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Abstract: Dispersed ownership in companies in the context of the separation of ownership and control pose challenges to corporate governance. The agency problem comes to the fore bringing into question the efficacy of shareholder protection mechanisms particularly as provided for in the Companies Act. The paper examines the vulnerability of shareholders in exercising their right to determine the composition of the board.

Keywords: Shareholders, directors, corporate governance, shareholder franchise, shareholder control, removal, protection, role, agency problem, appointment rights.

1. Introduction.

This paper recognizes the many different stakeholders, but focuses only on the roles that shareholders play when directors are removed and whether the shareholders are protected in these processes. The question to be answered is whether the Companies Act 71 of 2008\(^1\) protects and/or advances the shareholders’ interests in this regard when compared with its predecessor, the 1973 Act.

2. The Position under the 1973 Act

The 1973 Act regulates the removal of directors whether appointed or elected. Section 220(1)(a) of the 1973 Act provides that “a company may notwithstanding anything in its Memorandum or Articles or in any agreement between it and any director, by resolution remove a director before the expiration of his period of office.” An ordinary resolution is required for the removal of a director.\(^2\) This section prohibits an agreement between the company and its director not to remove the latter. If such agreement were entered into, it would be invalid,\(^3\) and the director would remain subject to removal by ordinary resolution. It is possible, however, to exclude this mode of removal by way of shareholder agreement.\(^4\) The courts have also held that a shareholder agreement precluding the removal of a director in terms of section 220 is both valid and enforceable.\(^5\)

However, section 220(7) does not deprive the director so removed or terminated from claiming compensation or damages for breach of contract. The director retains the right, in terms of common law, to claim damages or other compensation for loss of office due to his removal. This section also recognises that there could be powers to remove a director other than those indicated in this section. In this way it extends the powers for director removal at the shareholders’ disposal. The provision ensures that the position of director is not entrenched in any way. This is necessary to protect shareholders from the difficulty that would obtain were certain directors allowed to enter into pacts prohibiting their removal. The fact that an ordinary resolution suffices to remove a director, makes it easier for shareholders to secure removal than it would be were a special resolution which requires a higher percentage vote, required. The provision ensures that the control by shareholders over the company, exercised through the power to dismiss directors as they please, is neither circumvented nor diluted.

Agreements between the shareholders and a director not to remove the latter from office are,

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\(^1\) The Companies Act 71 of 2008, hereafter ‘the 2008 Act’.

\(^2\) Meskin Henochsberg on the Companies Act section 220; Swerdlowv Chen 1977 (3) SA 1050 (T) 1053.

\(^3\) Meskin Henochsberg on the Companies Act section 220; Stewart v Schwab 1956 (4) SA 791 (T), Amoils v Fuel Transport (Pty) Ltd 1978 (4) SA 343 (W) 347.

\(^4\) Neube 2011 SALJ 35.

\(^5\) Stewart v Schwab 1956 (4) SA 791 (T); Desai v Greyrdge Investments (Pty) Ltd 1974 (1) SA 509 (A) 518.
however, valid and enforceable.\(^6\) Where such an agreement exists a director is able to interdict or restrain the shareholders from voting for his removal as a director in breach of the shareholder agreement.\(^7\) These agreements tend to weaken the power of shareholders to control the company through dictating persons who are to serve as directors.

It was further decided in Swerdlow v Cohen, that a provision in the Memorandum of Association giving a director veto power to frustrate a duly adopted resolution to remove him, is of no effect.\(^8\) If it were to be allowed, certain directors would be able to entrench their positions and operate as a law unto themselves at the expense of shareholder interests. It would then be possible for such directors to pursue their own interests without any sanction from the shareholders. If that were to be the case, it is submitted that there would be no incentive for shareholders to invest in a company.

In terms of section 220 of the 1973 Act any director can by ordinary resolution of shareholders in a general meeting, be removed from office before the expiry of his or her tenure. The Act grants shareholders extensive right to remove any director. In so doing it entrenches the right of shareholders to remove the directors.

It should also be noted that section 220(1)(b) is an exception to the general right of shareholders to remove a director.\(^9\) The situation is different if the company in question is a private company. Because of the nature of private companies, before June 1949 certain directors could hold office for life.\(^10\) These directors of private companies, who were in office before 13 June 1949, could not be removed by ordinary resolution. It is submitted that the exception was reasonable in that in private companies shareholding is not as dispersed as in public companies. Shareholders in private companies usually serve as directors, and generally share close bonds/ties. The law does not interfere in private arrangements unless one of parties cries foul. This does not apply to public companies where the public is involved. The public require protection of the law. The fact that in terms of section 220(2), the director to be removed is entitled to be heard on the proposed resolution at the meeting meant that the resolution could not be passed unanimously. The option of a written resolution was excluded because that would prevent the director concerned from being heard at the meeting.

The 1973 Act also embodies the possibility of a director making and circulating written representations to shareholders prior to the meeting.\(^11\) That provision is intended to expose malicious attempts to remove directors which may not have been in the interests of shareholders. However, the removal of a director should not be cumbersome and prohibitive because it will discourage the exercise of appointment and removal rights that shareholders enjoy. To that effect the resolution to remove a director requires only an ordinary majority of 50 per cent plus one.\(^12\) The company, while permitted to set a higher percentage of voting rights for other ordinary resolutions, is prohibited from doing so for resolutions to remove a director.\(^13\)

The company has discretion to regulate the removal of directors in other ways not provided for in the 1973 Act.\(^14\) This means that through its Articles the company could stipulate grounds on which a director could be removed from office, but, as noted earlier, that alone would not prevent the removal of a director by ordinary resolution before the expiry of his period of office.\(^15\) In any event, there is no requirement requiring that the director be provided with a statement setting out the reasons for the resolution to remove him as a director.\(^16\) Ncube\(^17\) contends that directors serve at the pleasure of shareholders and may be removed without cause. This means shareholders have no obligation to give reasons for removing a director. However, this should be balanced against the right of such a director to be heard, and also that there will be breach of contract at common law warranting a claim for damages.

\(^{6}\) Meskin Henochsberg on the Companies Act section 220; Nourse v Farmers’ Co-operative Co. Ltd (1905) 19 EDC 291; Ncube 2011 SALJ 35; Stewart v Schwab 1956 (4) SA 791(T) 793-4.  
\(^{7}\) Ibid; Amoils v Fuel Transport (Pty) Ltd 1978 (4) SA 343 (W) 347.  
\(^{8}\) Swerdlow v Cohen 1977(1) SA 178(W).  
\(^{9}\) Section 220(1)(a): ‘the provisions of paragraph (a) shall not be construed as authorising the removal of a director of a private company who was holding office for life on the thirteenth day of June 1949.”  
\(^{10}\) Section 220(1)(b).

\(^{11}\) Section 220(2), Ncube 2011 SALJ 33-51.  
\(^{12}\) Section 71(1) and Swerdlow v Cohen 1977 (1) SA 178 (W)  
\(^{13}\) Section 65(8).  
\(^{14}\) Section 220(7);  
\(^{15}\) Shuttleworth v Cox Brothers & CO (Maidenhead) Ltd [1948] 2 KB 9(CA);  
\(^{16}\) Cassim Contemporary Company Law 2011.  
\(^{17}\) Ncube 2011 SALJ 39.
3. Observation

Under the 1973 Act shareholders had extensive powers to remove any director. No director was immune from removal by the shareholders. Shareholders played a significant role in director removal. Shareholders could use this power to protect their interests against errant directors.

4. The Position under the 2008 Act

As regards the removal of a director, the 2008 Act provides that:

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 shareholder 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).\(^{18}\)

As discussed earlier under appointment of directors, the removal of a director depends on who appointed him or her in the first place and how this was done. The type of director whose removal is being contemplated is important, as is the number of directors on the relevant company’s board, and the reasons for the removal.\(^ {19}\)

The first directors cease to be directors when subsequent directors are appointed in terms of the minimum requirements of the 2008 Act or the Memorandum of Incorporation.\(^ {20}\) Consequently the first directors’ tenure expires on the appointment of new directors.

Where the director to be removed is one whose appointment was made in terms of the Memorandum of Incorporation, removal can only be by the specific persons to whom that power is granted by the Memorandum of Incorporation.\(^ {21}\) These directors may still be removed by the Companies Tribunal in terms of section 71(8), regardless of who appointed them, but only where the board consists of fewer than three directors.\(^ {22}\) It is submitted that giving the Companies Tribunal the power to remove a director whom it did not appoint, can be seen as usurping shareholders’ rights. It is further submitted that because shareholders are the owners of the company, they should have the sole prerogative to determine who controls their company. Shareholders have a greater interest in the well-being of the company than the Companies Tribunal: they have an investment to safeguard.

Ex-Officio directors assume the office of director by virtue of the office, title, designation, or status they hold.\(^ {23}\) These directors automatically vacate their office upon losing the office, title, designation, or status on the basis of which they became directors. Section 71 identifies four basic methods by which directors may be removed from office. These are: removal by shareholders, removal by the board, removal by the Companies Tribunal and removal by the court.

4.1. Shareholder removal of elected directors

Elected directors, as earlier discussed, are those voted into office by shareholders.

In terms of section 71(1), shareholders can remove an elected director by adopting an ordinary resolution. A simple majority, that is 50 per cent plus one, is enough to secure this ordinary resolution. It should be noted that while section 65(8) permits a company’s Memorandum of Incorporation to require a higher percentage of voting rights for the approval of an ordinary resolution, the ordinary resolution for the removal of a director under section 71 is an exception. That resolution is secured by a simple majority. The company may not require a higher majority because that would be tantamount to entrenching the position of director contrary to the spirit of corporate law.

Removal by shareholders is not restricted by the company’s Memorandum of Incorporation, rules, agreement between a company and a director, or agreement between any shareholder and a director.\(^ {24}\) This provision is similar to section 220(1)(a) of the 1973 Act save that the latter made no reference to agreements between shareholders and a director. In terms of the 1973 Act, such agreements could preclude the removal of a director from office by ordinary resolution contrary to the position now obtaining under the 2008 Act.

The effect of section 71(1) of 2008 Act is that shareholders’ power to remove directors directly by ordinary resolution is restricted to elected directors. In the other forms of removal the shareholders play

\(^{18}\) Section 71(1).
\(^{19}\) Ncube 2011 SALJ 39.
\(^{20}\) Section 67(1).
\(^{21}\) Section 66(4)(a)(i).
\(^{22}\) Section 71(8).
\(^{23}\) Section 66(4)(a)(i).
\(^{24}\) Section 71(1).
an indirect role. Ncube submits that under section 220 of the 1973 Act, an ordinary resolution by shareholders in general meeting was enough to remove any director, whereas under the 2008 Act shareholders can remove only the directors they elected to the board.\(^{25}\) She further submits that shareholders cannot remove ex-officio directors and directors appointed in terms of the Memorandum of Incorporation, and this significantly dilutes the shareholders’ franchise.\(^{26}\)

Where shareholders intend to remove a director, they do not need to proffer grounds for removal. This is, according to Ncube,\(^ {27}\) because directors serve at the pleasure of shareholders and hence may be removed without cause. It is submitted that this argument is reasonable. Owners of companies should be able to remove directors even where there is no compelling reason. Requiring a plausible or cogent reason is tantamount to dissuading shareholders from exercising their ownership right to determine who controls their enterprise. However, this must be balanced against the director’s right to be heard and the realisation that there will be breach of contract at common law.

In terms of the 2008 Act, a director retains the right to be afforded a reasonable opportunity to make representation, in person or through a representative, to a meeting before the resolution for his removal is put to a vote.\(^ {28}\) This provision suggests an oral presentation, whereas section 220 of the 1973 Act was explicit in that the director could circulate written comments/remarks/responses or make oral presentations to shareholders, prior to the meeting. The provision enables a director to present arguments against his or her removal, and at the same time affords shareholders an opportunity to consider the director’s response in advance of the meeting.\(^ {29}\) The aim of section 220 of the 1973 Act and section 71 of 2008 Act is the same. However, section 71(2)(b) is peremptory in that it makes it mandatory for the director to be afforded an opportunity to make presentations in person or through a representative.\(^{30}\) Under section 220, while the option was available for oral presentations, it was not peremptory. It is submitted that oral presentations put the director in a better position to engage the shareholders than written representations. Shareholders will be better informed when they converse directly with the director. They will also have the opportunity to ask questions or seek clarifications, thereby enabling them to make informed decisions.

### 4.2 Removal by the board

This is a new mode of removal for which the 1973 Act does not provide. Section 71 (3) provides that where a director has become ineligible, disqualified, or incapacitated, or has neglected his functions, the board may remove him or her.\(^ {31}\) An ineligible director is one who is not permitted to become a director and there is no room for allowing such a person to become director. Even a court does not have discretion to permit an ineligible person to become a director. Disqualification arises when a person fails to meet one or more requirements as set, for example, in the Memorandum of Incorporation. Such a person will not be permitted to hold the office of director. However, with disqualification, the court may exercise its discretion to permit a disqualified person to act as director. Disqualification is, therefore, not absolute but ineligibility is. Where disqualification or ineligibility arises when a person is already serving as director, he or she should cease to be a director with immediate effect subject to section 70(2).\(^ {32}\)

For this mode of director removal to apply, the company in question must have more than two directors at the time the removal is contemplated.\(^ {33}\)

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\(^{25}\) Ncube 2011 *SALJ* 34.  
\(^{26}\) Ibid.  
\(^{27}\) Ncube 2011 *SALJ* 39.  
\(^{28}\) Section 71(2)(b).  
\(^{29}\) Ncube 2011 *SALJ* 35-36.  
\(^{30}\) Own emphasis.  
\(^{31}\) If a company has more than two directors and a shareholder or a director has alleged that a director of the company: (a) has become- Ineligible or disqualified in terms of Section 69, other than on the grounds contemplated in Section 69(8)(a); or In capacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or  
\(^{32}\) Cassim Contemporary Company Law 402.  
\(^{33}\) Section 71(3).
So, obviously, it has limited application because it cannot apply where the company has less than three directors.

The triggering event for this type of removal could be allegations by either a shareholder or another director. So, while it is regarded as a board removal, the role of the shareholder in this mode of removal is to raise an allegation which the board must look into. The influence or role of the shareholder in this mode of removal is remote and indirect. It reduces the shareholder to a mere complainant. The shareholder does not participate in the board’s decision to remove the director. It is submitted that this amounts to a dilution of shareholder power as regards director removal. It is therefore further submitted that, compared to the 1973 Act, the 2008 Act has weakened shareholder power.

4.3. Removal by the Companies Tribunal

As stated above, the removal by the board applies where the company has more than two directors. Where there are less than three directors, removal will be effected through the Companies Tribunal.

Under this approach, any shareholder or director may apply to the Companies Tribunal to make a determination whether a director should be removed on the grounds listed in section 71 (3). Again, in this mode of removal the shareholder is reduced to a mere applicant whose application may or may not succeed. This mode is not provided for in the 1973 Act. It is a new provision in the 2008 Act. The criticism of these provisions is that they tend to usurp what was formerly the sole responsibility of the shareholders. As complainants or applicants in this mode of removal, shareholders are not the only ones granted the right to raise or make an application for consideration by the Companies Tribunal; any other interested person may also do so. Removal by the court

In terms of section 71(6) (a) of the 2008 Act, a person who is entitled to vote in the election of a director may apply to court to review the determination made by the board. The court may then order removal or otherwise review the decision of the board. This review may be requested both where the board has removed a director, and when it is refusing to remove a director. As highlighted earlier, the role of shareholders is reduced to that of applicants. They have no control over the outcome after making the application, leaving them at the mercy of other persons on issues involving their company. It is submitted that this amounts to interference in the welfare of their company by outsiders.

Ncube regards the disqualification of a person from serving as a director as, in effect, a removal from office. A person vacates the office of director upon disqualification by court. Section 70(1)(b)(v) provides that a person ceases to be a director if he or she becomes ineligible or disqualified in terms of section 69, subject to section 71(3). Section 71(3) (b) provides that in the removal of a director, the members of the board – excluding the director whose removal is sought - must determine the issue of incapacity, ineligibility, or disqualification by resolution. The writer agrees with Ncube that this amounts to a removal of a director because if ineligibility or disqualification arises, section 69(4) provides that the director ceases to be a director, thereby creating a vacancy on the board. There are specific grounds for disqualification. While the Act lists persons who may be disqualified from being directors, the company may provide in its Memorandum of Incorporation additional grounds for disqualification. This is where the issue of qualification shares may arise. The 2008 Act leaves it to the company to decide this in its Memorandum of Incorporation. It is submitted that it would have provided better protection had certain director qualifications -- such as share qualification, or even educational qualifications -- been made peremptory rather than leaving it to the company to decide if it so wishes in its Memorandum of Incorporation.

Removal may also arise automatically if the director is declared delinquent, or is placed under probation in terms of section 162(2) of 2008 Act. Declaration of delinquency and of probation comes about after the shareholders – or other competent persons - make an application to court. For purposes of this application, shareholders are grouped together with directors, the company secretary, and the prescribed officer of a company

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34 Ncube 2011 SALJ 34.
35 Section 71(8).
36 Section 71(3).
37 Section 71(80(b)-(c).
38 Section 220 of the1973 Act.
39 Interested persons can creditors or debenture holders.
40 Ncube 2011 SALJ 40.
41 Section 69(8) of the 2008 Act; section 219 of the 1973 Act; Ex parte Screuder 1964 (3) SA 84 (O).
42 Grounds for disqualification: prohibited by court, declared delinquent, unrehabilitated insolvent, prohibited by any public regulation, removed from office of trust because of dishonesty, or convicted and imprisoned without option of a fine.
or trade union.\textsuperscript{43} This appears to be an unjustified relegation of shareholders from the position of owners, to that of any other stakeholder in the company.

In the case of probation, however, whether one is prohibited from assuming office as a director depends on the conditions of the probation declaration.

In confirmation of Ncube's\textsuperscript{44} assertion that disqualification indeed amounts to removal of directors from office, section 69(4) of 2008 Act provides that: “A person who becomes ineligible or disqualified while serving as a director of a company ceases to be a director immediately subject to Section 70(2).” This refers to a situation where a director has been removed by the board. Section 70(2) provides that such automatic loss of office is subject to the proviso that a vacancy on the board will not arise until expiry of the time for filing an application for review or the granting of an order by the court on such an application.\textsuperscript{45}

\section*{4.4. Observations}

Section 220 of the 1973 Act entrenched shareholders’ powers to remove directors. By way of an ordinary resolution shareholders could, with very few exceptions, remove any\textsuperscript{46} director. While the 1973 Act grants shareholders the virtually exclusive power to remove directors,\textsuperscript{47} the same cannot be said of the 2008 Act.

The 2008 Act has introduced new ways of removing directors in which shareholders have little or no say. The board is now empowered to remove directors contrary to the previous era.\textsuperscript{48} The Companies Tribunal has the power to remove directors, and has such powers exclusively in certain instances.\textsuperscript{49} In certain instances, shareholders are reduced to no more than applicants or complainants when it comes to the removal of directors. This is a shift away from the position under the 1973 Act. Section 71 of the 2008 Act provides for director removal by shareholders, the board, and the Tribunal - notwithstanding anything to the contrary in Memorandum of Incorporation, rules, agreement between a company and a director, or even an agreement between any shareholders and a director.\textsuperscript{50} This is in sharp contrast to section 220 of the 1973 Act, where an agreement between the shareholders and a director not to remove the director from office was valid and enforceable, and a director was able to interdict or restrain the shareholders from voting for his or her removal in breach of the agreement.\textsuperscript{41} Compared to the 1973 Act on this aspect, it is submitted the 2008 Act plugs the possibility for director entrenchment more effectively. However, there is a possibility that shareholders among themselves (with no director involvement) may agree not to remove a particular director. Cassim \textit{et al} \textsuperscript{52} suggest that such agreements could fall outside of the scope of section 71. It would consequently be valid, although it remains subject to section 15(7).\textsuperscript{53} It is doubtful whether such agreements would be consistent with the Act as they allow room for the entrenchment of directors contrary to the spirit of the Act. At the same time, a provision in the Memorandum of Incorporation preventing a valid resolution from having any force or effect, will be invalid as it will conflict with the right of the shareholders to remove a director by ordinary resolution.\textsuperscript{54}

The 2008 Act actually seeks to protect the position of shareholders in many indirect ways. The removal by a board may be initiated by a single director or shareholder who raises allegations which the board must investigate.\textsuperscript{49} This mode of removal affords significant protection to minority shareholders whose attempt to remove a director by ordinary resolution may be thwarted by the majority. This development has resulted in significant protection, particularly for minority shareholders. A single shareholder can now bring his or her case before the board, and in terms of section 71(3), the board is obliged to consider that request and to initiate proceedings to remove the director in question. This is an improvement on the 1973 Act where removal could only be by ordinary resolution. In that case, minority interests could be thwarted by the majority. As already indicated,\textsuperscript{55}

\begin{thebibliography}{99}
\bibitem{43} Section 162(2).
\bibitem{44} Neube 2011 \textit{SALJ} 40.
\bibitem{45} Neube 2011 \textit{SALJ} 41.
\bibitem{46} Own emphasis.
\bibitem{47} Section 220(1)(a).
\bibitem{48} Section 71.
\bibitem{49} Ibid.
\bibitem{50} Cassim Contemporary Company Law 409.
\bibitem{51} Ibid.
\bibitem{52} Neube 2011 \textit{SALJ} 409.
\bibitem{53} "The shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, but any such agreement must be consistent with this Act and the company’s Memorandum of Incorporation, and any provision of such an agreement that is inconsistent with this Act or the company’s Memorandum of Incorporation is void to the extent of the inconsistency.”\textsuperscript{54} Cassim Contemporary Company Law 410.
\bibitem{54} Section 71(3).
\end{thebibliography}
although the role of the shareholder in the removal seems somewhat diminished, it may not be true to say shareholders enjoy less protection now than before. Protection is actually increased under the 2008 Act –– albeit often indirectly.

Criticism of the removal of a director by the board is based on the board retaining the discretion to retain a director even if it has found him to be incapacitated, negligent, or in dereliction of duty. This tends to open space for abuse where the board may frustrate a director’s removal. The only control mechanism to ensure the board exercises this discretion properly is that were it to do otherwise; it would be in breach of its duties to the company. It is submitted that this is not a sufficient check on the possible abuse of discretion. Punitive measures that are more restrictive may be necessary.

As indicated above, the removal of a director by a Tribunal can also be initiated by application by any shareholder or director. For the reasons explained under removal by the board, the shareholder enjoys increased protection. That application by a single shareholder is now possible, bodes well for minority shareholder protection.

A shareholder’s role in the removal of directors by the court lies in initiating proceedings by way of application. A shareholder may apply for review of the board or Tribunal’s decision to remove (or not to remove) a director. They also apply when having a director placed under probation or declared delinquent. The process affords greater protection to the shareholders although the role they play in the process is diminished as they are reduced to mere applicants.

Further protection is afforded to shareholders through disqualification of certain persons from holding positions as directors. In effect, these disqualifications amount to removal of directors from office. Section 69(5) allows the Memorandum of Incorporation to impose additional grounds for disqualification. This allows the shareholders space to prescribe requirements for persons who may be directors, and in so doing gives them a screening mechanism to weed out undesirable characters from the office of director. Disqualifications can be based on shareholding or any other conditions as may be provided for by the company in its Memorandum of Incorporation. This affords shareholders protection in that it enables them to prescribe any conditions or requirements – for example, retirement and rotation.

As indicated above, the role of shareholders in the removal of directors is greatly diminished. They are left with only the power to remove the directors whom they elected or appointed. They cannot remove all the other directors save through indirect means, yet those whom they elect may be removed by the board and the Tribunal. It is submitted that this does not amount to a reduction in protection, but merely a reduction in role. However, Ncube disagrees; she regards it as a significant dilution of shareholders’ franchise which diminishes shareholder control over the company through the removal of directors.

The board or Tribunal may remove directors elected by the shareholders. However, where the shareholders remove a director, that removal is not subject to review, whereas a board or Tribunal removal is reviewable. Review connotes an enquiry into the procedural aspects of a decision. When the matter is taken on review, the court may either confirm or reverse the board or Tribunal’s determination. This offers serious protection for the interests of the shareholders. The shareholder is empowered to apply for review. It is submitted that this serves as a check on abuses that may be perpetrated by the board or the Tribunal.

5. Summary and Conclusion

The 2008 Act has introduced new procedural and substantive requirements for the removal of directors. The earlier position where shareholders could remove any director has been revised. Shareholders can now only directly remove those directors whom they elected.

New modes of removal have been introduced, such as removal by the board and the Tribunal. The board or Tribunal can remove directors who were elected by the shareholders. However, such removal by the board or Tribunal is reviewable by a court, while removal by shareholders is not.

With regard to removal by a board or Tribunal, the role of the shareholder is reduced to that of a complainant or applicant. The rest of the process is beyond his or her power save that if he or she is not

56 Section 71(3), SABC v Mpofu 2009 (4) ALL SA 169 (GSJ) 37-41.
57 Section 71.
58 Section 162.
59 Ncube 2011 SALJ 34.
60 Section 71(5).
61 Ncube 2011 SALJ 47.
62 Section 71(6)(b).
satisfied with the outcome, he or she may apply for review.

While the role of the shareholders may seem to have been diminished, the opposite is true of their protection. They appear to be better protected now than they were under the 1973 Act. The protection is not only afforded to shareholders as a group - as under the 1973 Act - it is now accorded to individuals. Individual shareholders can trigger director removal by the board or the Tribunal. This is a significant development in shareholder protection, and more specifically, in minority protection.

Compared to the 1973 Act, the 2008 Act provides greater protection to shareholders as regards the removal of directors despite their reduced role in the processes. It is submitted that even under the new modes of director removal, shareholders still play a role, albeit indirectly.

References

2. Blackburn MS, Jooste RD and Everingham GK “Commentary on the Companies Act (2002)” Juta Lansdowne South Africa
10. Amour J, Hansman H and Kreakman R “Agency problems legal strategies and enforcement” 2009 Oxford University 255
14. Ncube CB “You’re fired-The Removal of Directors under the companies Act Act 71 of 2008” 2011(128) (1) SALJ 33
15. Olson JF ‘South Africa moves to a global model of corporate governance but with important national variations’ 2010 Acta Juridica 219
17. Companies Act 71 of 2008
18. Companies Act 61 of 1973
19. Witchen v Dench 1964 (2) SA 515 (7) 516
20. Amous v Fuel Transport (Pty) Ltd 1978 (4) SA 343 (W)
21. Ex parte Schrender 1964 (3) SA 84 (O)
22. In re: The Bodega Co Ltd (1904) Ch 276
23. Ex parte Umtentweni Motels (Pty) Ltd 1968 (1) SA144 (D&C)
24. Flegg v McCarthy & Flegg 1942 CPD 109
25. Goike Schneider v Westies Mineral (Edms) Bp 1970 (2) SA 685 (A)
26. Grundt v Greta Boulder Proprietary Gold Mines Ltd (1948) Ch; (1948) 1 All ER
27. John Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113 (CA)
29. Marock Place (Pty) Ltd v Advance Seed Co (Pty) Ltd 1975 (3) SA 403 (A)
30. Robinson v Randfontein Est GM Ltd 1921 AD 168
31. SABC v Mpolo 2009 (4) All SA 169 (GSJ)
32. Salomon v Salomon & Co 1897 AC 22
33. Schachat v Trans-African Credit & Savings Bak Ltd 1963 (4) SA 523 (C)
34. Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd (1927) 2 KB 9 (CA)
35. Steenkamp v Webster 1955 (1) SA 524 (A)
36. Stewart v Schwab 1956 (4) SA 791 (T)
37. Swerdlow v Cohen 1977 (1) SA 178 (W); 1973 (3) SA 1050 (T)
38. Tesco Supermarkets Ltd v Nuttress (1970) AC 1531; (1971) 2 All ER 127 (HL)

Abreviations

ABLR -Australia Business Law Reports
AD-Appellant Division
All ER -All England Law Reports
Australia Corp-Australia Corporate Law Reports
D&C-Durban and Coast Local Division
ILJ-International Law Journal
JRP - Journal of Research Practice
O -Orange Free State
SA Merc LJ - South African Mercantile Law Journal
SALJ-South Africa Law Journal
SC - Supreme Court
SCA- Supreme Court of Appeal
T -Transvaal
Tk-Transkei
VI LR-Virginia Law Review