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Corporate & Commercial ALERT

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In instances where a director does not act in the company's best interests, the danger of causing reputational harm arises. It is commonplace for the solution to lie in the removal of the director(s) from the board of a company by way of a shareholders' resolution.

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CLIFFE DEKKER HOFMEYR

INCORPORATING
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Shareholders take heed: The removal of a director where a shareholder has questioned a meeting

In instances where a director does not act in the company's best interests, the danger of causing reputational harm arises. It is commonplace for the solution to lie in the removal of the director(s) from the board of a company by way of a shareholders' resolution.

Relevant provisions of the Companies Act

Shareholders have the power to keep directors accountable for their actions and, if necessary, to remove directors from the board. Section 65(3) of the Companies Act 71 of 2008 (Companies Act), for instance, provides a mechanism for **two** shareholders of a company to propose a resolution on **any** matter on which they are entitled to exercise a vote, once a shareholders' meeting has been requisitioned (or requested) in terms of section 61(3) of the Companies Act. Section 65(3) of the Companies Act stipulates the following:

*"Any **two** shareholders of a company:*

- (a) may propose a resolution concerning any matter in respect of which they are each entitled to exercise voting rights; and*

(b) when proposing a resolution, may require that the resolution be submitted to shareholders for consideration:

- (i) at a meeting demanded in terms of section 61(3)..."*
(emphasis ours)

Section 61(3) of the Companies Act, which is referenced in this extract, provides that a board of a company must call a shareholders' meeting if one or more written and signed demands are delivered. The demand must describe the specific purpose for which the meeting is proposed and in aggregate, demands for substantially the same purpose must be made and signed by the holders of at least 10% of the voting rights entitled to be exercised in relation to the proposed matter to be discussed at the meeting. The removal of directors may accordingly fall under the ambit of matters on which resolutions may be proposed, in terms of section 65(3) of the Companies Act.



Cliffe Dekker Hofmeyr

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Shareholders take heed: The removal of a director where a shareholder has questioned a meeting

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Section 71(1) of the Companies Act is the go-to mechanism when a shareholder has the need to remove a director. It provides that a director may be removed from office by way of a shareholders' resolution passed at a shareholders' meeting. Assuming that the correct procedures have been followed, this may be done despite anything to the contrary stipulated in the company's memorandum of incorporation, rules, or any agreement between the company, its shareholders, and a director. Section 65(3) and section 61(3) of the Companies Act have, however, recently come under scrutiny by the High Court (in the context of the removal of a director) in the matter of *Foxvest Group (Pty) Ltd and Another v Rocky Park Holdings (Pty) Ltd and Others (2022/2807)* [2023] ZAGPJHC 63 (27 January 2023).

The Foxvest case

This case involves the requisition of a shareholders' meeting in relation to Rocky Park Holdings Proprietary Limited terms of section 61(3) of the Companies Act to remove a director (Mr Blarney) from office due

to alleged fraudulent misconduct. The shareholders of the company in this case, were Rocky Park Holdings (respondent) and Foxvest Group (applicant) who respectively held 51% and 49% of the issued share capital in the company. On the day of the requisitioned shareholders' meeting, neither Blarney nor the applicant were in attendance. In the absence of the applicant (i.e. the minority shareholder) the respondent proceeded to adopt an ordinary shareholders' resolution to remove Blarney in terms of section 71 of the Companies Act.

The applicant relied on the respondent's failure to comply with section 65(3) of the Companies Act in an attempt to set aside the resolution passed by the respondent to remove Blarney as a director of Rocky Park Holdings Proprietary Limited. It contended that it was insufficient for only one shareholder to remove Blarney when section 65(3) of the Companies Act clearly stipulates that two shareholders should have proposed the resolution for consideration at a meeting demanded in terms of section 61(3)

of the Companies Act. In contrast, the respondent relied on section 71(1) of the Companies Act. The court ruled in favour of the applicant and held that in order to remove Blarney as a director, an ordinary resolution must be passed that complies with the provisions of section 65(3) of the Companies Act, i.e. two shareholders must have proposed such a resolution following the requisition of such meeting in accordance with section 61(3) of the Companies Act.

Observations and conclusion

In light of this judgment, where a company has two shareholders, a director cannot be removed by a single majority shareholder that proposes such a resolution following the requisition of such meeting in accordance with section 61(3) of the Companies Act. The resolution must be proposed and supported by two shareholders of a company in compliance with section 65(3) of the Companies Act.

**Shanna Eeson and
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