preserving a vital avenue for shareholders to actively shape the trajectory of corporate governance.

Directors who are removed from office, under section 71 of the Act, have several remedies available to them.[128] One primary remedy is the potential claim for damages against the company, particularly if the director had a fixed-term appointment and was removed before the expiration of that term.[129] This claim would be founded on the premise of contract violation. It is worth mentioning that according to common law, a director could only win a claim for damages due to dismissal if they were on a fixed-term contract that was ended prematurely without cause, and they had not breached the contract themselves leading to its termination.[130]

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[126] Hannigan, B *Company Law* 4 ed (2016) at 185.
[127] John Olson op cit note 19 at 782.
[128] Rahana Cassim 'Critical analysis of the judicial review procedures under section 71 of the Companies Act 71 of 2008'(2008) 30 *SA Merc LJ* at 303.
[129] Rahana Cassim 'A Critical Analysis on the Use of the Oppression Remedy by Directors Removed from Office by the Board of Directors Under the Companies Act 71 Of 2008' (2019) 30 *Obiter* at 155; Cilliers & Benade op cit note 97 para 9.31 Commentary at 8-286; and Henochsberg op cit note 16 at 422.
[130] Rehana Cassim op cit note 129 at 157 – 160.

This position is extended to statutory removals by section 71(9) of the Act. Where there has been no breach by the director, but the director has been removed nonetheless by shareholders in terms of the Act, such a director is entitled to damages.

The Act acknowledges the possibility of a director claiming damages not only for the loss of the directorship but also for the loss of any other office or appointment resulting from their removal as a director. For instance, under section 71(9)(b) of the Act, a director who held ex-officio directorships in other companies by virtue of their directorship in the company from which they were removed can potentially claim damages for the loss of those ex-officio directorships.[131]

The removal of a director who also holds an employment position, and whose employment is contingent upon their directorship, is considered a dismissal in the context of employment law.[132] This principle was affirmed in the case of *SA Post Office Ltd v Mampeul*.[133] The court in the above matter expressed that any action by the employer leading, directly or indirectly, to the termination of the employee's contract of employment qualifies as a dismissal under section 186(1)(a) of the Labour Relations Act ("LRA")[134]. The concept of constructive dismissal, recognised in section 186(1)(e) of the LRA, acknowledges situations where the employer's actions effectively result in the termination of the employment contract.[135]

In the specific case mentioned, the court highlighted that when the minister removed the individual from the company's board of directors, triggering an automatic and simultaneous termination of their employment contract with the company, this action constituted a dismissal.[136] The court emphasised that dismissal does not solely occur when the employer explicitly informs the employee of termination but extends to situations where the employer's actions lead to the automatic termination of the employment contract.[137]

The exploration of remedies available to directors following their removal serves as a critical reminder of the nuanced balance inherent in corporate governance dynamics. One pivotal

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[131] Ibid.
[132] Caroline Ncube op cit note 8 at 49.
[133] *SA Post Office Ltd v Mampeule* 2010 (10) BLLR 1052 (LAC).
[134] Labour Relations Act 66 of 1995.
[135] *SA Post Office Ltd* supra note 133 at para 28.
[136] See also *PG Group (Pty) Ltd v Mbambo NO & others* 2005 (1) BLLR 71 (LC) para 22–25; Michael Beaumont 'Executive directors — Are they employees?' (2005) 7(1) *Beaumont Express* 6 at 7–8; Michael Beaumont 'Loss of directorship — Does this amount to a dismissal?' (2009) 11(9) *Beaumont Express* 168; B P S van Eck and S Lombard 'Dismissal of executive directors: comparing principles of company law and labour law' 2004 *TSAR* 20.
[137] *SA Post Office Ltd* supra note 133 para 28.

aspect to underscore is that these remedies act as a safeguard, particularly when directors believe they have been wrongfully removed by shareholders.[138]

Importantly, the absence of a mandate for shareholders to provide reasons for removal does not inherently render the removal unfair. Instead, it underscores the principle of shareholder autonomy. The remedies available to directors, including the right to seek damages, serve as a crucial check and balance mechanism.[139] They not only protect directors from arbitrary or unjustified removals but also emphasise the need for shareholders to exercise their removal powers judiciously. It becomes apparent that the remedies serve as a counterweight to the authority vested in shareholders, adding layers of accountability and ensuring that the removal process adheres to principles of fairness and transparency.

[138] Rahana Cassim 'Contesting the removal of a director by the board of directors under the Companies Act' (2016) 133(1) *SALJ* at 159.
[139] See R P Austin & I M Ramsay Ford's *Principles of Corporations Law* 14 ed (2010) at 263.

IV. CONCLUSION AND RECOMMENDATIONS

This research has delved into the multifaceted landscape of director removal within the South African legal framework, with a particular focus on the 1973 Act and the transformative implications brought forth by the 2008 Act. The historical context has illuminated the evolution of regulations governing director removal, showcasing the dynamic nature of corporate governance.

This report has discussed that section 71 of the Act highlights the intricate balance of powers between shareholders and directors in the corporate governance framework through the power of director removal. It focused on shareholders' rights to appoint and remove directors, ensuring that directors act in the best interests of the company and its shareholders. The absence of specific grounds for removal by shareholders provides flexibility, enabling shareholders to remove directors for reasons they deem fit, without being constrained by predetermined criteria. This flexibility, coupled with the prospect of removal, serves as a powerful motivator for directors to align their actions with shareholders' best interests, fostering a culture of accountability and responsible governance.

The impact on shareholder rights, especially the limitations imposed by the granting of wide removal powers to the board and the Tribunal, challenges the traditional authority shareholders wielded in director removal through ordinary resolution. However, the distinction in procedural requirements between board and shareholder removal reflects the legislature's intent to acknowledge the different roles and responsibilities of shareholders and directors. Directors, responsible for day-to-day operations, face more stringent requirements, while shareholders, with ultimate decision-making authority, have a more straightforward process.

The divergence in court rulings, exemplified by *Miller* and *Pretorius*, has brought to light the need for clarity in the requirements surrounding the removal of directors. While the *Miller* case argued that shareholders are not obliged to provide reasons for removal, contrasting with *Pretorius*, which stressed the importance of advanced reasons. The lack of a unified stance leaves room for ambiguity.

The availability of remedies for directors following their removal serves as a crucial safeguard, ensuring fairness and accountability in the corporate governance structure. These remedies act as a counterbalance to shareholder authority, emphasising the checks in place during exercise of removal powers.

There are a few points that can be raised for future recommendations in light of this report. First, to avoid discrepancies in legal interpretation, an amendment to section 71 may be considered to explicitly outline whether shareholders are required to furnish directors with reasons in advance for their removal. This would provide a clearer framework for both shareholders and directors.

Secondly, the board's and Tribunal's authority to remove a director deserves careful consideration. Ensuring that the board and Tribunal exercise this power in alignment with the company's best interests without diminishing the shareholders' power could enhance corporate governance.

Lastly, given the conflicting interpretations in different jurisdictions, a superior court decision is necessary to provide a consistent and authoritative stance on whether shareholders are obligated to provide reasons for director removal. This would contribute to legal certainty and uniformity in application.

In essence, the evolving landscape of director removal necessitates a fine balance between empowering shareholders and maintaining effective corporate governance. The Act may benefit from periodic reviews to address emerging challenges and ambiguities to prevent potential abuses of power and ensure effective corporate governance.

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