

CORPORATE & COMMERCIAL ALERT

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CLIFFE DEKKER HOFMEYR

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Shareholders' discretion to remove directors: Are shareholders required to give reasons?

In the recent judgment handed down by the Gauteng Local Division (Johannesburg) of the High Court, in the matter *Miller v Natmed Defence (Pty) Ltd* (18245/2019) [2021] ZAGPJHC 352 (24 August 2021), the court confirmed the long-held view that the shareholders of a company are not required to give reasons for their decision to remove a director pursuant to sections 71(1) and 71(2) of the Companies Act 71 of 2008 (Companies Act).

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Shareholders' discretion to remove directors: Are shareholders required to give reasons?

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RELEVANT PROVISIONS OF THE COMPANIES ACT

In brief, section 71(1) of the Companies Act states that, subject to section 71(2), a director of a company 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.

Section 71(2) sets out the procedural requirements relevant to the removal of a director, and states that before the shareholders may consider a resolution contemplated in section 71(1):

- the director concerned must be given notice of the shareholders' meeting and the resolution (at least equivalent to that which a shareholder is entitled to receive); and
- the director must be afforded a reasonable opportunity to make a presentation in person or through a representative, to the shareholders' meeting, before the resolution is put to a vote.

Sections 71(1) and 71(2) are unalterable provisions of the Companies Act, which means that despite anything to the contrary in the company's memorandum of incorporation, or rules, or any agreement between the company and a director or between the shareholders and a director, sections 71(1) and 71(2) will prevail.

MILLER CASE

The applicant (Mr Miller) in this matter approached the court for an order to, among other things, set aside the decision by the shareholder of the first respondent (the company) to remove Miller as a director of the company, due to alleged non-compliance by the shareholder with the Companies Act.

In particular, Miller contended that his removal as a director was in breach of section 71(2)(b) of the Companies Act, for the following reasons:

- he was not given any reasons as to why his removal was proposed, in order to enable him to make representations;

- the notice to remove him was given short of the statutorily required period of 10 business days;
- the shareholders' meeting that was held to consider the resolution to remove him was held telephonically and in breach of section 63(2) of the Companies Act; and
- the notice of the meeting was given less than 10 business days before the meeting, in breach of section 62(1)(b) of the Companies Act.

For the purposes of this alert, we will only focus on the first two items. Our colleagues, Yaniv Kleitman and Neha Dhana, recently published an alert setting out the pressure points and hurdles when removing a director by the shareholders, and their [alert](#) unpacks considerations to keep front of mind, including procedural matters relevant to the shareholders' meetings.

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The court in its reasoning noted that section 71 of the Companies Act distinguishes between instances where the shareholders of a company remove a director and instances where the directors of a company remove a director. In the case of the latter, the Companies Act, in section 71(3), requires that the concerned director be provided with a statement setting out the reasons for the proposed resolution to remove them.

On the contrary, sections 71(1) and 71(2) of the Companies Act does not contain language obliging the shareholders to provide the concerned director with a statement setting out the reasons for the proposed resolution. The court further held that:

- the legislature has deliberately preserved the right of the majority shareholders to remove a director who they no longer support;

- directors serve at the behest of the shareholders who elected them; and
- the shareholders can remove directors at will without having to provide reasons.

The court further voiced its disagreement with the finding by the Western Cape Division (Cape Town) of the High Court in the Pretorius and *Another v Timcke and Others* (15479/14 [2015] ZAWCHC 215 (2 June 2015) judgment, that the requirement that the director be afforded "*reasonable opportunity to make a presentation*", as set out in section 71(2)(b) of the Companies Act, must be read to require that reasons for the proposed removal be given to the concerned director prior to the decision being taken.

Regarding the issue of short notice, the court held that the short notice did not prejudice Miller to such an extent that it would warrant setting aside the shareholder's decision in exercising a statutory right that they possessed (i.e. the right to remove a director). It's worth noting that the court found that there is nothing in section 71 of the Companies Act that would deprive Miller of the right that he may have in common law or otherwise to claim damages for loss of office as a director for non-compliance with the required notice period.

The court went one step further and stated that even if it was incorrect in finding that it was competent for the shareholder to remove Miller as a director without having to give reasons in advance for its decision, Miller could not insist on remaining a director of the company when the shareholder no longer had trust that he could conduct the affairs of

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the company to the shareholder's liking. The court held that the latter was evidenced by the facts in this matter (i.e. the dispute over salary and bonuses), which illustrated that the relationship of trust between the shareholder and Miller had broken down irretrievably. In this instance, the court held that the appropriate remedy for Miller would be a claim for damages for loss of office as a director, as contemplated in section 71(9) of the Companies Act.

FINAL OBSERVATIONS

Although the judgment in Miller is a welcomed departure from the judgment in the Pretorius case, it must be noted that the two judgments were handed down in different divisions of the High Court. Accordingly, each judgment will be authoritative and binding in its respective division, and only constitute a persuasive source of law in the other divisions of the High Court.

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2021 WINNERS OF M&A DEAL FLOW 2021

2021

1st by M&A Deal Flow.
2nd by General Corporate Finance Deal Flow.
2nd by BEE Deal Value.
3rd by General Corporate Finance Deal Flow.
3rd by BEE Deal Flow.
4th by M&A Deal Value.

2020

1st by M&A Deal Flow.
1st by BEE Deal Flow.
1st by BEE Deal Value.
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2nd by General Corporate Finance Deal Value.
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2019

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1st by General Corporate Finance Deal Flow.
2nd by M&A Deal Value.
2nd by M&A Deal Flow.

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OUR TEAM

For more information about our Corporate & Commercial practice and services in South Africa and Kenya, please contact:



Willem Jacobs

Practice Head
Director
Corporate & Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@cdhlegal.com



David Thompson

Deputy Practice Head
Director
Corporate & Commercial
T +27 (0)21 481 6335
M +27 (0)82 882 5655
E david.thompson@cdhlegal.com



Sammy Ndolo

Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com

Roelof Bonnet

Director
T +27 (0)11 562 1226
M +27 (0)83 325 2185
E roelof.bonnet@cdhlegal.com

Tessa Brewis

Director
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Etta Chang

Director
T +27 (0)11 562 1432
M +27 (0)72 879 1281
E etta.chang@cdhlegal.com

Vivien Chaplin

Director
T +27 (0)11 562 1556
M +27 (0)82 411 1305
E vivien.chaplin@cdhlegal.com

Clem Daniel

Director
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Jenni Darling

Director
T +27 (0)11 562 1878
M +27 (0)82 826 9055
E jenni.darling@cdhlegal.com

André de Lange

Sector head
Director
Agriculture, Aquaculture
& Fishing Sector
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

John Gillmer

Joint Sector head
Director
Private Equity
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Johan Green

Director
T +27 (0)21 405 6200
M +27 (0)73 304 6663
E johan.green@cdhlegal.com

Ian Hayes

Director
T +27 (0)11 562 1593
M +27 (0)83 326 4826
E ian.hayes@cdhlegal.com

Peter Hesseling

Director
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesseling@cdhlegal.com

Quintin Honey

Director
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Brian Jennings

Director
T +27 (0)11 562 1866
M +27 (0)82 787 9497
E brian.jennings@cdhlegal.com

Rachel Kelly

Director
T +27 (0)11 562 1165
M +27 (0)82 788 0367
E rachel.kelly@cdhlegal.com

Yaniv Kleitman

Director
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Justine Krige

Director
T +27 (0)21 481 6379
M +27 (0)82 479 8552
E justine.krige@cdhlegal.com

OUR TEAM

For more information about our Corporate & Commercial practice and services in South Africa and Kenya, please contact:

Johan Latsky

Executive Consultant
T +27 (0)11 562 1149
M +27 (0)82 554 1003
E johan.latsky@cdhlegal.com

Nkcubeko Mbambisa

Director
T +27 (0)21 481 6352
M +27 (0)82 058 4268
E nkcubeko.mbambisa@cdhlegal.com

Nonhla Mchunu

Director
T +27 (0)11 562 1228
M +27 (0)82 314 4297
E nonhla.mchunu@cdhlegal.com

William Midgley

Director
T +27 (0)11 562 1390
M +27 (0)82 904 1772
E william.midgley@cdhlegal.com

Tessmerica Moodley

Director
T +27 (0)21 481 6397
M +27 (0)73 401 2488
E tessmerica.moodley@cdhlegal.com

Anita Moolman

Director
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@cdhlegal.com

Francis Newham

Executive Consultant
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@cdhlegal.com

Gasant Orrie

Cape Managing Partner
Director
T +27 (0)21 405 6044
M +27 (0)83 282 4550
E gasant.orrie@cdhlegal.com

Verushca Pillay

Director
T +27 (0)11 562 1800
M +27 (0)82 579 5678
E verushca.pillay@cdhlegal.com

David Pinnock

Joint Sector head
Director
Private Equity
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Allan Reid

Joint Sector Head
Director
Mining & Minerals
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Megan Rodgers

Sector Head
Director
Oil & Gas
T +27 (0)21 481 6429
M +27 (0)79 877 8870
E megan.rodgers@cdhlegal.com

Ludwig Smith

Director
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Tamarin Tosen

Director
T +27 (0)11 562 1310
M +27 (0)72 026 3806
E tamarin.tosen@cdhlegal.com

Roxanna Valayathum

Director
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Roux van der Merwe

Director
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@cdhlegal.com

Andrew van Niekerk

Head of Projects & Infrastructure
Director
T +27 (0)21 481 6491
M +27 (0)76 371 3462
E andrew.vanniekerk@cdhlegal.com

Charl Williams

Director
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@cdhlegal.com

Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

Emma Hewitt

Practice Development Director
T +27 (0)11 562 1635
E emma.hewitt@cdhlegal.com

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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