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REMOVAL OF A DIRECTOR BY SHAREHOLDERS – TO GIVE REASONS OR NOT TO GIVE REASONS?

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CDH
CLIFFE DEKKER HOFMEYR

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The Companies Act does not prescribe any grounds for the removal of a director by shareholders. The shareholders are not required to have any particular reason to remove a director – it is the right of the majority of them to do so.

For convenience, the relevant provisions of s71 read as follows:

71. Removal of directors:

(1) 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).

(2) 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.

Thus, in terms of s71(1), a director may be removed from the board of directors by means of an ordinary resolution passed by the shareholders in a shareholders' meeting, despite anything to the contrary in the company's Memorandum of Incorporation, rules, or any agreement between the company, its shareholders and directors (subject, of course, to the correct procedure being followed for the convening of shareholders' meetings).

The Companies Act does not prescribe any grounds for the removal of a director by shareholders. The shareholders are not required to have any particular reason to remove a director – it is the right of the majority of them to do so. This is because "directors serve at the pleasure of shareholders" and consequently, shareholders may effect removals without cause (see John E Moye The Law of Business Organisations (2004) 166). It is also for this reason that the substance of a decision by the majority of shareholders to remove a director from the board of directors is not subject to review by a court. In other words, it is not open to the courts to second-guess the decisions of the majority of shareholders, save perhaps in cases where the shareholders have acted fraudulently or in bad faith.

CDH
CLIFFE DEKKER HOFMEYR

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The Pretorius case concerned the removal of the directors of a company by its shareholders in terms of s71 of the Companies Act.

But what of the notice provisions contained in s71(2)? What suffices for purposes of giving a director "notice" of a resolution proposing their removal? And what constitutes a "reasonable opportunity to make a presentation"?

The *Pretorius* case

The decision of the Western Cape High Court in *Johannes Jacobs Pretorius & 1 Other v Steven Edward Timcke & 3 Others*, case number 15479/2014 (as yet unreported) concerned the removal of the directors of a company by its shareholders in terms of s71 of the Companies Act. The shareholders gave notice to the directors of their intention to remove them by way of a resolution, and their removal followed. However, the directors challenged the procedure followed, contending that although they had received notice, the notice did not state the grounds on which the shareholders proposed to remove them.

The Western Cape High Court held that the notice was defective (and thus the resolution for the removal of the directors was invalid), in that it did not comply with s71(2) of the Companies Act. In doing so the court affirmed the distinction drawn by the legislature between the removal of directors by the shareholders of a company and instances where the board seeks to remove a director (the former being less onerous). However, the court held that the requirement that the director be afforded a "reasonable opportunity to make a presentation" is to be interpreted as requiring the shareholders to furnish the director concerned with the reason or reasons for the proposed resolution in advance, in order to properly make a presentation at the meeting.

In our respectful view, the court did not adequately explain how s71(2) is capable of being interpreted in this manner (particularly in view of the express provisions of s71(3) which provide for this requirement in relation to the removal of directors by the board). Nor did the court clearly explain how the section is capable of satisfying the test for reading-in. In *Rennie NO v Gordon* 1988 (1) SA 1 (A), Corbett, JA (as he then was) expressed the test for interpretation in the statutory context as follows: "words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands". The court also did not explain how, if no reasons are required by the majority of shareholders, they are nevertheless obliged to give reasons in advance. This begs the question: why interpret s71(2) in this manner if the legislature did not expressly provide for it, but did so in s71(3)?

The court placed reliance on the decision in *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 CC, where the Constitutional Court held that the principles of natural justice dictate that, in the absence of reasons, the applicants could not possibly have been afforded a proper hearing and, as such, could not place facts or evidence which could have a bearing on the decision of the shareholders. The court concluded that s71(1) and s71(2) require shareholders to give reasons to directors so they are afforded an opportunity to make presentations as to why they should not be removed.

However, the *Motau* case is distinguishable from the *Pretorius* case, and, in our opinion, the court's reliance on it was misplaced. *Motau* concerned the application of s71(2)

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of the Companies Act read together with s8(c) of the Armament Corporation of South Africa Limited Act, No 51 of 2003 (Armscor Act). Section 8(c) of the Armscor Act entitles the Minister of Defence and Military Veterans to dismiss the services of a board member on "good cause". In other words, s8(c) of the Armscor Act introduced the threshold of "good cause" for the removal of a director, requiring the director to be given an adequate opportunity to address why this was not met in a particular case.

It is correct that s71(2) introduces a notice procedure and affords a director the opportunity to make a presentation. However, we disagree with an interpretation of s71(2) of the Companies Act that requires shareholders to provide directors with reasons for their removal.

Conclusion

The *Pretorius* judgment was not taken on appeal. It is therefore binding in the Western Cape, unless a full bench of the Western Cape High Court, or the Supreme Court of Appeal rules differently in another similar matter.

As matters stand, shareholders are thus required to provide reasons to directors in advance of a meeting proposing their removal. However, it will be interesting to track the impact of the *Pretorius* judgment on similar cases in the future as it remains to be seen whether this interpretation of s71(2) of the Companies Act is legally sustainable.

Justine Krige and Samantha Matjila

CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:

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

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

Mmatiki Aphiri
Director
T +27 (0)11 562 1087
M +27 (0)83 497 3718
E mmatiki.aphiri@cdhlegal.com

Chris Baird
Director
T +27 (0)11 562 1556
M +27 (0)82 544 4988
E chris.baird@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

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
Director
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Werner de Waal
Director
T +27 (0)21 481 6435
M +27 (0)82 466 4443
E werner.dewaal@cdhlegal.com

Rafael Eliasov
Director
T +27 (0)11 562 1866
M +27 (0)61 268 8797
E rafael.eliasov@cdhlegal.com

Lilia Franca
Director
T +27 (0)11 562 1148
M +27 (0)82 564 1407
E lilia.franca@cdhlegal.com

John Gillmer
Director
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Sandra Gore
Director
T +27 (0)11 562 1433
M +27 (0)71 678 9990
E sandra.gore@cdhlegal.com

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

Allan Hannie
Director
T +27 (0)21 405 6010
M +27 (0)82 373 2895
E allan.hannie@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

Roelf Horn
Director
T +27 (0)21 405 6036
M +27 (0)82 458 3293
E roelf.horn@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

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

Badian Maasdorp
Director
T +27 (0)11 562 1777
M +27 (0)82 924 8429
E badian.maasdorp@cdhlegal.com

Banzi Malinga
Director
T +27 (0)11 562 1100
M +27 (0)82 469 5758
E banzi.malinga@cdhlegal.com

Giada Masina
Director
T +27 (0)11 562 1221
M +27 (0)72 573 1909
E giada.masina@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

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

Jo Neser
Director
T +27 (0)21 481 6329
M +27 (0)82 577 3199
E jo.neser@cdhlegal.com

Francis Newham
Director
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
Director
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Allan Reid
Director
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

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

Ben Strauss
Director
T +27 (0)21 405 6063
M +27 (0)72 190 9071
E ben.strauss@cdhlegal.com

Deepa Vallabh
Head: Cross-border M&A,
Africa and Asia
Director
Corporate and Commercial
T +27 (0)11 562 1188
M +27 (0)82 571 0707
E deepa.vallabh@cdhlegal.com

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

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

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

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