

# Shareholders Removal of a Director in a Company

By **Robert January** (Senior Associate),  
and **Ofentse Setoaba** (Candidate Attorney)

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## INTRODUCTION

The Companies Act, No 71 of 2008 (“Companies Act”) was introduced *inter alia* to provide for the organisation and management of companies, to define the relationships between companies and its respective shareholders or members and directors.<sup>1</sup> This article considers the process set out in the Companies Act for shareholders of a company to remove one of its directors.

## THE COMMON LAW POSITION

At common law a director may be removed by ordinary resolution of the shareholders where the company’s memorandum of incorporation is silent as to the director’s term of office.<sup>2</sup>

## REMOVAL IN TERMS OF SECTION 71(1) and (2) OF THE COMPANIES ACT

Section 71 of the Companies Act provides that a director may be removed by the shareholders (under section 71(1) and (2)) or by the board of directors (under section 71(3)) of a Company.

The procedure for the removal of a director by shareholders is set out in section 71(1) and (2) of the Companies Act, which provides that:

1. a director may be removed at a shareholders’ meeting by an ordinary resolution adopted by the persons who are entitled to exercise voting rights in an election of that director.
2. Before the shareholders may consider the proposed resolution, the director in question must be -
  - a. given notice of the meeting and the resolution for the removal, which notice must at least be equivalent to that which a shareholder is entitled to receive, for a shareholders meeting, regardless of whether the director is a shareholder of the company or not; and
  - b. afforded a reasonable opportunity, before the proposed resolution is put to a vote, to make a presentation / representations to the meeting, either in person or through a representative.

The Constitutional Court, in *Minister of Defence and Military Veterans v Motau and Others* (CCT 133/13) [2014] ZACC 18, held that the removal of two directors of the Armscor board by the Minister of Defence and Military Veterans was unlawful because the Minister had not followed the procedural requirements set out in section 71(1) and (2) of the Companies Act.

In *Steenkamp and Another v Central Energy Fund SOC Ltd and Others* 2018 (1) SA 311 (WCC)[para 31], the Western Cape High Court held that:

*“It would also appear that the shareholders of a company, acting through a shareholders’ meeting, have a wider discretion or power to remove directors than does the company itself acting through its board of directors. In the case of the board it would appear to be a requirement for the removal of a director that he or she has become ineligible in terms of s 69 of the Companies Act, or disqualified or incapacitated or has neglected or been derelict in the performance of his or her functions as a director. Section 71(3) is not made directly applicable to shareholders acting through a shareholders meeting as provided by s 71(1) and (2). Be that as it may, there will obviously be cases where the shareholders are of the view, for example, that a director has neglected or been derelict in the performance of his or her functions as a director and that this provides grounds for his or her removal.”*

## REQUIREMENT FOR THE REMOVAL OF A DIRECTOR

The requirements for the removal of a director in terms of section 71(1) and (2) of the Act are summarised in item 1 of Practice Note 40 of 2015, which provide as follows:

*“1. A director may be removed by an ordinary resolution adopted at a shareholders’ meeting by persons entitled to vote in an election of directors; with the following additional supporting documents.*

- a. *Proof that a notice was sent to the director concerned;*
- b. *Attendance register; and*
- c. *Certified copy of the share register.”*

## CONCLUSION

Should the company's shareholders fail to comply with the procedure of section 71(1) and (2) of the Companies Act and the requirements of Practice Note 40 of 2015, the removal will be unlawful and the removed director may bring an application to the relevant court for the removal to be reviewed and set aside, to be reinstated as a director and for and any compensation the director might be entitled to.

*Please note: this article is for general public information and use. It is not to be considered or construed as legal advice. Each matter must be dealt with on a case-by-case basis and you should consult an attorney before taking any action contemplated herein.*

<sup>1</sup>Companies Act preamble.

<sup>2</sup>LAWSA, Second Edition, 2014, Volume 4 (Part 2), paragraph 91.



**Robert January**  
(Senior Associate)



**Ofentse Setoaba**  
(Candidate Attorney)