

SOUTH AFRICA / JUDGMENT

Weir v Wiehahn Formwork Solutions (Pty) Ltd and Others (19494/2024) [2025] ZAWCHC 74; [2025] 2 All SA 938 (WCC); 2025 (4) SA 637 (WCC) (4 March 2025) [2025] ZAWCHC 74

COURT

Western Cape High Court, Cape Town

BEFORE

Holderness

CASE / FILE NUMBER

19494/2024

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FLYNOTES: COMPANY

– Director – Removal – Whether
shareholders required to provide reasons for intended removal in
advance of shareholders meeting
– Applicant seeking
declarator that resolution be declared invalid – Reasons
given when resolution proposed –
Applicant had reasonable
opportunity to make presentation before resolution put to a vote –
Also given reasons prior
to meeting – Application dismissed
– Companies Act 71 of 2008, ss 71(1) and (2).

IN THE HIGH COURT OF

SOUTH AFRICA

(WESTERN CAPE

DIVISION, CAPE TOWN)

Case No: 19494/2024

In the matter between: JONATHAN PHILIP
 WEIR
 Applicant
 and
 WIEHAHN FORMWORK
 SOLUTIONS (PTY) LTD
 First Respondent
 P & R FORMWORK
 CC
 Second Respondent
 PR WIEHAHN (PTY) LTD
 Third Respondent

Date of Hearing: 27 February 2025

Date of Judgment: 4 March 2025

Coram: Holderness
 J

JUDGMENT

HOLDERNESS J

Introduction

- [1] The issue to be determined in this application is whether shareholders seeking the removal of a director, in terms of sections 71(1) and (2) of the Companies Act, 71 of 2008 ('the Act'), are required to provide the director with reasons for his intended removal in advance of the shareholders' meeting, to give effect to his right in terms of section 71(2) to be afforded a reasonable opportunity to make representations at such meeting, before the resolution is put to a vote.
- [2] The principal relief sought by the applicant is a declarator that a resolution in terms of section 71(1) and (2) of the Act ('the resolution') to remove Mr Weir as a director of the Company passed by the first respondent, Wiehahn Formwork Solutions (Pty) Ltd ('Wiehahn Formwork') and the second respondent, P & R Formwork ('P & R Formwork') as the shareholders of the third respondent, PR Wiehahn (Pty) Ltd ('the Company'), be declared invalid and set aside.

Salient facts

- [3] Mr Weir was an executive director of the Company. He was formerly employed by the Company as a contracts manager.

- [4] On 13 June 2024 the Company gave Mr Weir notice of a shareholders' meeting ('the notice') to take place at 11h00 on 2 July 2024 ('the meeting') to discuss his removal as a director of the Company. Mr Weir was further informed that by virtue of section 71(2)(b) of the Act, he or his legal representative may attend the meeting to make representations regarding his proposed removal as director. Copies of the proposed shareholders' resolution for adoption at the meeting and the agenda for the meeting were annexed to the notice.
- [5] On 14 June 2024, Mr Weir in an email to Mr Craig Bradnick ('Mr Bradnick'), an executive director of the Company and a shareholder and director of Wiehahn Formwork (which holds 50% of the issued shares in the Company), requested reasons for his intended removal.
- [6] Mr Bradnick declined to provide the requested reasons. He informed Mr Weir, in an email on the same date, that he did not have a mandate from the shareholders to provide any reasons, and that Mr Weir would have an opportunity to discuss this with the shareholders at the meeting.
- [7] On 21 June 2024 Mr Weir received a further notice from the Company relating to an incompatibility hearing to be held on 28 June 2024. On 28 June 2024 he received a notice of a disciplinary hearing to be held on a date to be advised.
- [8] It appears from the contents of the incompatibility notice that, according to the Company, Mr Weir had refused to speak to Mr Giles Rogers ('Mr Rogers'), the managing director of the Company, from about 7 November 2023, his relationship with senior management had become 'toxic to the point where it was directly impacting the operations of the business,' and that Mr Weir was no longer 'operationally functional'. The letter concluded by stating that the board of the Company was of the view that Mr Weir was incompatible with the management of the Company.
- [9] It would seem that the genesis of Mr Weir's dispute with Mr Rogers relates to governance issues pertaining to P & R Formwork, and not the Company.
- [10] On 1 July 2024 Mr Weir's attorney, Mr David Higgs ('Mr Higgs') addressed correspondence to Mr Bradnick stating that the meeting could not proceed, as the notice did not comply with section 71 of the Act, and requesting a postponement for the Company to provide reasons.
- [11] In an email to Mr Higgs sent at 14h32 on 1 July 2024, Mr Bradnick stated that the shareholders do not need a reason to remove a director, and that Mr Weir could make a presentation to the shareholders at the meeting, should he wish to do so.
- [12] In a second email to Mr Higgs sent at 15h18 on the same day, Mr Bradnick further stated that if Mr Weir wanted a reason for his removal, it was that the Company had lost confidence in him.
- [13] The meeting proceeded on 2 July 2024. Mr Weir and Mr Higgs were both present. Part of what was discussed at the meeting is as follows:

13.1 Mr Higgs stated that Mr Weir was unable to make a presentation as he did not know why the shareholders had lost confidence in him, and that if the reason given was valid it is prejudicial as Mr Weir was not given adequate time to prepare;

13.2 Mr Weir believed that his removal was a ‘witch hunt’ because he had raised irregularities in the financials of P & R Formwork;

13.3 Mr. Bradnick stated that the reason that Mr Otto Wiehahn, the major shareholder in Wiehahn Formwork called for the meeting was because Mr Weir had made threats against him and other individuals in the Company, to which Mr Weir responded that this was taken out of context;

13.4 Mr Weir stated that he had always had the Company’s best interests at heart, and had executed his duties diligently for almost 20 years. Mr Weir ended off by saying, ‘So at the end of the day I’ve had my say and you guys have already come to a decision,’ to which Mr Bradnick responded that they would make the decision and put the matter to a vote.

[14] It is clear from the transcript of the meeting that, when the resolution was proposed, the reasons for the proposed removal were given. Mr Weir then had a reasonable opportunity to make his presentation before the resolution was put to a vote.

[15] The resolution was unanimously adopted by the shareholders. The Company advised Mr Weir of the outcome on 4 July 2024.

[16] On 27 August 2024 Mr Weir threatened to bring an urgent application seeking to ‘review and set aside’ the resolution. On 28 August 2024, the Company’s attorney, Mr Guthrie, advised Mr Weir that should he persist in launching this application, and purely as a precaution, the shareholders would consider calling a precautionary shareholders meeting to enable them to again resolve to remove him as a director.

[17] The present application was ultimately launched on 5 September 2024, and enrolled for hearing on 19 September 2024 in respect of Part A, and on a date then to be determined in respect of Part B. The relief in Part A was merely for an order postponing the Part B relief for hearing on the semi-urgent roll.

[18] On 7 October 2024 the Company called for a ‘precautionary’ shareholders’ meeting to take place on 23 October 2024.

[19] In the notice of the precautionary meeting the Company stated that the purpose of a meeting was to discuss the removal of Mr Weir as a director of the company and to vote for his removal as a precaution, should it be found that the removal on two July was invalid.

- [20] Reasons were given in the notice for the proposed removal, namely that there had been an irretrievable breakdown of the relationship between Mr Weir and Mr Rogers, the CEO of the Company and that Mr Weir is incompatible with the management of the company for all the reasons advanced in the incompatibility hearing before the chair of that hearing, Mr Bagraim.
- [21] Mr Weir declined the invitation to attend the precautionary meeting on 15 October 2024, on the basis that as he was not a director in the Company, having been removed as such, and that he could not thus be removed as such, on a precautionary basis or otherwise.[22] The precautionary shareholder meeting proceeded on 23 October 2024 and, to the extent that Mr Weir was still a director of the Company, a second unanimous resolution was adopted removing him from office (the second resolution).

Section 71 of the Act – Relevant legal principles

- [23] Section 71 of the Act sets forth the procedure for the removal of directors by shareholders or directors.
- [24] The requirements for the removal of directors by shareholders are set out in Section 71(1) and (2) as follows:

‘(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.’

[25] Shareholders seeking to remove a director are accordingly enjoined to fulfil two peremptory statutory requirements: due notice of the meeting must be given,[1] and the director must be afforded a reasonable opportunity to make a presentation to the meeting before the resolution is put to a vote.

[26] The statutory requirements for the removal of a directors by his or her fellow directors are significantly more onerous and stand in stark contrast to the requirements to be met by shareholders.[2]

- [27] Section 71(4)(a) provides that where fellow directors seeks to remove a director, the director must be given:
- (a) notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response...'[3] (Emphasis added)
- [28] It is clear from the text and import of these subsections that the legislature imposed more stringent requirements for a removal by directors than shareholders, which is both instructive and sensible when viewed through the prism of the different roles which shareholders and directors fulfil in a company.
- [29] In both instances the director facing removal 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.
- [30] Unlike directors, shareholders as the owners of the shares of a company are not enjoined to furnish any reasons nor to state the grounds for the intended removal.
- [31] The reason for this distinction may be located in the nature of the duties and right to vote of shareholders and directors respectively. In the case of shareholders, a vote is a proprietary right of shareholding, which may be exercised by the shareholder in his or her own interests. [4]
- [32] A director on the other hand must exercise his right to vote in accordance with the fiduciary duty which he owes to the company. He must act in good faith and in the best interests of the company.
- [33] As only certain grounds suffice for a removal of a director by other directors in terms of section 71(3) of the Act, namely that the director is ineligible or disqualified, incapacitated, or negligent or derelict, it is sensible that reasons are required to be provided for such removal.
- [34] In her article 'The power to remove company directors from office: historical and philosophical roots'[5], Professor Rehana Cassim observed that shareholders' power to remove directors of a company enhances the ability of shareholders to control the disposition of their investment in the company, and the accountability of directors. If shareholders have removal rights, directors would know that the shareholders may exercise their right to remove them from office 'if they behave in an incompetent manner or engage in self-serving, opportunistic behaviour.' Since directors exercise significant discretion over the affairs of the company, it is important for them to have a reason to serve the interests of shareholders, which the threat of removal provides.

- [35] As observed by Professor Cassim, the shareholders' power to remove directors is a critical tool, which strikes a balance between 'the directors' powers of management on the one hand and the shareholders' powers of control on the other.
- [36] Shareholders dissatisfied with the manner in which the company is being run have the right to exercise their ultimate power of control by removing the directors from office, and is a key form of corporate democracy and a necessary and key provision of modern company law.[6]
- [37] The view expressed by Professor Cassim is that, in exercising their right in terms of section 71(1) to remove directors by an ordinary resolution adopted at a shareholders' meeting, shareholders are not required to give reasons for the removal, and that the power granted to shareholders in terms of this provision applies despite anything to the contrary in a company's Memorandum of Incorporation or rules, or in any agreement between a company and a director, or between any shareholders and a director.

The decision in Timcke

- [38] Mr Felix, who appeared on behalf of the applicant, relied on a decision in this division, Pretorius and Another v Timcke and Others[7] ('Timcke'), in which the court held that section 71(2) must be read to include a further requirement, namely that shareholders are required to provide a director with reasons for their intended removal. There are decisions in other divisions of the High Court which conflict with the decision in Timcke.
- [39] In the Gauteng division in Miller v Natmed Defence (Pty) Ltd[8] ('Miller') the applicant, expressly relying on the decision of Timcke, asserted that he was entitled to be furnished with reasons for his intended removal (by the shareholders in terms of s 71(1) and
- (2) in order for him to 'make a meaningful presentation,' and absent such reasons would be denied his 'statutory right before the shareholder votes to adopt a resolution for his removal.'[9]
- [40] The court in Miller disagreed with the finding in Timcke that the statutory requirement that the director be afforded 'reasonable opportunity to make a presentation' be read to require that reasons for the proposed removal be given to the director prior to the decision being taken.
- [41] In a recent decision of the Eastern Cape Local Division, Gqeberha in Besso Investments (Pty) Ltd and Others v Capeco Development (Pty) Ltd and Others[10] Potgieter J aligned himself with the findings made by Matojane J in Miller. The court in Besso held that the requirement in section 71(2)(b) that the director concerned be afforded a 'reasonable opportunity to make a presentation ... to the meeting before the resolution is put to the vote' does not support the conclusion that reasons for the intended removal must be given to the director prior to the decision to remove being taken.
- [42] The court in Besso noted that:

‘..section 71(4)(b), similarly to section 71(2)(b), affords the director the right to make a presentation to the meeting. However, section 71(2)(a) unlike section 71(4)(a) does not provide for a statement of reasons to be furnished for the director’s removal. It follows that where the removal of a director is sought by the shareholders, the latter are not required to provide the director with reasons or grounds for their intended action.’[11]

[43] The reasoning and findings in Miller are considered to be persuasive in academic literature, [12] were applied in Besso and by the Gauteng Division, Pretoria in Jones v Delport,[13] and is the prevailing position adopted by the Companies Tribunal.[14]

[44] In Timcke the court held that shareholders seeking to remove a director in terms of section 71(1) and (2) are obliged to provide the director with reasons for their intended removal before the meeting is held and the resolution is put to a vote.

[45] In developing his argument, Mr Felix appeared to suggest that perhaps the Court in Timcke went too far in requiring that a directors be given reasons in advance of the meeting, but that at the very least a directors should be furnished with adequate information to enable him to make representations before the resolution to remove him is put to a vote.

[46] Mr Felix contended that section 71(2)(b) of the Act requires the application of the principle of audi alteram partem as a rule of natural justice, and that a director facing removal must be provided with reasons before the meeting is held in order to give effect to his right to ‘be afforded a reasonable opportunity to make a presentation.’ Mr Felix argued that whether a directors has been afforded a reasonable opportunity to make representations is a fact bound enquiry, which depends on the peculiar circumstances of each case.

[47] In this regard Mr Felix relied inter alia on the following dictum of the Constitutional Court in Minister of Defence and Military Veterans v Motau and Others (‘Motau’):[15]

‘For the purpose of those provisions is not only to ensure that a majority of shareholders assent to a decision to dismiss a director, but also to ensure that those whose interests may materially be affected by the decisions taken are given an opportunity to put forward relevant information, and to ensure that the decision makers are appropriately informed before taking a serious decision.’[16]

[48] Mr Sholto-Douglas SC, who appeared for the respondents, together with Mr Brouwer, contended, with due respect to the learned judge in Timcke, that the court’s finding in this regard flies in the face of the section itself, the previous iteration of the section and the contrary approaches of other divisions where this issue has been raised.

[49] The doctrine of stare decisis, which requires that courts ‘stand or abide by cases already decided’ was dealt with by the Supreme Court of Appeal in Patmar Explorations (Pty) Ltd v Limpopo Development Tribunal,[17] where the court stated as follows:

‘The basic principle is stare decisis, that is, the court stands by its previous decisions, subject to an exception where the earlier decision is held to be clearly wrong. A decision will be held to have been clearly wrong where it has been arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake. This court will only depart from its previous decision if it is clear that the earlier court erred or that the reasoning upon which the decision rested was clearly erroneous. The cases in support of these propositions are legion. . . .

The doctrine of stare decisis is one that is fundamental to the rule of law. The object of the doctrine is to avoid uncertainty and confusion, to protect vested rights and legitimate expectations as well as to uphold the dignity of the court. It serves to lend certainty to the law.’ [18]

[50] The apex court In *Ayres and Another v Minister of Justice and Correctional Services and Another* [19] said the following:

‘As this court noted in *Camps Bay Ratepayers' and Residents' Association*, the doctrine of precedent is not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution.

Similarly, in *Ruta*, this court held:

“(R)espect for precedent, which requires courts to follow the decisions of coordinate and higher courts, lies at the heart of judicial practice. This is because it is intrinsically functional to the rule of law, which in turn is foundational to the Constitution. Why intrinsic? Because without precedent, certainty, predictability and coherence would dissipate. The courts would operate without map or navigation, vulnerable to whim and fancy. Law would not rule.” [20]

[51] I am accordingly bound by *Timcke*, unless I find it to be clearly wrong. To find that the decision in *Timcke* was clearly wrong, I will have to be persuaded that the decision of that court on the issue of whether shareholders are required to give reasons in terms of s 71(1) and (2) was arrived at as a result of ‘some fundamental departure from principle, or a manifest oversight or misunderstanding...in the nature of a palpable mistake.’ [21]

[52] In *Timcke* the court formulated the issue which it was asked to determine as follows:

‘Whilst subsection (2) of the Act sets out the manner and procedure by which shareholders are to remove directors from office, what exactly does section (b) thereof entail. In other words, what exactly is contemplated when provision is made in the act affording a reasonable opportunity to the affected director to make a presentation in person or through a representative?’ [22]

[53] The learned judge in *Timcke* relied on *Motau* as authority for the proposition that that section 71(2) of the Act ‘requires compliance with the rules of natural justice.’ [23]

[54] Proceeding from the basis that the Act requires less of shareholders seeking to remove directors than it does of fellow directors seeking to remove a director, the court in Timcke went on to hold that:

‘To read into the provision that an affected director can make representations, without being furnished with reasons for his or her

intended removal, would render the wording of the provision superfluous and without effect. Its simple interpretation would be

that the applicants had to be afforded with reasons in order that they could make representations in respect thereof and meet their

case accordingly.

In my view therefore the reason was never given by the shareholders and consequently without such reason being made known, the applicants

were not afforded the fundamental right to be heard. By not knowing the reason for their proposed removal, they could not exercise their right to be heard as they undoubtedly did not know on what issue/s to state their case. Rules of natural justice and the fundamental principle of audi alterem partem presupposes the right to place facts and evidence before the decision maker. A prelude to the exercise of the right includes the right to obtain information, particulars or documents so as to place the affected person in a position to meet the case that need be answered. The Respondents wanted to avoid this situation from arising again. The argument by Mr. Loots that they nonetheless had an opportunity to make representations, is in my view incorrect as the applicants' representatives would not have known what information to place before the shareholders which would be relevant and apposite to the reason/s for their intended removal.’[24]

[55] With due respect to the learned judge in Timcke, one of the fundamental difficulties which I have with this conclusion is that the Constitutional Court in Motau did not find that section 71(2) required compliance with the rules of natural justice.

[56] The issue which the court in Motau was called upon to decide, was whether the Minister was bound by any procedural constraints in exercising her power in terms of section 8(c) of the Armscor Act 51 of 2003 to terminate General Motau and Ms Mokoena’s membership of the Board.[25]

[57] In deciding whether the Minister had to comply with section 71(1) and

(2) of the Act, the court in Motau observed that, ‘importantly, section 71(2) requires that a shareholder must give a director notice and a chance to make representations before a resolution is adopted to dismiss him or her.’

- [58] The Court further noted that the purpose of section 71(1) and (2) is not only to ensure that a majority of shareholders assent to a decision to dismiss a director, but also to ensure that those whose interests may materially be affected by the decisions taken are given an opportunity to put forward relevant information, and to ensure that the decision makers are appropriately informed before taking a serious decision, the Constitutional Court in *Motau* did not make a finding, nor did it appear to suggest, that a director facing removal by shareholders is entitled to reasons before the meeting is held and the resolution is put to a vote.
- [59] In dealing with the procedural constraints on the exercise of the Minister's section 8(c) power, the court in *Motau*, in held that the Minister had to comply with the procedure set forth in section 71(1) and (2) of the Act in exercising her power. It was explained thus: 'It would not lead to an absurdity to hold that the Minister, as sole shareholder for these purposes, was obliged to comply with s 71(1) and (2) in the circumstances of this case' and that '[t]he minister took no steps required by the companies Act when she exercised her s 8(c) power.'
- [60] As stated by the learned authors *MS Blackman et al* section 71(1) was introduced 'in pursuance of the policy of giving shareholders a greater voice in the administration of the company.'
- [26] It was not intended to restrict shareholders' rights remove directors. On the contrary, the provision seeks to broaden the scope for the removal of entrenched directors. In terms of section 71 of the Act, unlike section 220 of the Companies Act 61 of 1973,[27] even an agreement between any shareholders and a director, in which a director is otherwise entrenched, can be overridden by ordinary resolution for removal in terms of section 71.
- [61] In *Miller Matojane J* held that the court in *Timcke* impermissibly resorted to the remedy of reading into section 71(2) in circumstances where the Act is clear and the reading in was not warranted.[28] It referred in this regard to *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*[29] where the Constitutional Court cautioned that: 'It follows that where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. Only if this is not possible should one resort to the remedy of reading in or notional severance.'
- [62] I align myself with the findings in *Miller*, particularly that in light of the express provision in s 71(4)(a) that a statement of reasons must be given before a director is removed by other directors, it is clear that the legislature deliberately preserved the right of the majority shareholders to remove a director who they no longer support.

- [63] The conclusion that shareholders need not give reasons for the removal of a director proceeds naturally from the well-established principle that the directors of a company can be removed at will by the shareholders who elected them. Unlike in the case of a removal by directors, the shareholders' power of removal need not be reasonable or based on good and sufficient cause. It is a proprietary right bound up in the shareholding.[30]
- [65] Mr Felix contended that Timcke has been endorsed by this court in *Theart v Theart*[31] ('Theart') and *Steenkamp and Another v Central Energy Fund SOC Ltd* ('Steenkamp').[32] However, as was correctly pointed out by Mr Sholto-Douglas, neither of these matters referred to nor placed reliance on Timcke, and both are distinguishable from the present matter. *Theart* involved the removal of the applicant by the board of directors in terms of section 71(3) and (4), and reasons were therefore required to be provided.[33]
- [66] In *Steenkamp* the applicants alleged that the directors should have been removed in terms of sections 71(3) read with section 71(8)[34] and not s 71(1). The court found that as the only relevant meeting ever held was the shareholder meeting called by CEF's board as the sole shareholder of PetroSA, the provisions of sec 71(3) -
- (8) did not directly apply. The court did not find that the Central Energy Fund was required to give reasons in terms of section 71(1). The reasons given were given voluntarily.[35] Properly interpreted, these authorities do not support the applicant's contention that a shareholder is required to provide reasons in terms of section 71(1).
- [67] Having carefully considered the authorities and academic literature set out above, I am respectfully of the view that the court in *Timcke* was mistaken in finding that shareholders are required to furnish reasons in advance for an intended removal of a director. In my view its finding in this regard was clearly wrong.
- [68] Even if the reasoning in *Timcke* is applied in the present application, it is clear that prior to the meeting, the applicant was given a reason for his intended removal, namely that the Company had lost confidence in him. At the meeting the reasons were explained to him again. He then made representations in response thereto. In the circumstances the applicant, on the facts before, had a reasonable opportunity to make a presentation to shareholders of the Company before the resolution for his removal was put to a vote.

The precautionary meeting and the second resolution

- [69] It is a well-established principle in our law that a court may decline to grant a declaratory order, if it is of the view that the question raised before it is hypothetical, academic or of no practical effect to the parties.[36]
- [70] The applicant's view was that the resolution stands until such time as it is revoked by the Company and / or is declared invalid and set aside by court.

- [71] The respondent on the other hand contends that in terms of s 71(1) and (2) the shareholders remain entitled to convene a meeting at any time for the purposes of considering the removal of a director, irrespective of the fact that Mr Weir is not currently recorded as a director with the Companies and Intellectual Property Commission ("CIPC").[37]
- [72] Reasons for the (precautionary) proposed removal were given in the notice for the precautionary meeting, and at the meeting held on 23 October 2024, in which Mr Weir declined to participate for the reason set out above, the second resolution was adopted in terms of which Mr Weir (to the extent that he is still a director) is removed as a director of the Company with immediate effect.[73] Arising from the foregoing the Company contends that any interest that Mr Weir may have had in an existing, future or contingent right or obligation relative to the resolution, has been extinguished by the second resolution. Accordingly a declaratory order setting aside his removal on July 2024 would have no practical effect on his directorship.
- [74] In light of my findings above that the shareholders were not required to give reasons in terms of s 71(1) and (2), the resolution did not fall foul of the relevant provisions and is valid. A second resolution was therefore not necessary and I need not make any finding regarding the mootness argument. Suffice it to say that in light of the facts placed before me, it is clear that it was untenable for Mr Weir to remain on the board of the Company. This is particularly so in circumstances where the shareholders no longer trust him or wish him to do so. On this further basis in my discretion the declaratory relief should in any event be refused.
- [75] Even if I am wrong in finding that the shareholders were not required to give advance reasons for the removal of the applicant, it is clear that the applicant was possessed of sufficient information and was fully aware of the reasons for his removal. He has therefore failed to show that he was not afforded a reasonable opportunity to make representations as envisaged in section 71(1) and (2).

Costs

- [76] In view of my findings above, there is no reason why costs should not follow the result.
- [77] Mr Felix argued that should the respondents be successful in their opposition, the matter was not sufficiently complex to justify the employment of two counsel. He further submitted that the costs of the answering affidavit in respect of Part A of the Application should be disallowed as the only relief sought was a postponement to the semi-urgent roll, which was granted on 19 September 2024.
- [78] It is not entirely clear what transpired on that date, however I am not persuaded that this matter warranted a hearing on a semi-urgent basis and do not believe that it was unreasonable for the respondents to deal with this aspect in a separate answering affidavit. I therefore am not convinced that the costs attendant upon the drafting of this affidavit should be excluded in the order which I propose to make.

[79] Regarding the costs of two counsel, whilst I agree that the matter is not unduly complex, it is an issue of importance, particularly in light of the conflicting judgments in the different divisions.

[80] In the circumstances, in my view an appropriate costs order should include the costs of two counsel, with costs on Scale C for senior counsel, and Scale A for junior counsel.

Conclusion

[81] It follows that the applicant's claim must be dismissed with costs, such costs to include the costs of two counsel, with costs on Scale C for senior counsel, and Scale A for junior counsel.

The order

[82] In the result, the following order is made:

1. The application is dismissed.
2. The applicant is to pay the respondents' costs, including the costs of two counsel. The costs of senior counsel are to be taxed on Scale C, and the costs of junior counsel on Scale A.

M HOLDERNESS

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant: J K Felix Instructed by: D Higgs Frank Holland & Associates For the First, Second and Third Respondents: A R Sholto-Douglas SC A Brouwer

Instructed by: C Guthrie Guthrie Colananni Attorneys

Judgment

delivered on: 4 March 2025

- [1] That is '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.'
- [2] The Companies Act came into force on 1 May 2011. It introduced into South African law a provision that, for the first time, empowers the board of directors to remove a director from office. This provision is contained in section 71(3), and it permits the board, on certain grounds and subject to a right of review, to remove a director from office in certain instances. Previously, under the repealed Companies Act 61 of 1973, only the shareholders acting in a shareholders' meeting - and not the board of directors - were statutorily empowered to remove a director from office. See Cassim, Rehana. (2019). The power to remove company directors from office: historical and philosophical roots. *Fundamina*, 25(1), 37-69. <https://doi.org/10.17159/2411-7870/2019/v25n1a3>

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- [3] Section 71(4)(a).
- [4] *Sammel v President Brand Gold Mining Co Ltd* 1969
- (3) SA 629 (A) at 680.
- [5] See f/n 2 above, under heading, The power to remove company directors from office: historical and philosophical roots, and the authorities there cited.
- [6] Cassim, *supra* at f/n 126-128.
- [7]
- [2015] ZAWCHC 215.
- [8] *Miller v Natmed Defence (Pty) Ltd* (18245/2019)
- [2021] ZAGPJHC 352; 2022 (2) SA 554 (GJ) (24 August 2021).
- [9] *Id* at para 26.
- [10] *Besso Investments (Pty) Ltd and Others v Capeco Development (Pty) Ltd and Others* (3812/2024)
- [2024] ZAECQBHC 74 (28 November 2024).
- [11] *Id* at para 57.
- [12] R Cassim, Confusion In the Removal of Directors by Shareholders Under the Companies Act 71 of 2008: *Miller v Natmed Defence (Pty) Ltd*, SALJ Vol 139 (Part 4) 2022 where the learned author submits that ‘the court in *Miller* was correct in ruling that shareholders need not furnish directors with reasons in advance for their removal, since this is not a legislative requirement.’ This view is shared by the learned authors of Meskin et al, Henochberg on the Companies Act 61 of 1973, (November 2024), service issue 36 at 277.
- [13] 2024 JDR 3755 (GP) at para 38.
- [14] *Daily Grind Innovation Hub NPC v Companies and Intellectual Properties Commission* (CT101115ADJ2022)
- [2023] COMPTRI 45 (14 April 2023) at para 7(i)(a).
- [15] 2014 (5) SA 69 (CC).
- [16] *Id* at para 79.
- [17] 2018
- (4) SA 107 (SCA) at para 3.
- [18] *Id* paras 3 – 4.
- [19] 2022

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- (2) SACR 123 (CC) (2022 (5) BCLR 523; [2022] ZACC 12).
- [20] Id paras 16 – 17.
- [21] Id f/n 10.
- [22] Timcke at para 6.
- [23] Id at para 7.
- [24] Id at paras 10 and 11.
- [25] Motau at para 25.
- [26] Commentary on the Companies Act, (2010), revision service 7 at 8-281.
- [27] See *Stewart v Schwab and other* 1956
- (4) SA 791 (T); *Amolis v Fuel Transport (Pty) Ltd* 1978
- (4) SA 342 (W).
- [28] At para 33.
- [29] [2000] ZACC 12; 2001(1) SA 545; 2000
- (10) BCLR 1079 (CC) at para 22.
- [30] MS Blackman et al, Commentary on the Companies Act, (2010), revision service 7 at 8-825 citing *Inderwick v Snell* (1875) 2 Mac & G 216 221-223; 42 ER 83 85-86.
- [31] *Theart v Theart and Other* [2023] ZAWCHC 130 at paras 32 to 38.
- [32] *Steenkamp and Another v Central Energy Fund SOC Ltd and Others* [2017] ZAWCHC at para 33.
- [33] *Theart* at paras 28 and 29.
- [34] Section 71 (8) provides that: ‘If a company has fewer than three directors-
- (a) subsection
- (3) does not apply to the company;
- (b) in any circumstances contemplated in subsection (3), any director or shareholder of the company may apply to the Companies Tribunal, to make a determination contemplated in that subsection; and
- (c) subsections (4), (5) and (6), each read with the changes required by the context, apply to the determination of the matter by the Companies Tribunal.
- [34] Section 71 (8) provides that:
- ‘If a company has fewer than three directors-

- (a) subsection
- (3) does not apply to the company;
- (b) in any circumstances contemplated in subsection (3), any director or shareholder of the company may apply to the Companies Tribunal, to make a determination contemplated in that subsection; and
- (c) subsections (4), (5) and (6), each read with the changes required by the context, apply to the determination of the matter by the Companies Tribunal.

[35] Steenkamp at para 33.

[36] Association for Voluntary Sterilisation of South Africa v Standard Trust Limited and Others (325/2022)

[2023] ZASCA 87 (7 June 2023) at para 12.

[37] The respondents averred that whilst companies still have to comply with an administrative process to inform CIPC (so that the register of companies can be updated), the decision is effective immediately upon compliance with the Act.

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