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A critical analysis of the judicial review procedures under section 71 of the Companies Act 71 of 2008

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Abstract

Section 71(5) of the Companies Act 71 of 2008 provides that a director who has been removed from office by the board of directors may apply to court to review the board's decision. If the board of directors decides not to remove a director from office, any director who voted in favour of the removal, may, under section 71(6) of the Companies Act 71 of 2008, apply to court to review the board's decision. This article critically examines: the powers of a court under the judicial review processes; the permissible court orders which may be made; the locus standi to apply to court for a judicial review under section 71(5) and 71(6); the time period within which an application for judicial review must be instituted; the costs of the judicial review procedures; and the discretion of a court in granting or dismissing such applications. It is argued that the judicial review processes in section 71(5) and 71(6) are unclear and ambiguous in certain respects. Recommendations to amend and modify section 71(5) and 71(6) are made with a view to removing ambiguities in these provisions, and to improving and strengthening the judicial review processes under these provisions.

I Introduction

Section 71(3) of the Companies Act 71 of 2008 ('the Companies Act') permits the board of directors to remove a fellow director from office. This may be done in instances where a company has more than two directors, and a shareholder or director alleges that the director in question has become ineligible or disqualified to be a director, or has

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become incapacitated to the extent that he is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time, or that he has neglected or has been derelict in the performance of the functions of a director.¹ A director who has been removed from office by the board of directors on these grounds is empowered by statute to question the board's decision to remove him or her from office. Under section 71(5) of the Companies Act, a director may apply to court within 20 business days of his or her removal from office to 'review' the board's decision. On the other hand, in terms of section 71(6) of the Companies Act, if the board of directors has determined that a director is not ineligible, disqualified or incapacitated or has *not* been negligent or derelict, any director on the board who voted in favour of the removal of the impugned director, or any holder of voting rights entitled to be exercised in the election of that director, may apply to court to 'review' the board's determination not to remove the director from office. For example, if the applicant is of the view that the board of directors had favoured the impugned director by not removing him or her from office, or had breached its fiduciary duties in failing to remove the impugned director, the applicant may apply to court to review the board's decision. Decisions of the Companies Tribunal to remove, or not to remove, a director from office, are also subject to review.²

The judicial review processes in section 71(5) and 71(6) of the Companies Act are critically analysed in this article. In particular, the article critically examines: the powers of a court under the judicial review processes; the permissible court orders which may be made under the review processes; the locus standi to apply to court under section 71(5) and 71(6) for a judicial review; the time period within which an application for judicial review must be instituted; the costs of the judicial review procedures; and the discretion of a court in granting or dismissing such applications. Furthermore, the article discusses the review of decisions of the Companies Tribunal on the removal of directors from office under section 71(8) of the Companies Act. It is argued that the judicial review processes embodied in section 71(5) and

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71(6) of the Companies Act are unclear and ambiguous in certain respects, and that these provisions offend against the principle of non-interference by courts in the internal affairs of a company. Recommendations to amend and modify section 71(5) and 71(6) are made with a view to removing ambiguities in these provisions, to improving and strengthening the judicial review processes under these provisions, and to ensuring that a court does not unduly interfere in the internal affairs of a company.

II Powers of a court under a section 71(5) and section 71(6) review application

(a) Distinction between an appeal and a review

A distinction is drawn in South African law between an appeal and a review.³ In the strict traditional sense, a review involves an enquiry into the procedural aspects of a decision.⁴ In contrast, an appeal is a reconsideration and a fresh determination on the merits of the matter, but it is limited to the evidence or information on which the original decision was given.⁵ Since an appeal is concerned with the merits of the

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matter, the question in an appeal is whether the decision was right or wrong.⁶ The question in a review, however, is not whether the decision was wrong or right, but whether the way in which the decision was reached is acceptable.⁷ As the Supreme Court of Appeal stated in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration*,⁸ in a review, the 'focus is on the process and on the way in which the decision-maker came to the challenged conclusion'. Therefore, in a review a court is not entitled to consider the merits of the decision.⁹ Instead, the focus is on whether the procedure adopted was formally correct, or whether there were irregularities in the proceedings that may show that there has been 'a failure of justice'.¹⁰

In practice, however, the distinction between questions of procedure and merits is not always clear.¹¹ It may be that the term 'appeal' or 'review' is used in legislation when the intention of the legislature is, in substance, to confer a narrower or a wider power on the courts.¹² In some instances it may be impossible to separate the merits of a decision from the decision-making process as a court is not able effectively to assess the legality of the decision without also considering its merits.¹³ Accordingly, the focus in a review may in some instances fall on the merits of the decision instead of the decision-making process.¹⁴ In *Rustenburg Platinum Mines* (above)¹⁵ the Supreme Court of Appeal

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acknowledged that the line between review and appeal may be 'notoriously difficult to draw.' The court explained that this is 'partly because process-related scrutiny can never blind itself to the substantive merits of the outcome.'¹⁶ Nevertheless, the distinction between an appeal and a review is steadfastly upheld by our courts.¹⁷

(b) Powers of a court under a section 71(6) review

Section 71(6)(b) of the Companies Act provides that a court may either: (i) confirm the determination of the board of directors not to remove the director from office; or (ii) remove the director from office, if it is 'satisfied' that the director is ineligible, disqualified, incapacitated, or has been negligent or derelict. The word 'satisfied' indicates that, in reviewing the board's decision not to remove a director, a court is empowered to consider the substance of the decision or the merits of the matter, and not merely its procedural aspects.¹⁸ Accordingly, the term 'review' is not used in section 71(6) of the Companies Act in the traditional sense because the focus of the review may fall on the decision itself instead of the decision-making process. Section 71(6) is, therefore, an example of the blurring of the lines between an appeal and a review. It is submitted that the 'review' in section 71(6) of the Companies Act may be described as a 'substantive' or a 'wide review.'¹⁹

It is further submitted that the review power conferred on courts in section 71(6) of the Companies Act may also be construed as a special statutory power of review. In *Johannesburg Consolidated Investment Co v*

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Johannesburg Town Council Innes CJ distinguished three types of judicial review in the South African system: a review of the decisions of the inferior courts; a common-law (inherent) review of decisions of administrative authorities; and a wider form of statutory review.²¹ The special statutory review is one where the legislature confers on the courts a statutory power of review.²² With reference to this type of review, Innes CJ stated that a court could:

'[E]nter upon and decide the matter *de novo*. It possesses not only the powers of a court of review in the legal sense, but it has the functions of a court of appeal with the additional privileges of being able, after setting aside the decision arrived at . . . to deal with the whole matter upon fresh evidence as a court of first instance.'²³

In *Nel & another NNO v The Master (Absa Bank Ltd & others Intervening)*,²⁴ the Supreme Court of Appeal, per Van Heerden AJA, approved the above dictum of Innes CJ. The Supreme Court of Appeal affirmed that a statutory power of review confers on the court powers of both appeal and review with the additional power, if required, of receiving new evidence and of entering into and deciding the whole matter afresh.²⁵ The court's powers under a statutory power of review are not,

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however, unlimited or unrestricted.²⁶ The extent of any statutory review-type power depends on the particular statutory provision concerned and on the nature and extent of the functions entrusted to the person or body making the decision under review.²⁷ A statutory power of review may be wider than a judicial review of administrative action since it combines aspects of both a review and an appeal, but it may also be narrower if the court is confined to particular grounds of review or particular remedies.²⁸

It is submitted that the power given to the courts under a section 71(6) review is wider than a mere review. It combines aspects of both a review and an appeal since the court is empowered to consider the substance of the decision of the board of directors not to remove the director from office, and not merely the procedural aspects of the decision. For this reason, it is submitted that the power conferred on courts in section 71(6) of the Companies Act may be construed as a special statutory power of review. The courts' remedies are, however, limited by section 71(6)(b) of the Companies Act, to confirming the determination of the board of directors not to remove the director from office, or removing the director from office. It does not appear from the wording of section 71(6)(b) that the court is empowered to grant any other remedy under its statutory review power, save for making a costs order (discussed in VI below).

If a court is satisfied that the director concerned is ineligible, disqualified, incapacitated, or has been negligent or derelict, it may itself remove the director from office — it need not remit the matter to the board of directors to reconsider and make a new decision. In other words, a court may substitute its own decision for that of the board of directors. The courts' respect for the distinction between appeal and review has traditionally made them reluctant to usurp the decision-making powers which the legislature has delegated to the

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administration.²⁹ For this reason, substitution is regarded as an extraordinary remedy in judicial review.³⁰ In *Gauteng Gambling Board v Silverstar Development Ltd & others*,³¹ the Supreme Court of Appeal reasoned that remittance is almost always the prudent and proper course since the administrator is generally best equipped by the variety of its composition, experience, and access to sources of relevant information and expertise to make the correct decision. The Supreme Court of Appeal held that the remedy of substitution is to be exercised in exceptional circumstances, and only when a court is persuaded that a decision to exercise a power should not be left to the designated functionary.³² In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited & another*, the Constitutional Court further emphasised that even where there are exceptional circumstances, a court must be satisfied that it would be just, equitable, and fair to the parties involved to grant an order of substitution. This power granted to the courts is indicative of the wide powers given to a court under section 71(6)(b) of the Companies Act.

(c) Powers of a court under a section 71(5) review

It is not clear from the wording of section 71(5) whether a court is empowered to review the substance and merits of the board's decision to remove a director from office, or whether it may enquire only into the procedural correctness of the decision. Unlike section 71(6)(b), section 71(5) does not state that a court may reinstate a director to office if it is 'satisfied' that he or she is not ineligible, disqualified, incapacitated, or has been negligent or derelict. Since section 71(5) uses the word 'review', and there are no indications in the provision pointing to a court being empowered to review the substance and merits of the decision, on a strict reading of the section a court reviewing the decision of the board of directors to remove a director from office is empowered to enquire only into the procedural correctness of the decision. The procedural elements would be whether the board had fully and correctly complied with the

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requirements set out in section 71(4) of the Companies Act. These requirements relate to the notice of the board meeting, giving the director the reasons for the proposed removal resolution, and providing him or her with a reasonable opportunity to make a presentation to the board of directors before a vote on the resolution is taken. On the basis of section 71(5), a court is not, for example, empowered to consider whether the board of directors acted in breach of its fiduciary duties in removing a director from office since this would entail an enquiry into the substantive correctness of the decision.³⁴

It is submitted that in order for there to be consistency with section 71(6) of the Companies Act, a court should under a section 71(5) review, be empowered to enquire into the merits of the board's decision to remove a director from office. As is the case with the review power under section 71(6) of the Companies Act, the review power under section 71(5) is also a statutory power of review. As discussed, a statutory power of review confers on the court powers of both appeal and review with the additional power, if required, of receiving new evidence and of entering into and deciding the matter *de novo*. It is consequently arguable that since the review power conferred on a court in section 71(5) of the Companies Act is a statutory power of review, a court is empowered to consider both the procedural aspects of the decision as well as the substance and merits of the decision to remove a director from office.

It is of particular importance that a court be empowered under a section 71(5) review, to consider the substance and merits of the board's decision to remove a director in order to ensure that the board has not acted with ulterior motives and is consequently in breach of its fiduciary duties. It would be anomalous if a court were to review a decision of the board of directors to remove a director where the board had acted in breach of its fiduciary duties, only to find that it is powerless to set aside that decision simply because the board had complied with the relevant procedures. Giving a court the power to consider the merits of the board's decision to remove a director in a section 71(5) review, is a significant and essential safeguard against the abuse of the board's power to remove a fellow director. Clarity is, however, required on the court's review powers under section 71(5) of the Companies Act.

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III Locus standi to apply to court to review the board's decision

(a) Locus standi under a section 71(5) review

Section 71(5) of the Companies Act allows a director who has been removed from office by the board of directors, or a person who appointed that director as contemplated in section 66(4)(a)(i) of the Companies Act to apply to court to review the decision of the board. Under section 66(4)(a)(i), a company's memorandum of incorporation (MoI) may provide for the direct appointment and removal of a director by any person named in or determined in terms of the MoI. This strengthens the power conferred on a person named in or determined in terms of the MoI to ensure that the director he or she appointed is not improperly removed from office. These are the only persons who have locus standi to institute a review application in terms of section 71(5) of the Companies Act. Notably, section 71(5) does not confer locus standi on a shareholder to institute a review application under section 71(5).

(b) Locus standi under a section 71(6) review

Section 71(6)(a) of the Companies Act, too, confers locus standi to apply to court for a review of the board's decision not to remove a director from office on only two persons: a director who voted in favour of the removal resolution; and a holder of voting rights entitled to be exercised in the election of that director. It should be noted that section 71(3) of the Companies Act empowers a 'shareholder' to allege that a director has become ineligible, disqualified, incapacitated, or negligent, while section 71(6)(a) empowers 'any holder of voting rights entitled to be exercised in the election of that director' to apply to court to review the board's decision.

A 'shareholder' may not necessarily be a 'holder of voting rights entitled to be exercised in the election of that director.' A shareholder is defined in section 1 of the Companies Act to mean, subject to section 57(1) of the Companies Act, the holder of a share issued by the company and whose name is entered as such in the securities register. In terms of section 57(1), for purposes of Part F (Governance of companies) 'shareholder' has the meaning set out in section 1 of the Companies Act, but further includes a person who is entitled to exercise any voting rights in relation to a company. This applies irrespective of the form, title, or

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nature of the securities to which those voting rights are attached.³⁵ A specific shareholder may not necessarily have voting rights to elect the director who is the subject of a removal resolution. In this event, the shareholder would not be empowered under section 71(6) of the Companies Act to apply to court to review the board's decision not to remove the director. This means that a shareholder who does not have voting rights to elect a particular director to office, may make an allegation against a director under section 71(3) of the Companies Act that the director is ineligible, disqualified, incapacitated, negligent or derelict. But, if the board does not remove the particular director from office, that shareholder will not have a right under section 71(6) of the Companies Act to apply to court to review the board's decision.

It seems anomalous to give a shareholder the right to make an allegation against a director under section 71(3), but not to allow him or her a right to apply to court to review the board's decision not to remove the director. Notably under section 71(6) 'any' holder of voting rights entitled to be exercised in the election of a director may apply to court to review the board's determination not to remove the director from office, regardless of whether or not he or she brought an allegation against the director under section 71(3) of the Companies Act.

IV Time period within which the review application must be lodged

(a) Time period to lodge a section 71(5) review application

Section 71(5) of the Companies Act provides that if a director has been removed from office by the board of directors, the director or a person who appointed that director as contemplated in section 66(4)(a)(i), may, within 20 business days, apply to a court to review the board's determination.³⁶ The period of 20 business days places a cap on the time allowed a director to contend that he has been improperly removed from office by the board of directors. This has the benefit of bringing the matter to a finality.

Section 70(2) of the Companies Act states that if the board of directors

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has removed a director in terms of section 71(3) of the Companies Act, a vacancy on the board does not arise until the later of: the expiry of the time for filing an application for review in terms of section 71(5) (that is, 20 business days); or the granting of an order by the court on such an application. However, during this time the director concerned is suspended from office. It follows that once the board of directors removes a director from office, it may not fill the vacancy until the expiry of the period of 20 business days, or until the court grants an order on a section 71(5) review application if such an application is instituted.

If the director is suspended during the 20-business-day period and during the time taken by a court to rule on an application for review in terms of section 71(5) of the Companies Act, the director would clearly not, pending the resolution of the dispute, be regarded as a board member. Section 70(2) of the Companies Act, therefore, makes it clear that the expelled director is not to be treated as a board member during this period. The advantages of this provision are that the management of the company does not come to a standstill pending the resolution of the dispute, and there is no uncertainty as to whether the expelled director is to be treated as a member of the board of directors.

Section 71(5) does not, however, specify when the period of 20 business days commences. Presumably, the period of 20 business days would commence from the date that the board of directors takes the decision to remove the director from office. It is submitted that section 71(5) should specify when the period of 20 business days commences.

(b) Time period to lodge a section 71(6) review application

In sharp contrast to section 71(5), section 71(6) of the Companies Act imposes no time limit within which a director or a holder of voting rights entitled to be exercised in the election of that director, may apply to court to review the board's determination not to remove a fellow board member. It is important that a time limit be imposed as without it the impugned director's status on the board is uncertain in that a director or a holder of voting rights could apply to court at any time to review the board's decision not to remove him or her from office. Even though there would be no uncertainty as to whether the director in question is a board member because the board would simply regard the director as being a member as it did not remove him or her from office, it is submitted that there must nevertheless be a time limit within which a director or a holder of voting rights may apply to court to review the board's determination not to remove the director from office, so as to bring the matter to a finality.

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It is, consequently, submitted that an applicant under section 71(6) of the Companies Act should be given 20 business days to apply to court to review the board's decision not to remove the director from office. The period of 20 business days should commence from the date of the board's decision not to remove the director. The period of 20 business days would harmonise section 71(6) of the Companies Act with section 71(5). It would also accord with the purposes of the Companies Act in sections 7(j) and 7(l), ie, to encourage the efficient and responsible management of companies, and to provide a predictable and effective environment for the efficient regulation of companies.

V Permissible court orders under a review application

(a) Permissible court orders under a section 71(5) review application

Section 71(5) of the Companies Act is silent on the orders that a court may make on a review if it finds that a director has been improperly

removed from office by the board of directors. It is not clear whether a court is empowered to reinstate a director to office under section 71(5) if it finds that he or she has been improperly removed. A distinction is drawn between an executive director — who is both a full-time director and an employee of the company — and a non-executive director, who is a part-time director and not an employee of the company. ³⁷ In *PG Group (Pty) Ltd v Mbambo NO & others*, the Labour Court cast doubt on whether an executive director is entitled to reinstatement because of the dual capacities (director and employee) in which he holds office. While reinstatement may be more difficult with regard to executive

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directors, this does not mean that a court would not in appropriate circumstances order reinstatement.

For instance, in *Whitcutt v Computer Diagnostics & Engineering (Pty) Ltd*, the former Industrial Court reinstated the financial director of a company as an employee on the ground that his dismissal as an employee had been substantively and procedurally unfair. ⁴⁰ The court found that the financial director's position as an employee could be distinguished from his capacity as a director. ⁴¹ It consequently reinstated the employee, retrospectively, on terms and conditions no less favourable to him than those that had governed his employment before his dismissal. ⁴² In *Oak Industries (SA) (Pty) Ltd v John NO & another*, an application for a review of a decision of the Industrial Court, the High Court found that the managing director of the company was an employee of the company who had been unfairly dismissed. The court upheld the reinstatement of the unfairly dismissed managing director to his employment position with the company. The former managing director was reinstated only to his position of employment but not to his position as a director of the company. ⁴⁴ Even though it may be complicated to reinstate executive directors in the company given the dual capacities in which they hold office, the courts may nevertheless reinstate executive directors as employees if they have been unfairly dismissed as employees. The director's capacity as employee must, however, be capable of being separated from his or her capacity as director. It is submitted that a court ought to have the power to order the reinstatement of an improperly removed director to the board of directors where this would be appropriate, and that section 71(5) should be amended accordingly.

Section 1726(d) of the Pennsylvania Business Corporation Law provides that if a director has been suspended or removed for cause, and the suspension or removal is thereafter rescinded by the shareholders, the board, or by the final judgment of a court, an act of the board of directors performed during this period would not be impugned or invalidated. Drawing on this section, it is submitted that section 70(2) of the Companies Act should be amended to incorporate a provision to the

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effect that any act by the board during the period of suspension of a director who is later reinstated by a court under a section 71(5) review, may not be impugned or invalidated. Such a provision would ensure a minimal disruption to the running of the company. It would also remove any doubt of whether decisions taken by the board of directors in the absence of the suspended director, remain valid once he has been reinstated. It would further ensure that any decision taken by the board of directors in the absence of the suspended director would not be subject to challenge by third parties when the suspended director is reinstated. Such a provision would also accord with the purpose of the Companies Act in section 7(j) of encouraging the efficient and responsible management of companies.

It is also not clear whether a court is empowered under section 71(5) of the Companies Act, to order that compensation be paid to a director who has been improperly removed from office, and if so, the basis on which the compensation is to be calculated. This compensation is not to be confused with damages or compensation for loss of office, which may be claimed by a director under section 71(9) of the Companies Act. Damages or compensation for loss of office under section 71(9) arises from a breach of contract by the company, ⁴⁵ while compensation which may be payable under section 71(5) arises from the improper removal of a director from office by the board of directors under section 71(3) of the Companies Act. It is submitted that, where appropriate, a court should order that compensation be paid to a director who was improperly removed from office by the board of directors under section 71(3). If a court were to order compensation under section 71(5) of the Companies Act, one form it could order is that the improperly removed director be compensated for the loss of board fees during his suspension from office in terms of section 70(2) of the Companies Act. Clarity, perhaps by legislative amendment, is required as regards the orders a court may make under section 71(5).

(b) Permissible court orders under a section 71(6) review application

Under section 71(6)(b) of the Companies Act, a court may either confirm the decision of the board of directors not to remove the director

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from office, or it may itself 'remove the director from office, if the court is satisfied that the director is ineligible or disqualified, incapacitated, or has been negligent or derelict.' Section 71(6)(b) of the Companies Act thus gives a court a direct power to remove a director from office. In terms of section 70(1)(b)(vi)(cc), if a director is removed from office by an order of the court in terms of section 71(6) of the Companies Act, the person removed ceases to be a director and a vacancy arises on the board of the company.

VI Costs of the review applications

(a) Costs of a section 71(6) review application

Section 71(7) of the Companies Act provides that if a director or a holder of voting rights entitled to be exercised in the election of that director, applies to court under section 71(6) of the Companies Act to review the board's decision not to remove the director from office, he is required to compensate 'the company, and any other party' for any costs incurred in relation to the application, unless the court reverses the decision of the board. In other words, if the court confirms the decision of the board of directors not to remove the director from office, the applicant under section 71(6) must compensate the company and any other party for the costs incurred in relation to the application.

The fact that the applicant is statutorily required to compensate the 'company' implies that the review application must be brought against the company itself. However, as the applicant may be required to compensate 'any other party' for costs incurred in relation to the application, it appears that the review application may also be instituted against the members of the board of directors personally, who will be entitled to compensation for any costs incurred in the application.

The provisions of section 71(7) embody the general principle in South African civil procedure that costs follow the event, that is, that costs are generally awarded against the unsuccessful party and that the successful party should be awarded his or her costs. ⁴⁶ While the general principle regarding costs is well-settled in the common law, the courts may, in their discretion, depart from this principle because each case must be

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decided on its own facts and is in essence a question of fairness to both sides. ⁴⁷ In *Intercontinental Exports (Pty) Ltd v Fowles*, the Supreme Court of Appeal asserted that a court's discretion with regard to costs is wide, unfettered, and equitable, which must be exercised judicially with due regard to all relevant considerations. For instance, as the Supreme Court of Appeal indicated, a court may in certain circumstances wish to deny a party costs, or a portion thereof, or to order less costs than it might otherwise have done as a mark of displeasure at that party's conduct in relation to the litigation. ⁴⁹

Notably, under section 71(6) of the Companies Act the legislature has excluded the common-law discretion conferred on courts with regard to the making of a costs order. It appears from a literal interpretation of section 71(7) that even if, in the circumstances, it would be fair not to award costs against an unsuccessful applicant in a section 71(6) review application, a court 'must' nevertheless order an unsuccessful applicant to pay the costs of the company and any other party. Section 71(7) is a mandatory provision. It is debatable whether the exclusion of the discretion to make a costs order is advisable. On the one hand, the threat of a potential costs order would discourage frivolous and vexatious

applications to court to review the board's decision not to remove a director from office. ⁵⁰ On the other hand, the threat of a potential costs order would also deter bona fide applicants from instituting a review application, even when the application is justified. Individual directors and holders of voting rights generally do not have the funds and resources necessary to institute litigation proceedings. Therefore, the risk of being burdened with the costs of the company and any other party if the review action fails, is a formidable deterrent to instituting a review application. This has the effect that a decision of the board of directors not to remove a fellow board member from office in circumstances

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where there are valid grounds to do so, may frequently go unchallenged.

In contrast, the legislature has not excluded the discretion of the court to make a costs order with regard to an application for leave to bring derivative proceedings under section 165 of the Companies Act. In terms of section 165(10) a court 'may make any order it considers appropriate about the costs'. Also noteworthy is that if a shareholder applies to court to determine the fair value of his or her shares with regard to the exercise of the appraisal remedy under section 164 of the Companies Act, the legislature has not excluded the court's discretion in making a costs order, but has given the court the discretion to make an 'appropriate order of costs'. ⁵¹

It is submitted that it would be preferable for the general discretion of courts which applies in the ordinary course in deciding costs applications, to be preserved under section 71(7) of the Companies Act. This should be done to allow courts to award costs they consider fair and equitable in the circumstances of the case. In accordance with this submission, section 71(7) of the Companies Act should be deleted altogether and replaced by a provision allowing a court the discretion to make any order it considers appropriate on the costs of the application in terms of section 71(6).

In *Lynmar Investments (Pty) Ltd v South African Railways and Harbours*, the High Court held that it was not fettered by a statutory injunction (being the provisions of the now-repealed Railway Expropriation Act 37 of 1955) as to costs, and that it was at liberty to make any order as appeared to it to be proper in the circumstances of the case. If section 71(7) of the Companies Act is not deleted and replaced with a provision as indicated above, it is submitted that the approach adopted by the High Court in *Lynmar Investments* ought to be adopted to the awarding of costs under section 71(7) of the Companies Act. The courts

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should still have a residual discretion, if valid reasons and justice so require, to depart from the rule in section 71(7) of the Companies Act.

For example, where an applicant under a section 71(6) review application is unsuccessful, but had meritorious grounds to institute the review application, a court would, if it had a discretion with regard to a costs order, be able to order the applicant to compensate the company for its costs, but not to compensate the directors whose conduct was the subject of the complaint. It is submitted that conferring on a court a discretion to make a costs order which is fair to both parties would strike the right balance in ensuring that, on the one hand, directors and holders of voting rights are not discouraged from instituting bona fide and genuine review applications in terms of section 71(6) of the Companies Act, and that, on the other hand, they do not institute vexatious and frivolous review applications.

Section 71(6) of the Companies Act does not explicitly provide that a successful applicant in terms of a section 71(6) review application is entitled to be compensated by the company, or by any other party, for the costs he or she has incurred in the application. In accordance with the common-law rule that a successful party should be awarded his or her costs, it is submitted that a successful applicant in a section 71(6) review application must be compensated for the costs he or she incurred in instituting the application.

(b) Costs of a section 71(5) review application

Section 71(5) is silent on the payment of the costs of a section 71(5) review application. Presumably, the common-law civil-procedure rule that costs follow the event, as discussed above, will apply. As indicated, the courts have a discretion to depart from this principle as each case must be decided on its own facts. In essence, the issue is a question of fairness to both sides. On this basis, a successful applicant in a section 71(5) review application could be awarded costs and an unsuccessful applicant may be required to pay the costs of the other party or parties to the review application.

VII Interference by the judiciary in the internal affairs of a company

A distinct advantage of the provisions of section 71(5) and 71(6) of the Companies Act is that they are prophylactic. They serve as both a deterrent and a safeguard against the board of directors abusing its power to remove a fellow director, or favouring a director who ought

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properly to be removed from office. If the board of directors were to vote improperly under section 71(3) of the Companies Act, it would run the risk of an application for judicial review by anyone with locus standi to do so. If the application succeeds, the directors run the risk of having to pay the costs. Access to court is an important safety mechanism in instances where the board of directors abuses its power of removal, or is unable or unwilling to remove a director from office.

This notwithstanding, the provisions of section 71(5) and 71(6) offend the principle of non-interference by courts in the internal affairs of the company. As a general principle, courts are disinclined to interfere in the internal management decisions of a company. ⁵⁴ Courts adopt the policy that they should not get involved in situations where the parties are capable of resolving their disputes internally. ⁵⁵ The election, retention, dismissal, or removal of officers, directors, and employees are examples of such internal corporate operations which essentially involve management decisions. ⁵⁶ For instance, if under a section 71(6) review application a court is satisfied that the director in question is ineligible, disqualified, incapacitated, or has been negligent or derelict in his or her duties, it may remove the director from office even if the board of directors has voted against the removal. This results in a clear infringement of the principle of non-interference in the internal affairs of a company.

If the board of directors were to vote against the removal of an ineligible or disqualified director, its failure to remove that director would contravene section 69(2) of the Companies Act, which prohibits a person who is ineligible or disqualified from acting as a director of a company. ⁵⁷ In this event, the removal of the director by the court and the interference by the court in the internal affairs of the company under section 71(6)(b) of the Companies Act, would be justified. Other instances where the removal of a director and the interference in the internal affairs of the company by the court would be justified, are:

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where there has been some illegality or oppressive or fraudulent conduct by the board of directors in removing a director from office or in failing to remove a director from office. ⁵⁸ The board of directors has some discretion, under section 71(3) of the Companies Act, whether or not to remove a director whom it has found to be incapacitated, or one who has neglected or has been derelict in the performance of his or her functions, or who has been negligent. ⁵⁹ If a court were to remove from office an incapacitated, negligent, or derelict director whom the board of directors has, in its discretion, decided not to remove, or vice versa, the interference by the court in the internal affairs of the company would be more difficult to justify.

While the powers of the court under section 71(5) of the Companies Act are not clear, as discussed earlier, the use of the word 'may' in section 71(6)(b) makes it clear that a court has a discretion whether or not to remove a director from office. It follows that even if a court is satisfied that a director whom the board of directors has failed to remove from office is ineligible, disqualified, incapacitated, or has been negligent or derelict, it is not obliged to remove him or her.

It is recommended that in order to ensure that a court does not unduly interfere in the internal affairs of the company, before it exercises its

discretion to remove a director from office under a section 71(6) review application, it should give due consideration to the reasons why the board of directors failed to remove the director concerned from office in the first place. A court should also consider whether the board of directors complied with its fiduciary duties in not removing the director from office, whether it acted with ulterior motives, and whether it acted openly and transparently and in the best interests of the company in not removing the director. It is submitted that if these

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factors are taken into account by courts in a section 71(6) review application, they will have given due consideration to the principle of non-interference in the internal affairs of the company, and the interference of the court may in that event be justifiable. These considerations should also be taken into account by a court in a section 71(5) review application — always assuming that a court has a discretion whether or not to reinstate a director to the board of directors under section 71(5) of the Companies Act.

VIII Judicial review of a decision of the companies tribunal on the removal of a director from office

If a company has fewer than three directors, the board of directors may not remove a director from office. Section 71(3) of the Companies Act does not apply to that company.⁶⁰ Instead, any director or shareholder may apply to the Companies Tribunal for a determination concerning the removal of a director from office.⁶¹ Section 71(4), 71(5), and 71(6) of the Companies Act, read with the changes required by the context, would apply to the determination of this matter by the Companies Tribunal.⁶² Therefore, a decision of the Companies Tribunal to remove, or not to remove, a director from office, is also subject to review under section 71(5) and 71(6) of the Companies Act, as applicable.

It should be noted that section 71(6)(a) states that 'any director who voted otherwise on the resolution' may apply to court to review the determination by the board not to remove the director in office. If this provision is applied to the removal of a director by the Companies Tribunal, it becomes unclear whether the remaining director in the company (whose removal is not in issue) may apply to court to review the determination of the Companies Tribunal, or whether only a holder of voting rights entitled to be exercised in the election of that director, may do so.⁶³ This is because the remaining director would not have 'voted otherwise on the resolution' because the matter would have been determined by the Companies Tribunal and not by the directors.

In *Talisman Compressed Air (Pty) Ltd v Dykman*, the court affirmed the right of a director or a shareholder to apply to the Companies

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Tribunal to determine whether a director had been guilty of neglect or dereliction. The court stated that this right is 'subject to the right of any party, as provided in subsection (6), to review the determination by a court of law.'⁶⁵ The word 'any' could be interpreted to indicate that the remaining director of the company may also apply to a court to review the determination of the Companies Tribunal by a court of law. It must be conceded, however, that whether or not the remaining director may apply to court to review the determination of the Companies Tribunal was not in issue before the court. Undue weight should not, therefore, be attached to this obiter dicta by the court. It is submitted that as section 71(8)(c) of the Companies Act states that section 71(6) applies to the determination of the removal of a director by the Companies Tribunal as 'read with the changes required by the context', the remaining director ought to have the right to apply to court for a review of the decision of the Companies Tribunal. Clarity is, however, required on this point by either the legislature or the courts.

As discussed earlier, section 70(2) of the Companies Act states that if the board of a company has removed a director in terms of section 71(3) of the Companies Act, a vacancy on the board does not arise until the later of the expiry of the time for filing an application for a review of the board's decision in terms of section 71(5) of the Companies Act (ie, 20 business days), or the granting of an order by the court on such an application. The director is, however, suspended from office during this 'waiting period'. The legislature did not impose a similar requirement with regard to the removal of a director by the Companies Tribunal.⁶⁶ This may well be an oversight. In the interests of clarity and consistency, and to remove any ambiguity, it is submitted that section 70(2) of the Companies Act should be amended to include a reference to a removal of a director by the Companies Tribunal in terms of section 71(8) of the Companies Act.⁶⁷

IX Conclusion

This article has critically evaluated the judicial review processes under section 71(5) and 71(6) of the Companies Act. Under section 71(5), a director has a right to institute a review application to court within 20 business days of his removal from office by the board of directors. The person who appointed that director in terms of section 66(4)(a)(i) of

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the Companies Act also has locus standi to institute the review application. It is submitted that section 71(5) of the Companies Act is silent or ambiguous on certain important matters. The following recommendations are made in regard to improving the review application in terms of section 71(5) of the Companies Act:

- (i) The powers of a court under a section 71(5) review application are uncertain. Clarity should be provided by the legislature as to whether, in such an application, a court is empowered to enquire into the merits of the board's decision to remove a director from office, or whether it is confined solely to reviewing the procedural aspects of the board's decision to remove a director from office. In order to strengthen the review application and to bring it into line with the review process under section 71(6) of the Companies Act and to widen the basis on which a director may challenge his removal from office, it is recommended that a court should be empowered under a section 71(5) review, to enquire into the merits of the board's decision to remove a director from office, and should not be confined merely to enquiring into the procedural correctness of the decision.
- (ii) Section 71(5) fails to specify the orders that a court may make on a review should it set aside the board's decision to remove a director from office. The legislature should provide clarity in this regard. It should be stated whether a court is empowered to reinstate an improperly removed director to office, in appropriate circumstances, and whether it may order that the director be paid compensation.
- (iii) It is submitted that section 70(2) of the Companies Act

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should incorporate a provision to the effect that any act of the board during the period of suspension of a director who is later reinstated by a court under a section 71(5) review, may not be impugned or invalidated. This would ensure a minimal disruption to the running of the company if the suspended director were to be reinstated to the board by a court. Such a provision would also accord with the purpose of the Companies Act in section 7(j) of encouraging the efficient and responsible management of companies.

- (iv) It is not clear when the period of 20 business days within which to lodge the section 71(5) review application commences. Presumably, this would be from the date that the board of directors makes the decision to remove the director from office. In the interests of clarity and legal certainty, section 71(5) should specify when the period of 20 business days commences.
- (v) In the interests of clarity and consistency and to remove any ambiguity, it is submitted that section 70(2) of the Companies Act should be amended to include a reference to a removal of a director by the Companies Tribunal in terms of section 71(8) of the Companies Act. This would make it clear that a director who has been removed from office by the Companies Tribunal under section 71(8) of the Companies Act, would also be suspended from office until the expiry of the period for filing an application for review in terms of section 71(5) or the granting of an order by the court on such an application. Clarity should also be provided as to whether the remaining director whose removal is not in issue, may apply to court to review the determination of the Companies Tribunal, or whether only a holder of voting rights entitled to be exercised in the election of that director may do so.

It is, consequently, recommended that section 71(5) of the Companies Act should be amended as follows:⁶⁸

'(5) If, in terms of subsection (3), the board of a company has determined that a director is ineligible or disqualified, incapacitated, or has been negligent or derelict, as the case may be —

- (a) the director concerned, or a person who appointed that director as contemplated in section 66(4)(a)(i), if applicable, may apply within 20 business days of the board's determination to a court to review the determination of the board; and
- (b) the court, on application in terms of paragraph (a), may —
- (i) confirm the determination of the board; or
 - (ii) reinstate the director to office, if the court is satisfied that the director is not ineligible or disqualified, incapacitated, or has not been negligent or derelict, as the case may be, or make any other order which it considers appropriate.'

It is recommended further that section 70(2) of the Companies Act be amended as follows:

'(2) If, in terms of section 71(3) or section 71(8), the board of a company or the Companies Tribunal has removed a director, a vacancy on the board does not arise until the later of —

- (a) the expiry of the time for filing an application for review in terms of section 71(5) or section 71(8)(c); or
- (b) the granting of any order by the court on such an application,

but the director is suspended from office during that time, and any acts of the board of directors during the period that a director is suspended are not impugned or invalidated if the suspended director is reinstated to office by a court in terms of section 71(5).'

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In terms of section 71(6) of the Companies Act, if the board of directors has resolved not to remove a director from office, any director who voted in favour of the removal, or a holder of voting rights in the election of that director, may apply to court to review the board's decision. It was argued that the court's review powers under section 71(6) may be described as a 'substantive' or a 'wide review', or as a special statutory power of review. A 'substantive' or a 'wide review' contains a merits-based substantive element, while a 'special statutory power of review' confers on a court powers of both appeal and review. As is the position with section 71(5) of the Companies Act, it is submitted that section 71(6) is silent or ambiguous on certain important aspects of the review process. The following recommendations are made with regard to improving the review application in terms of section 71(6) of the Companies Act:

- (i) Section 71(6)(a) of the Companies Act confers locus standi to apply to court for a review of the board's decision not to remove a director from office, on a director who voted in favour of the removal resolution, and on a holder of voting rights entitled to be exercised in the election of that director. It was argued that a 'shareholder' may not necessarily be a 'holder of voting rights entitled to be exercised in the election of that director'. It is submitted that it is anomalous to provide a shareholder with the right to make an allegation against a director under section 71(3), but not to provide him or her with a remedy to apply to court to review the board's decision not to remove the director from office.
- (ii) Section 71(6) does not impose any time limit within which a director or a holder of voting rights is required to apply to court under section 71(6) to review the board's decision not to remove a director from office. In order to bring the matter to a finality and to have consistency with the time limit of 20 business days prescribed in a section 71(5) review, it is suggested that a time limit of 20 business days should be imposed in section 71(6). It is, consequently, recommended that section 71(6)(a) be amended as follows:
- '(a) any director who voted otherwise on the resolution, or any holder of voting rights entitled to be exercised in the election of that director, may apply within 20 business days of the board's determination to a court to review the determination of the board; and'
- (iii) Section 71(7) of the Companies Act has excluded the common-law discretion conferred on courts in regard to the making of a costs

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order. It is submitted that courts should be given a discretion to make an appropriate costs order under section 71(6) so as to strike the correct balance in ensuring, on the one hand, that directors and holders of voting rights are not discouraged from instituting bona fide and genuine review applications and that, on the other hand, they do not institute vexatious and frivolous applications. It is submitted that section 71(7) should be deleted and replaced with a provision conferring on a court the discretion to make any order it considers appropriate on the costs of the application in terms of section 71(6). It is, consequently, recommended that section 71(7) be amended as follows:

~~'71(7) An applicant in terms of subsection (6) must compensate the company, and any other party, for costs incurred in relation to the application, unless the court reverses the decision of the board'. A court may make an appropriate order of costs in relation to an application in terms of subsection (6).'~~

While the advantage of section 71(5) and 71(6) of the Companies Act is that these provisions are a deterrent and a safeguard against the board of directors abusing its power to remove a fellow director from office, or favouring a director who ought to be removed from office, it is submitted that the provisions of section 71(5) and 71(6) offend the principle of non-interference by courts in the internal affairs of the company. It was argued that the interference in the internal affairs of a company by the court is justified in certain circumstances. However, in order to ensure that a court does not unduly interfere in the internal affairs of the company, it is submitted that before a court exercises its discretion to remove a director from office under a section 71(6) review application, it should give due consideration to the reasons why the board of directors did not remove the director from office, whether the board of directors had complied with its fiduciary duties in not removing the director from office, and whether it had acted openly and transparently and in the best interests of the company in not removing the director from office. It is submitted that these considerations should also be taken into account by a court in a section 71(5) review application, assuming that a court has a discretion whether or not to reinstate a director to the board of directors under section 71(5) of the Companies Act.

It is hoped that these recommendations will clarify and improve section 71(5) and 71(6) of the Companies Act on the judicial review of decisions taken by the board of directors and the Companies Tribunal to remove directors from office, or to refrain from doing so. The right conferred on directors to apply to court to review the decisions of the

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board of directors on their removal is a significant and invaluable right. For this reason, it is imperative that directors have clarity and certainty on the relevant aspects of the review processes, and that the legislature provide such clarity on those uncertain and ambiguous aspects of the review processes.

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1 Under s 71(3) of the Companies Act the board of directors, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.

2 If a company has fewer than three directors, the board of directors may not remove a director from office. Instead, any director or shareholder may apply to the Companies Tribunal for a determination concerning the removal of a director from office (s 71(8) of the Companies Act).

3 The distinction between an appeal and a review stems from the doctrine of separation of powers. This doctrine holds that it would not be acceptable for judges to pronounce on the merits of administrative decisions because the judiciary would be usurping the functions entrusted by the Constitution of the Republic of South Africa, 1996 ('the Constitution') and by Parliament to the executive branch of government. The administration forms part of the executive branch of government. The court's role in administrative law is therefore restricted to ensuring that the administration keeps within its mandate and exercises its function in a manner that complies with all law. See *Carephone (Pty) Ltd v Marcus NO & others* 1999 (3) SA 304 (LAC) para 34; *Pharmaceutical Manufacturers Association of South Africa & another; In Re Ex Parte Application of the President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) para 45; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* 2004 (4) SA 490 (CC) para 46; Hoexter, 'The future of judicial review in South African administrative law' (2000) 117/3 SALJ 484 at 490; Hoexter et al (eds), *The New Constitutional and Administrative Law* vol 2 (Juta 2002) 65; Hoexter, *Administrative Law in South Africa* 2 ed (Juta 2012) 111; Corder, 'The development of administrative law in South Africa' in Quinot et al (eds), *Administrative Justice in South Africa: An Introduction* (OUP 2015) 13-14; and Quinot, 'Regulating administrative action' in Quinot et al (eds), *Administrative Justice in South Africa: An Introduction* (OUP 2015) 107. For a general discussion on the separation of powers doctrine see Maree, 'Administrative authorities in legal context' in

Quinot et al (eds), *Administrative Justice in South Africa: An Introduction* (OUP 2015) 34–40.

4 See *Tikly & others v Johannes NO & others* 1963 (2) SA 588 (T) at 590–591, where the difference between an appeal and a review is discussed. See further on the distinction between an appeal and a review *Minister of Environmental Affairs and Tourism & others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism & others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) para 52.

5 There is a distinction between an appeal in the ordinary strict sense and an appeal in the wide sense. An appeal in the ordinary strict sense is a re-hearing on the merits but is limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong. An appeal in the wide sense is a complete re-hearing of and a fresh determination on the merits of the matter with or without additional evidence or information. See *Tikly* at 590–591; *Health Professions Council of SA v De Bruin* [2004] 4 All SA 392 (SCA) para 23; *Samancor Group Pension Fund v Samancor Chrome* 2010 (4) SA 540 (SCA) para 15; and Hoexter, (Juta 2012) 68.

6 *Tikly* at 590; *Thuketana v Health Professions Council of South Africa* 2003 (2) SA 628 (T) at 634–635; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) para 30; Baxter, *Administrative Law* (Juta 1984) 256; Hoexter et al (eds), (Juta 2002) 64; Hoexter, (Juta 2012) 108.

7 Hoexter et al (eds), (Juta 2002) 64; Hoexter, (Juta 2012) 65.

8 2007 (1) SA 576 (SCA) para 31.

9 Hoexter et al (eds), (Juta 2002) 64 and 110.

10 *Davies v Chairman, Committee of the Johannesburg Stock Exchange* 1991 (4) SA 43 (W) at 48.

11 Baxter, (Juta 1984) 255; Hoexter et al (eds), (Juta 2002) 65.

12 Baxter, (Juta 1984) 255; Hoexter, (Juta 2012) 65 and 68–69.

13 Hoexter, (Juta 2012) 110; Quinot, (OUP 2015) 108. For instance, review on the ground of reasonableness applies to the process followed in taking the action but also necessitates some degree of consideration of the merits since the reasonableness of the consequences of the action taken also falls to be reviewed (Corder, (OUP 2015) 14). Corder describes review on the ground of reasonableness, which contains a merits-based substantive element, as not an appeal nor a mere procedural review, but as a 'substantive' or 'wide' review (Corder, 'Without deference, with respect: A response to Justice O'Regan' (2004) 121/2 SALJ 438 at 443–444).

14 Hoexter et al (eds), (Juta 2002) 65.

15 2007 (1) SA 576 (SCA) para 31.

16 *Rustenburg Platinum Mines Ltd* para 31. The remarks of the Supreme Court of Appeal were made in the specific context of review for rationality, which is an element of reasonableness. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 45, the Constitutional Court, per O'Regan J, also noted that review on the ground of reasonableness gives administrative law review a substantive element. See further Corder, (2004) 121/2 SALJ 438–444. Hoexter opines that it is difficult to draw the line clearly between review and appeal with regard to any ground of review (and not only that of rationality) that gives some scope for judicial choice, and that courts can avoid scrutiny of the merits only in cases decided on the narrowest or most technical grounds (Hoexter, (Juta 2012) 110 and 351–352; Hoexter, (2000) 117/3 SALJ 484 at 491).

17 See, for instance, *Bato Star Fishing* para 45, where the Constitutional Court, per O'Regan J, emphasised that the distinction between appeals and reviews continues to be significant. Likewise, in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2009 (3) SA 493 (SCA) para 28 the Supreme Court of Appeal remarked that 'whilst at times it may be difficult to draw the line [between appeal and review], the distinction must not be blurred.' See further Quinot, (OUP 2015) 108.

18 Ncube, 'You're fired! The removal of directors under the Companies Act 71 of 2008' (2011) 128/1 SALJ 33 at 47.

19 See Corder, (2004) 121/2 SALJ 438 at 443–444, where he describes review on the ground of reasonableness, which contains a merits-based substantive element, as not an appeal nor a mere procedural review, but as a 'substantive' or a 'wide' review.

20 1903 TS 111 at 115–117.

21 These three forms of review still exist today but other forms of review have since developed. For instance, another type of review is judicial review in the constitutional sense where courts have the power to declare unconstitutional any type of legislation that infringes on rights in the Bill of Rights or which offends against provisions of the Constitution. A further type of review is automatic review. Certain statutes make provision for the decisions of magistrates or other judicial officers to be reviewed automatically by judges, without an application for review being initiated. What used to be common-law review in administrative law has now predominantly been constitutionalised by s 33 of the Constitution and by the Promotion of Administrative Justice Act 3 of 2008 (see *Pharmaceutical Manufacturers Association of South Africa* paras 44–45 and *Bato Star Fishing* para 22). Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. It states further that national legislation must be enacted to give effect to these rights. This national legislation is the Promotion of Administrative Justice Act 3 of 2008. On the various forms of review see Baxter, (Juta 1984) 707; Hoexter et al (eds), (Juta 2002) 66–67; Hoexter, (Juta 2012) 112–113 and Quinot, (OUP 2015) 107–111.

22 *Nel & another NNO v The Master (Absa Bank & others Intervening)* 2005 (1) SA 276 (SCA) para 22; *Twala v MEC for Education, Eastern Cape & others* 2016 (2) SA 425 (ECB) para 11.

23 *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 117.

24 2005 (1) SA 276 (SCA) para 22.

25 *Nel v The Master* para 23. See further, *Simelane v Minister of Justice and Constitutional Development* 2009 (5) SA 485 (C) para 10; *Al-Kharafi & Sons v Pema & others NNO* 2010 (2) SA 360 (W) paras 22–23; *Tonga Paper Co (Pty) Ltd v The Master & others* 2011 (2) SA 17 (KZP) para 27 and *Van Zyl & others NNO v The Master, Western Cape High Court & another* 2013 (5) SA 71 (WCC) para 19.

26 *Nel v The Master* para 23.

27 *Nel v The Master* para 23. See further *Twala* para 11 and Baxter, (Juta 1984) 707.

28 *Nel v The Master* para 23. See further on the special statutory review *Simelane* para 10; *Al-Kharafi & Sons* paras 22–23; *Tonga Paper Co (Pty) Ltd* para 27; *Van Zyl* para 19; *Twala* para 11; Baxter, (Juta 1984) 707; Hoexter et al (eds), (Juta 2002) 67; and Hoexter, (Juta 2012) 112–114. Examples of a statutory power of review are the review of a decision, ruling, order or taxation of the Master of the High Court in terms of s 151 of the Insolvency Act 24 of 1936; a review to the Labour Court of arbitration awards made by the Commission for Conciliation, Mediation and Arbitration (CCMA) (see s 145 of the LRA); a review of decisions made in terms of the Promotion of Access to Information Act 2 of 2000 which takes place on grounds to be gleaned from this Act (see ss 74–82) and a review of private arbitration in terms of s 33(1) of the Arbitration Act 42 of 1965.

29 Hoexter, (Juta 2012) 552; Bleazard & Budlender, 'Remedies in judicial review proceedings' in Quinot et al (eds), *Administrative Justice in South Africa: An Introduction* (OUP 2015) 253.

30 Hoexter et al (eds), (Juta 2002) 292. See further *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration)* 1999 (1) SA 104 (SCA) at 109; *Minister of Home Affairs v Watchenuka & another* 2004 (4) SA 326 (SCA) para 37; and *Littlewood v Minister of Home Affairs & another* 2006 (3) SA 474 (SCA) para 18.

31 2005 (4) SA 67 (SCA) para 29.

32 *Gauteng Gambling Board v Silverstar Development Ltd & others* 2005 (4) SA 67 (SCA) para 28.

33 [2015] ZACC 22 paras 35, 47 and 53.

34 When the board of directors exercises the power to remove a director from office it must not breach its fiduciary duties to the company in doing so (*Murray v Conesco Inc* 795 NE 2d 454 (Ind 2003) at 461; *Liwszyc & anor v Smolarek & ors* [2005] ACSR 38 at 47; *Jackson v Dear* 2013 WL 617163 para 3).

35 In respect of a profit company 'voting rights' are the rights of any holder of the company's securities to vote in connection with a matter to be decided by a company. In respect of a non-profit company voting rights are the rights of a member to vote in connection with the matter (see s 1 of the Companies Act).

36 Alternatively, in terms of s 71(5) of the Companies Act, a person who appointed that director in terms of s 66(4)(a)(i) may apply to a court within 20 business days to review the determination of the board.

37 In *Protect a Partner (Pty) Ltd v Laura Machaba-Abiodun & others* [2013] JOL 31048 (LC) para 48 the Labour Court remarked that executive directors of a company are also referred to as 'inside directors'. The court stated that executive directors represent the interest of the entity's stakeholders and often have special knowledge of its inner workings, its financial or market position, and its vision and mission. A non-executive director, the court observed, is not employed by the entity and does not generally represent any of its stakeholders. A typical example of a non-executive director, the court remarked, is a director who is the president of a firm or entity in a different industry. For a further discussion of the distinction between executive and non-executive directors see *In re City Equitable Fire Insurance Co Limited* [1925] 1 Ch 407 at 429; *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) at 165; *Howard v Herrigel & another NNO* 1991 (2) SA 660 (A) at 678 and *AWA Ltd v Daniels t/a Deloitte Haskins & Sells & others* (1992) 7 ACSR 759 at 867.

38 [2005] 1 BLLR 71 (LC) para 29.

39 (1987) 8 ILJ 356 (IC).

40 The financial director was dismissed on the basis of misconduct and incompetence. The Industrial Court found that these allegations were unfounded and his dismissal was therefore substantively unfair. He had also not been given an opportunity to present his side of the case at a hearing, and for this reason the dismissal was also found to be procedurally unfair.

41 *Whitcutt v Computer Diagnostics & Engineering (Pty) Ltd* (1987) 8 ILJ 356 (IC) at 362.

42 *Whitcutt* at 365.

43 1987 (4) SA 702 (N) at 704.

44 *Oak Industries (SA) (Pty) Ltd v John NO & another* 1987 (4) SA 702 (N) at 703.

45 See *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701; *Read v Astoria Garage (Streatham) Ltd* [1952] 2 All ER 292; *De Villiers v Jacobsdal Saltworks (Michaelis & De Villiers) (Pty) Ltd* 1959 (3) SA 873 (O); *Griffin Company Law Fundamental Principles* 4 ed (Pearson: Longman 2006) 287; *Davies & Worthington Gower Principles of Modern Company Law* 10 ed (Sweet & Maxwell 2016) 382–383; *Hannigan Company Law* 4 ed (OUP 2016) 299.

46 See for instance *Union Government v Gass* 1959 (4) SA 401 (A) at 413; *Kunene v South African Mutual Fire And General Insurance Co Ltd* 1977 (4) SA 508

(D) at 511; *Nxumalo & another v Mavundla & another* 2000 (4) SA 349 (D) at 354; *Mancisco & Sons CC (in liquidation) v Stone* 2001 (1) SA 168 (W) at 181; *Gauteng Provincial Legislature v Kilian & others* 2001 (2) SA 68 (SCA) para 24 and *Nzimande v Nzimande & another* 2005 (1) SA 83 (W) para 75.

47 *Gelb v Hawkins* 1960 (3) SA 687 (A) at 694; *Transvaal and Orange Free State Chamber of Mines v General Electric Co* 1967 (2) SA 32 (T) at 72; *Ward v Sulzer* 1973 (3) SA 701 (A) at 706; *Nieuwoudt v Joubert* 1988 (3) SA 84 (SE) at 88; *Joubert T/A Wilcon v Beacham & another* 1996 (1) SA 500 (C) at 502; *Malangu v De Jager* 1996 (3) SA 235 (LCC) at 246-247; *McDonald t/a Sport Helicopter v Huey Extreme Club* 2008 (4) SA 20 (C) at 22; *Antoy Investments v Rand Water Board* (159/2007) [2008] ZASCA 10 (20 March 2008) para 9; *Wanderers Club v Boyes-Moffat & another* 2012 (3) SA 641 (GSJ) at 643-644. In *Gelb* at 694 the Appellate Division stated as follows, with regard to the general principle on the awarding of costs: 'In seeking a basic principle to apply, I do not think it is necessary or desirable to say more than that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that in essence it is a matter of fairness to both sides.'

48 1999 (2) SA 1045 (SCA) para 25.

49 *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) para 25.

50 See *Beinash & another v Ernst & Young & others* 1999 (2) SA 116 (CC) para 30.

51 The appraisal remedy is the right of dissenting shareholders who do not approve of certain triggering events (such as an amalgamation or merger) to have their shares bought out by the company in cash at the fair value of the shares. In certain instances the fair value of the shares may be determined judicially. In making an appropriate order of costs s 164(15)(c)(iv) requires a court to have regard to any offer made by the company for the shareholder's shares and the final determination of the fair value of the shares made by the court.

52 1975 (3) SA 905 (D) at 911. This case concerned an expropriation of a block of flats under the now repealed Railway Expropriation Act 37 of 1955.

Regarding the award of costs, s 9(1)(c) of this Act set out certain rules regarding the award of a costs order by the court. Miller J held that the purpose of the legislature when enacting s 9(1) of the Railway Expropriation Act 37 of 1955 was to induce both parties to a dispute in respect of compensation for expropriation to act reasonably (at 910).

53 1975 (3) SA 905 (D) at 911.

54 *Maynard v Office Appliances (SA) (Pty) Ltd* 1927 WLD 290 at 293; *Irvin & Johnson Ltd v Gelcer & Co (Pty) Ltd* 1958 (2) SA 59; *Yende v Orlando Coal Distributors (Pty) Ltd & others* 1961 (3) SA 314 (W); *Breetveldt & others v Van Zyl & others* 1972 (1) SA 304 (T); *Makhuva v Lukoto Bus Service (Pty) Ltd & others* 1987 (3) SA 376 (V) at 393-395; *Mbethe v United Manganese of Kalahari (Pty) Ltd* 2016 (5) SA 414 (GJ) para 59; *CDH Invest NV v Petrobank South Africa (Pty) Ltd & another* [2018] 1 All SA 450 (GJ) paras 44 and 82.

55 See *Cluver & another v Robertson Portland Cement and Lime Co Ltd* 1925 CPD 45 at 52.

56 *Wilkes v Springside Nursing Home, Inc* Mass 353 NE 2d 657 (1976) at 662; *Connolly v Bain* 484 NW 2d 207 (Iowa App 1992) at 211; *Demoulas v Demoulas* 1996 WL 511519 (Mass Super Ct Pct 1 1996) para 32.

57 Under s 69(2) of the Companies Act, a person who is ineligible or disqualified to be a director must not be appointed or elected as a director of a company, or consent to being appointed or elected as a director, or act as a director of a company.

58 See *Maynard* at 294 where the court stated as follows: '[I]f the facts show that there has been mismanagement in the conduct of the company's affairs, the Court will not interfere on the application of a shareholder or an individual director. And the reason is that the directors can redress the mismanagement, or the shareholders can in the general meeting. If a director or shareholder is in a minority as regards the domestic policy of the company, a Court will not assist him unless he can show something *illegal* on the part of the company or something *oppressive* or *fraudulent* on the part of the persons who control the company.' (Emphasis added.) The dictum of this case was followed in numerous cases, such as *Reich v Hathorn Syndicate* 1930 NPD 233; *Silverman v Doornhoek Mines* 1935 TPD 349; *In Re Mulvihall's Mineral Waterworks (Pty) Ltd* 1936 CPD 135; *Repp v Ondundu Goldfields Ltd* 1937 CPD 375; and *Irvin & Johnson Ltd*. See further, *Kronenberg v Sullivan County Steam Laundry Co* 91 NYS 2d 144 (1949) para 8 and *Demoulas* para 32.

59 Section 71(3) of the Companies Act states that the board of directors 'may' remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict. This makes it clear that the board has a discretion whether or not to remove the impugned director from office.

60 Section 71(8)(a) of the Companies Act.

61 Section 71(8)(b) of the Companies Act.

62 Section 71(8)(c) of the Companies Act.

63 R Cassim, 'Governance and the Board of Directors' in FHI Cassim et al, *Contemporary Company Law* 2 ed (Juta 2012) 450.

64 [2016] JOL 36461 (GNP) para 17.

65 *Talisman Compressed Air (Pty) Ltd v Dykman* [2016] JOL 36461 (GNP) para 17.

66 Ncube, (2011) 128/1 SALJ 33 at 46.

67 See further Ncube, (2011) 128/1 SALJ 33 at 46.

68 In this article the recommended insertions in sections of the Companies Act are underlined, while the recommended deletions are 'struck out'.