

CORPORATE & COMMERCIAL ALERT

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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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1st by M&A Deal Flow.
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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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