A CRITICAL ANALYSIS OF THE GROUNDS OF REMOVAL OF A DIRECTOR BY THE BOARD OF DIRECTORS UNDER THE COMPANIES ACT

REHANA CASSIM†

Associate Professor, Department of Mercantile Law, University of South Africa

This article critically analyses the grounds for the removal from office of a director by the board of directors under s 71(3) of the Companies Act 71 of 2008. These grounds of removal are ineligibility, disqualification, incapacity, neglect and dereliction in the performance of the functions of a director. It is argued that certain grounds of removal are ambiguous while other grounds have the potential to be abused. For instance, there is much scope for the ground of incapacity to be abused; there are no provisions guarding against the introduction of new qualification requirements being improperly used to remove directors; the meaning of the term 'derelict' is not clear; an objective standard rather than a subjective standard has been imposed to ascertain whether a director has properly performed his or her functions; and it is not clear whether negligence is an additional ground for the removal of a director, nor is it clear whether additional grounds of removal may be explicitly inserted in a company's Memorandum of Incorporation. This article recommends that s 71(3) of the Companies Act be amended with a view to removing ambiguities in this provision and to improve and strengthen the grounds for the removal of directors by the board of directors.

I INTRODUCTION

The Companies Act 71 of 2008 ('the Companies Act') came into force on 1 May 2011. It introduced into South African law an innovative provision that for the first time permits the board of directors in certain instances to remove a fellow director from office. This provision is contained in s 71(3) of the Companies Act. Previously, under s 220 of the Companies Act 61 of 1973, only the shareholders were statutorily empowered to remove a director from the board of directors.[1]

This article critically examines the grounds for the removal of directors from office by the board of directors under s 71(3) of the Companies Act. It contends that certain grounds of removal are ambiguous or imprecisely worded, while other grounds are open to abuse. Recommendations to amend

† BA LLB LLM (Witwatersrand) LLD (Unisa). Attorney and Notary Public of the High Court of South Africa. This article is based on sections of the author's LLD thesis.

[1] See on s 220 of the Companies Act 61 of 1973 *Stewart v Schwab* 1956 (4) SA 791 (T); *Swerdlow v Cohen* 1977 (3) SA 1050 (T); *Amoils v Fuel Transport (Pty) Ltd* 1978 (4) SA 343 (W); *Barlows Manufacturing Co Ltd v RN Barrie (Pty) Ltd* 1990 (4) SA 608 (C); and *James North (Zimbabwe) (Pvt) Ltd v Mattinson* 1990 (2) SA 229 (ZHC).

and modify s 71(3) of the Companies Act are made with a view to removing ambiguities in this provision and to improve and strengthen the grounds for the removal of directors by the board of directors. The focus of this article is on the grounds of removal of a director by the board, and not on the procedural requirements to remove a director from office.[2]

Section 5(2) of the Companies Act provides that, to the extent appropriate, a court interpreting or applying the Companies Act may consider foreign law. In *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa v Bestvest 153 (Pty) Ltd*[3] the High Court, Western Cape Division, Cape Town observed that company law in South Africa has for many decades tracked the English system and has taken its lead from the relevant English Companies Act and jurisprudence. However, s 5(2) of our Companies Act now encourages our courts to look further afield and to have regard to other corporate law jurisdictions in appropriate circumstances, be they American, European, Asian or African, in interpreting the Companies Act.

It is notable that the corporate legislation of the United Kingdom ('UK'), Australia and the United States of America ('USA') has strongly influenced the Companies Act. Where relevant, this article will examine the provisions of the UK Companies Act, 2006 ('the UK Companies Act') on the removal of directors for the reason that South African company law is historically based on the English company-law system and the company law in both these jurisdictions was recently reviewed.[4] Relevant provisions of the Australian Corporations Act of 2001, which is historically based for the most part on UK company law, will also be reviewed in order to ascertain whether any useful guidelines may be gleaned from that jurisdiction which are relevant to South African law.[5] Certain states in the USA have for many years given the board of

[2] On the procedural requirements for the board of directors to remove a fellow director see *Pretorius v PB Meat (Pty) Ltd* [2013] ZAWCHC 89 paras 9–10; Caroline B Ncube 'You're fired! The removal of directors under the Companies Act 71 of 2008' (2011) 128 *SALJ* 33 at 43-4; Piet Delport *Henochsberg on the Companies Act 71 of 2008* (Service 18, 2018) 276–7.

[3] 2012 (5) SA 497 (WCC) para 26.

[4] The reforms made to the UK Companies Act are significant. The Company Law Review, which provides the essential blueprint for the UK Companies Act of 2006, was launched in March 1998, with the aim of modernising company law (see DTI Company Law Reform White Paper, Cm 6456, March 2005 at 3). The UK Companies Act repeals virtually the whole of the UK Companies Act, 1985. The new Act received Royal Assent on 8 November 2006, but the provisions of the new Act came into effect in stages.

[5] While company law in Australia is based historically on the company law in the UK and strongly resembles UK company law in fundamental respects, present-day company law in Australia under the Australian Corporations Act is less dependent on the company law in the UK (see Christopher M Bruner *Corporate Governance in the Common-Law World: The Political Foundations of Shareholder Power* (2013) 66).

directors the power to remove fellow directors from office. In light of the fact that the power conferred on the board of directors to remove another director from office is a novel power in South African company law, it is beneficial and informative to investigate the scope of this power under the Revised Model Business Corporation Act 1984 of the USA ('the MBCA') and under the corporate legislation of those USA states which permit directors to remove a fellow director from office. Consequently, this article will, where relevant, and as reinforced by s 5(2) of the Companies Act, refer to the corporate legislation in the UK, Australia and the USA in order to ascertain whether, in interpreting and applying s 71(3) of the Companies Act, any guidance may be obtained from these jurisdictions.

II THE GROUNDS FOR THE REMOVAL OF A DIRECTOR BY THE BOARD OF DIRECTORS

Section 71(3) of the Companies Act states as follows:

> 'If a company has more than two directors, and a shareholder or director has alleged that a director of the company —
>
> *(a)* has become —
>
> (i) ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69(8)*(a)*; or
>
> (ii) incapacitated 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
>
> *(b)* has neglected, or been derelict in the performance of, the functions of director, the board, 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.'

In essence, s 71(3) of the Companies Act permits the board of directors to remove a director from office in instances where a company has more than two directors, and a shareholder[6] or a director alleges that another director of the company has become ineligible or disqualified to be a director, or the director has become incapacitated 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 has neglected or been derelict in the performance of the functions of a director. The board of directors must determine the matter by resolution, and may remove a director from office only if any one of the grounds stipulated in s 71(3) of the Companies Act is applicable to the

[6] A shareholder, who would most likely be a minority shareholder, may seek to persuade the company's board of directors to remove a director from office for a particular reason rather than seeking the removal of the director through the mechanism of a shareholders' meeting under s 71(1) and (2) of the Companies Act (*Steenkamp v Central Energy Fund SOC Ltd* 2018 (1) SA 311 (WCC) para 30).

director. Before the board considers the resolution, the director concerned must be given notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution with sufficient specificity to reasonably permit him or her to prepare and present a response.[7] In addition, the director must be given a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.[8]

It is conceivable that the novel power given to directors to remove fellow board members may have the effect of limiting or hindering free and open discussion and debate in board meetings.[9] A director may hesitate to express a dissenting opinion in a board meeting because of the concern of removal by the board, or a dissident director may simply toe the line in order to preserve his or her position on the board.[10] If directors do not engage in discussion and debate in board meetings, or fail to question decisions to be made with regard to the company due to a concern of removal, this would impact negatively on the company and on the shareholders. Directors have a fiduciary duty to observe good faith towards the company, and in discharging that duty they must exercise an independent unfettered judgement, and take decisions according to the best interests of the company.[11] Should directors simply toe the line because of a concern of removal and fail to express controversial or dissenting opinions, they could be in breach of these fiduciary duties.

It is imperative that the board of directors does not abuse its novel power to remove a fellow director from office. When the board exercises the power to remove a director from office it must do so bona fide in the best interests of the company, and not for ulterior reasons.[12] Directors who exercise their power to remove a director for an improper purpose or for ulterior reasons

[7] Section 71(4)*(a)* of the Companies Act.

[8] Section 71(4)*(b)* of the Companies Act.

[9] Farouk H I Cassim 'The division and balance of power between the board of directors and the shareholders: The removal of directors' (2013) 29 *Banking and Finance Law Review* 151 at 162.

[10] Ibid.

[11] *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 163; *Fulham Football Club Ltd v Cabra Estates Plc* [1992] BCC 863; *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald (No 2)* [1995] 1 BCLC 452 (ChD); *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598 (ChD) at 618–19; *Liwszyc v Smolarek* (2005) 55 ACSR 38 at 46–7; *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) para 18; *CDH Invest NV v Petrotank South Africa (Pty) Ltd* 2018 (3) SA 157 (GJ) para 47.

[12] *Lee v Chou Wen Hsien* [1984] 1 WLR 1202 at 1206; *Liwszyc v Smolarek* supra note 11 at 46–7.

may be held to be in breach of their fiduciary duties.[13] However, and as demonstrated in case law, a director who has been removed from office by the board of directors in breach of its fiduciary duties would not necessarily or automatically be reinstated to the board of directors.[14] It accordingly becomes necessary that there are effective safeguards, checks and balances in the Companies Act against abuse of the board's power to remove a fellow director from office.

The grounds of removal of a director by the board of directors are discussed in turn below.

III INELIGIBLITY

The first ground on which a director may be removed from office is if a shareholder or a director alleges that the director has become ineligible or disqualified in terms of s 69 of the Companies Act, other than on the grounds contemplated in s 69(8)*(a)*. Section 69(3) of the Companies Act places an obligation on a company not knowingly to permit an ineligible or disqualified

[13] See *Punt v Symons & Co Ltd* [1903] 2 Ch 506; *Piercy v Mills* [1920] 1 Ch 77; *Hogg v Cramphorn Ltd* [1967] Ch 254; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (PC); *Extrasure Travel Insurances Ltd v Scattergood* supra note 11 at 618; *CDH Invest NV v Petrotank South Africa (Pty) Ltd* supra note 11 para 67; and *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71 para 15 on the fiduciary duty of directors to exercise their powers for a proper purpose.

[14] For example, a court may fail to reinstate an improperly removed director on the basis that there is an irretrievable breakdown in the relationship between the director in question and the board. In the pivotal and leading case of *Lee v Chou Wen Hsien* supra note 12 the court failed to reinstate a director who had been wrongly removed by the board of directors in breach of their fiduciary duties. The appellant had become suspicious about certain perceived wrongdoings by the chairperson and managing director of the company. His requests for access to various accounts were denied. When he requested that a board meeting be convened so that he could discuss his suspicions and concerns with the board, he received a notice signed by all his co-directors requesting him to resign immediately. In terms of the company's constitution, the effect of such a notice was that the office of the director in question had to be vacated immediately. The appellant was consequently removed from the board of directors. The Privy Council ruled that while each director who concurs in the removal of a director must act in accordance with what he or she believes to be in the best interests of the company, it does not follow that a director sought to be removed would continue to remain a director simply because one or more of the directors had acted from an ulterior motive in removing that director (at 1206). Even though the Privy Council found that the board had acted with ulterior motives in removing the appellant from the board, and had not acted to protect the best interests of the company, it nevertheless held that the removal from office of the director was valid. On the basis of s 5(2) of the Companies Act, this dictum may have persuasive authority in South African company law.

person to serve or act as a director.[15] A person who is ineligible or disqualified to serve or act as a director may not act as a director of a company, nor be appointed or elected as a director of a company, nor consent to being appointed or elected as a director.[16] This ground of removal therefore envisages a situation where a director was eligible and qualified to be a director at the time that he or she was appointed or elected as a director of the company, but has now become ineligible or disqualified to be a director. While a court may exempt a person from the application of any ground of disqualification listed in s 69(8)*(b)*, no provision is made in the Companies Act for a court to exempt a person from a ground of ineligibility set out in s 69(7) of the Companies Act.

In terms of s 69(4) of the Companies Act, a person who becomes ineligible or disqualified while serving as a director of a company 'ceases to be entitled to continue to act as a director immediately', subject to s 70(2) of the Companies Act.[17] In light of s 69(4) of the Companies Act, the question arises why formal removal proceedings in the form of a board meeting are necessary under s 71(3) of the Companies Act.[18] It is submitted that if a director were to become ineligible or disqualified to be a director, and his or her ineligibility or disqualification were not in dispute, and he or she were voluntarily to cease to act as a director, formal removal proceedings (in the form of a board meeting) under s 71(3) of the Companies Act would not be necessary. In those instances, however, where a director disputes that he or she has become ineligible or disqualified to be a director, formal removal proceedings (in the form of a board meeting) are necessary so that the director may be given an opportunity to make a presentation to the board of directors regarding his or her ineligibility or disqualification to be a director. The board of directors may then vote on whether to remove the director from office. Another instance when formal removal proceedings would be necessary would be

[15] The term 'knowingly' is defined in s 1 of the Companies Act. It includes having actual knowledge of a matter, as well as being in a position in which the person reasonably ought to have had actual knowledge or investigated the matter to an extent that would have provided the person with actual knowledge, or taken other measures which if taken would reasonably be expected to have provided the person with actual knowledge of the matter.

[16] Section 69(2) of the Companies Act.

[17] Section 70(2) of the Companies Act provides that where the board has removed a director, a vacancy on the board would not arise until the later of either the expiry of the time for filing an application for review of the decision, or the granting of an order by the court on such an application. However, the director would be suspended from office during that time.

[18] This question is raised by Ncube op cit note 2 at 41–2. See further Delport op cit note 2 at 276, where the view is expressed that to require a formal process if a director is ineligible or disqualified seems unnecessary as the factual situation should be clear.

where a shareholder or a director suspects that a director may be ineligible or disqualified to be a director, and formal proceedings are required in order to ascertain the true facts after an allegation to that effect by the shareholder or director.[19]

The Companies Act lists three grounds of ineligibility to be a director. If any of these grounds are applicable, a director may be removed from office by the board of directors under s 71(3) of the Companies Act. These grounds of ineligibility are discussed below.

(a) Juristic person

The first ground under which a person would be ineligible to be a director of a company is if the director is a juristic person.[20] For purposes of the Companies Act a 'juristic person' includes a foreign company and a trust, irrespective of whether or not it was established within or outside South Africa.[21] This means that under the Companies Act a director must be a natural person. This ground of ineligibility would bar the appointment of a juristic person as a director of a company in the first place and removal proceedings consequently become unnecessary.[22]

In contrast, under s 87(1) of the Companies Act a juristic person or a partnership may be appointed to hold the office of company secretary.[23] There is no equivalent provision in the Companies Act with regard to the appointment of directors. It is notable that in terms of s 155(1) of the UK Companies Act, a juristic person may be a director, and that only one director of a company is required to be a natural person. Subject to this requirement being satisfied, any legal person, including one that is a company or a firm, may be a director but one company cannot be the sole director of another company.[24]

[19] Delport ibid.

[20] Section 69(7)*(a)* of the Companies Act.

[21] See the definition of 'juristic person' in s 1 of the Companies Act.

[22] Ncube op cit note 2 at 41.

[23] This appointment is subject to two provisos: (i) every employee of that juristic person or partner and employee of that partnership (as the case may be) satisfies the requirements contemplated in s 84(5) of the Companies Act (relating to disqualification); and (ii) at least one employee of that juristic person, or one partner or employee of that partnership (as the case may be) satisfies the requirements contemplated in s 86 of the Companies Act (relating to having the requisite knowledge or experience).

[24] See further the 'Explanatory notes to the Companies Act of 2006' (2006) para 282, available at *http://www.legislation.gov.uk/ukpga/2006/46/notes*, accessed on 7 May 2019. However, s 87 of the Small Business, Enterprise and Employment Act, 2015 is expected to repeal s 155 of the UK Companies Act (from a date to be determined), and to insert a new s 156A to the UK Companies Act which will require all company directors to be natural persons, subject to certain specified exceptions (see the proposed

Generally, a director who is a corporate director appoints some natural persons to its own board of directors. If any documents have to be executed by the underlying company, one of those natural persons of the corporate director would sign the documents. For this reason, an advantage of appointing a corporate director is that it is not necessary to appoint alternate directors for a company, as is the case when natural persons are appointed as directors.[25] On the other hand, the appointment of corporate directors may make it difficult to determine who controls a company.[26] The investigation and prosecution of corporate frauds could also be hindered when corporate directors are appointed.[27] Furthermore, it could be difficult to apply meaningful sanctions to corporate directors.[28]

Importantly, s 7*(b)*(iii) of the Companies Act affirms that one of the purposes of the Companies Act is to promote the development of the South African economy by encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation. It is submitted that permitting

new s 156B). The Secretary of State for Business Enterprise and Regulatory Reform is empowered to provide for cases, by regulation, in which a person who is not a natural person may be appointed a director of the company.

[25] See s 66(4)*(a)*(iii) of the Companies Act on alternate directors and part V(c) below.

[26] Brenda Hannigan *Company Law* 4 ed (2016) 156.

[27] Ibid at 157.

[28] *Holland v The Commissioners for Her Majesty's Revenue and Customs* [2010] UKSC 51 para 101. This case provides a useful illustration of some disadvantages of appointing corporate directors. During the events that gave rise to the claim in this case, it was not a requirement that a company had to have at least one director who was a natural person. In this case, the company's sole director was a corporate director. All of the individual director's acts were done as a director of the corporate director and could be attributed in law solely to the activities of the corporate director. The question before the UK Supreme Court was whether the individual director was a de facto director of the underlying company, and accordingly liable for a breach of fiduciary duties of that underlying company. The majority of the court found that the individual director was not a de facto director of the corporate director. It reasoned that to impose fiduciary duties on the individual in relation to the underlying company would be an unjustifiable extension of the scope of a de facto director (para 53). It held that the individual director was doing no more than discharging his duties as a director of the corporate director, and that everything he had done was done under that umbrella (para 40). The individual director thus escaped personal liability. The dissenting minority judgment, on the other hand, pointed out that to attribute everything the individual did to his capacity as a director of the corporate director was 'the most arid formalism' (para 115) and that it makes it easier for risk-averse individuals to use artificial corporate structures to insulate themselves against liability (para 101).

corporate directors to be appointed would detract from this purpose of encouraging transparency because it would make it difficult to determine who controls a company and may make it easier for individuals to use artificial corporate structures to insulate themselves against liability.[29]

(b) Unemancipated minor or person under a similar legal disability

Under s 69(7)*(b)* of the Companies Act, a person is ineligible to be a director of a company if he or she is an unemancipated minor or is under a similar legal disability. In terms of s 17 of the Children's Act 38 of 2005 every child, whether male or female, becomes a major upon reaching the age of eighteen. This means that a person is not eligible to be a director of a company under the Companies Act unless that person has reached the age of eighteen, or unless the person has been emancipated.

In contrast, under s 157(1) of the UK Companies Act the minimum age at which a person may be appointed a director of a company is sixteen. Appointments made in breach of this rule are void.[30] This prohibition does not prevent the appointment of a person younger than sixteen years of age, provided that it is not to take effect until that person is sixteen years old.[31] The rationale behind introducing a minimum age requirement of sixteen in the UK is due to evidence that the appointment of young directors was being used to exploit their immunity from prosecution, and the general reluctance of public authorities to prosecute young persons.[32]

The Companies Act has not adopted the approach of the UK regarding the minimum age of a director. The Companies Act is in line with s 201B(1) of the Australian Corporations Act, which provides that an individual must be at least eighteen years old to be appointed a director of a company. Various states in the USA also require a director to be at least eighteen years old. For example s 701 of the New York Business Corporation Law and s 14A:6-1 of the New Jersey Business Corporation Act require a director to be at least eighteen years old. But s 10A-2-8.02 of the Alabama Business and Nonprofit Entities Code requires a director to be at least nineteen years old.

The Companies Act states that an 'unemancipated minor' would be ineligible to be a director. The use of the word 'unemancipated' implies that if the minor were emancipated, he or she would be eligible to be a director. It is thus possible under the Companies Act to appoint as a director a person

[29] See the minority judgment in *Holland* ibid para 101.

[30] Section 157(4) of the UK Companies Act.

[31] Section 157(2) of the UK Companies Act.

[32] Paul L Davies & Sarah Worthington *Gower: Principles of Modern Company Law* 10 ed (2016) 368. The Secretary of State in the UK may make provision by regulation for cases in which a person who is younger than sixteen years may be appointed a director of a company (s 158(1) and (2) of the UK Companies Act).

under the age of eighteen, provided that such person has been emancipated. Since an unemanicipated minor is ineligible to be appointed a director of a company and may be removed from office by the board of directors under s 71(3) of the Companies Act, it is important to understand what is meant by the term 'unemancipated'.

A minor is emancipated when he or she has received the express or tacit consent of his or her parent or guardian to participate in commercial dealings as an economically independent person.[33] Roman-Dutch law recognised two forms of emancipation, namely express emancipation and tacit emancipation. Express emancipation required a declaration by the minor's guardian before a court to the effect that the minor had been emancipated from parental responsibilities and rights.[34] By the eighteenth century express emancipation had been replaced by the institution of venia aetatis.[35] This doctrine was subsequently rendered obsolete by the Age of Majority Act 57 of 1972, which has now been repealed. Whether tacit emancipation still forms part of our law was regarded as an unresolved issue in *Grand Prix Motors WP (Pty) Ltd v Swart*.[36] However, in *Watson v Koen h/a BMO*[37] the court assumed, without deciding the issue, that tacit emancipation does remain part of South African law. As a result, it is generally accepted that tacit emancipation persists in South African law.[38]

The Children's Act does not contain provisions dealing with the emancipation of minors. Whether a minor has been emancipated or not is a question of fact to be decided from the circumstances of each case.[39] Tacit emancipation may be effected only by the express or implied consent of the

[33] *Dickens v Daley* 1956 (2) SA 11 (N) at 13; *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) at 224; *Ex parte Botes* 1978 (2) SA 400 (O) at 402; R A Jordaan & C J Davel *Law of Persons Source Book* 3 ed (2000) 185; Jaqueline Heaton *The South African Law of Persons* 4 ed (2015) 114.

[34] L I Schäfer 'Young persons' in Brigitte Clark (ed) *Family Law Service* (Service Issue 70, 2018) para E24.

[35] Venia aetatis was a common-law institution whereby the head of state could grant majority status to a person older than eighteen years (see Jordaan & Davel op cit note 33 at 216–24 and Trynie Boezaart *Law of Persons* 5 ed (2010) 92). Venia aetatis was granted in the former Province of the Free State only. It was governed by statute (chap 89 of the OFS Wetboek of 1901) and granted by the State President by proclamation in the *Government Gazette* after the high court had considered the desirability of granting it.

[36] Supra note 33.

[37] 1994 (2) SA 489 (O).

[38] See Belinda van Heerden, Alfred Cockrell & Raylene Keightley (eds) *Boberg's Law of Persons and the Family* 2 ed (1999) 473 and Schäfer op cit note 34 para E24.

[39] *Dama v Bera* 1910 TPD 928; Heaton op cit note 33 at 114.

minor's guardian.[40] Relevant facts may be that the minor lives on his or her own and manages his or her own business, the relationship between the minor and his or her guardian, the nature of the minor's occupation, and the length of time for which the occupation has been pursued independently of parental control.[41] It is not essential for the minor to live apart from his or her parents, but stronger evidence would be required to prove tacit emancipation where the minor lives with his or her parents.[42]

The effect of tacit emancipation on the minor's capacity to act has not been authoritatively decided. There is authority for the view that tacit emancipation gives the minor capacity to act in respect of all contracts, save that he or she cannot alienate or encumber his or her immovable property and he or she cannot enter into a marriage (and now, civil union) without his or her guardian's consent.[43] By contrast, there is authority to the effect that the minor is only tacitly emancipated in respect of contracts in connection with his or her particular business.[44] The effect of tacit emancipation is a matter of degree, and is determined by the guardian's intention, as evidenced by the circumstances of each case.[45] The general weight of opinion is that tacit emancipation, in modern times, does not result in a minor attaining majority status because an emancipated minor is still not competent to enter into a marriage (or civil union) without consent, or to alienate or encumber immovable property.[46]

The onus of proving that a minor is emancipated rests on the person who alleges this, and it must be proved on a balance of probabilities that the minor's guardian emancipated him or her, and not that the minor considered him- or herself to be emancipated.[47] It is not settled whether a guardian who has emancipated a minor may legally revoke the emancipation, but the preferred view is that since emancipation depends on parental consent, it should be revocable.[48]

[40] *Watson v Koen h/a BMO* supra note 37; *Sesing v Minister of Police* 1978 (4) SA 742 (W).

[41] Van Heerden, Cockrell & Keightley (eds) op cit note 38 at 478–9; Jordaan & Davel op cit note 33 at 185–6; Heaton op cit note 33 at 114–15.

[42] *Dama v Bera* supra note 39; Heaton ibid.

[43] *Dickens v Daley* supra note 33; *Watson v Koen h/a BMA* supra note 37.

[44] *Ambaker v African Meat Co* 1927 CPD 326; *Ahmed v Coovadia* 1944 TPD 364; *Sesing v Minister of Police* supra note 40.

[45] Van Heerden, Cockrell & Keightley (eds) op cit note 38 at 487.

[46] *Sesing v Minister of Police* supra note 40 at 746; Van Heerden, Cockrell & Keightley (eds) ibid at 474; Boezaart op cit note 35 at 80.

[47] *Grand Prix Motors WP (Pty) Ltd v Swart* supra note 33 at 222; *Watson v Koen h/a BMO* supra note 37 at 492-3.

[48] *Ahmed v Coovadia* supra note 44 at 366; *Ex parte Van den Hever* 1969 (3) SA 96 (E) at 99; Van Heerden, Cockrell & Keightley (eds) op cit note 38 at 474; Boezaart op cit note 35 at 80; Heaton op cit note 33 at 115.

In *Ex parte Velkes*[49] a minor who wished to be appointed a director of a company applied, with the support of his guardian, for an order declaring that he had become emancipated, either tacitly or by express consent, from the parental power of his guardian. Section *68bis*(1)*(a)bis* of the then Companies Act 46 of 1926 disqualified a minor from being appointed a company director. Corbett AJ did not grant the application for emancipation because he found that there was no existing and concrete dispute between persons and that it had no jurisdiction under s 19(1)*(c)* of the Supreme Court Act 59 of 1959 to make such a declaration of right.[50] In passing, the court cast doubt on whether the order sought would remove the minor's disqualification to be a company director.[51] It is accordingly an open question under the common law whether tacit emancipation would remove a minor's disqualification to be appointed a director.

It is submitted that it must be taken into account that, under s 69(7)*(b)* of the Companies Act, an 'unemancipated' minor is disqualified to be a company director. Notably, at the time that *Ex parte Velkes*[52] was decided, the Companies Act 46 of 1926 was applicable, and s *68bis*(1)*(a)bis* of that Act disqualified a 'minor or any other person under legal disability' from being appointed a director of a company. No mention was made of an 'unemancipated minor' in the section. Likewise, the Companies Act 61 of 1973 disqualified a 'minor' from being a director (in s 218(1)*(b)*) and did not refer to an 'unemancipated' minor. For the first time in our statutory company law, an 'unemancipated minor' has been disqualified from being appointed a director of a company. It is submitted that the express inclusion of the word 'unemancipated' in s 69(7) *(b)* of the Companies Act implies that an emancipated minor would qualify to be a director.

Should a company appoint an emancipated minor to its board of directors, it must take note of the fact that emancipation may be revocable. Accordingly, if a director or a shareholder becomes aware of the revocation of the emancipation of the minor, such director or shareholder must under s 71(3) of the Companies Act bring the loss of the director's emancipated status to the attention of the company. Failure to do so would violate s 69(3) of the Companies Act, which prohibits a company from knowingly permitting an

[49] 1963 (3) SA 584 (C).

[50] Section 19(1)*(c)* of the Supreme Court Act 59 of 1959 empowered a court 'in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination'. This provision was interpreted to mean that, in the exercise of the jurisdiction conferred upon it, a court will not deal with or pronounce on abstract or academic points of law (*Ex parte Velkes* supra note 49 at 587).

[51] Supra note 49 at 586.

[52] Ibid.

ineligible person to serve or act as a director. Should the board find that the director in question is indeed an unemancipated minor, he or she must be removed from office on the basis that he or she is not eligible to be a director. The question arises whether an unemancipated minor who purported to act as a director would be liable for breach of any of the fiduciary duties of a director, and whether his or her past acts would remain valid. The Companies Act fails to address these matters.

In contrast, s 157(5) of the UK Companies Act states that nothing in s 157 affects any liability of a person under any provision of the UK Companies Act if he or she purports to act as a director or acts as a shadow director, despite the fact that such person could not be validly appointed as a director. In other words, even though in the UK a person under the age of sixteen may not be validly appointed as a director, he or she will not be protected from criminal prosecution or civil liability were he or she to act as a de facto director or a shadow director.[53]

It is submitted that this is the approach that ought to be adopted with regard to underage directors under the Companies Act. This approach is further bolstered by the definition of the term 'director' in s 1 of the Companies Act, which states that a director means 'a member of the board of a company, as contemplated in s 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated'. Accordingly, if an underage director were to act as a director, he or she would be 'occupying the position of a director', regardless of the name by which he or she is designated. Consequently, he or she ought not to escape liability for his or her actions.

In terms of s 161 of the UK Companies Act, the acts of a person acting as a director are valid notwithstanding that it is afterwards discovered that there was a defect in his or her appointment, or that he or she was disqualified from holding office. The previous Companies Act 61 of 1973 contained a similar provision which was inexplicably not retained in the current Companies Act. Section 214 of the Companies Act 61 of 1973 provided that the 'acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification'. It is submitted that it would be disruptive to the running of a company's business and its affairs if the past

[53] See the 'Explanatory notes to the Companies Act of 2006' op cit note 24 para 284. A shadow director is defined in s 251(1) of the UK Companies Act as 'a person in accordance with whose directions or instructions the directors of the company are accustomed to act'. The difference between a de facto director and a shadow director in UK law, as explained in *Re Hydrodam (Corby) Ltd* [1994] BCC 161 at 163, is that a de facto director assumes to act as a director, and claims and purports to be a director, although never actually or validly appointed as such, while a shadow director does not claim or purport to act as a director but in fact claims not to be a director.

acts of an underage director were not regarded as valid. In the interests of clarity and certainty it is submitted that a provision similar to s 214 of the previous Companies Act 61 of 1973 and s 161 of the UK Companies Act should be inserted in the Companies Act.

Notably, s 69(7)*(b)* of the Companies Act states that an unemancipated minor or a person under a 'similar legal disability' is ineligible to be a director. The meaning of the phrase 'legal disability' was considered in *Standard Bank of South Africa Limited v Jwara*,[54] where the court stated:

> 'Persons are under legal disability when, by law, their capacity or ability to relate, as legal subjects, to the legal system, is curtailed. Examples are minors and insolvents that are not permitted ("*regsonbevoeg*") to perform certain juristic acts. In our law, "*legal disability*" relates to situations where there is an impediment in law (*impendimentumiuris*) without narrowing or limiting it to specific circumstances.'

Section 218(1)*(a)* of the Companies Act 61 of 1973 prohibited a minor 'or any other person under legal disability' from being appointed or acting as a director of a company. In contrast, s 69(7)*(b)* of the Companies Act prohibits an unemancipated minor or a person 'under *a similar* legal disability' from being a director. Consequently, the legal disability which makes a person ineligible to be a director must now be similar to the legal disability which is experienced by a minor. Examples of persons with similar legal disabilities to a minor would be an unrehabilitated insolvent who cannot be elected or appointed a trustee of an estate under sequestration,[55] a person with a mental disability and a person who has been declared by a court to be incapable of managing his or her affairs.[56]

(c) Failure to satisfy any qualification set out in the Memorandum of Incorporation

In terms of s 69(6) of the Companies Act, the Memorandum of Incorporation ('MoI') of a company may set out minimum qualifications for directors of the company, as well as additional grounds of ineligibility and disqualification of directors. Under s 69(7)*(c)* of the Companies Act a person is ineligible to be a director of a company if the person does not satisfy any qualification set out in the company's MoI. Consequently, subsequent to his or her appointment, if a director fails to satisfy any of the additional qualification grounds set out in the MoI, the board of directors of the company may remove him or her from office under s 71(3) of the Companies Act.

[54] 2012 JDR 0204 (GSJ) para 5.

[55] See ss 55*(a)* and 58*(a)* of the Insolvency Act 24 of 1936.

[56] On the legal capacities in our law see further *Standard Bank of South Africa Limited v Jwara* supra note 54 para 6; Van Heerden, Cockrell & Keightley (eds) op cit note 38 at 746; and Boezaart op cit note 35 at 7.

An example of a minimum qualification would be that a director must hold shares in the company in order to be eligible to be a director of the company. Additional eligibility requirements could be based on experience, expertise, professional qualifications, or length of service. The additional qualifications in the MoI should endeavour in principle to enhance the ability of the board to perform its role effectively.[57] They should not be used for improper or inappropriate purposes, nor should they be unreasonable or unlawful. For example, a qualification that a director must be affiliated to a particular political party would be unreasonable, or a qualification that a director must be of a certain race, would be discriminatory and unlawful.

The Companies Act does not impose any requirement to the effect that any additional grounds of eligibility or disqualification or minimum qualifications to be a director must be reasonable and lawful. In contrast, s 8.02*(a)* of the MBCA, which specifies that the articles of incorporation or by-laws may prescribe qualifications for directors, states that these qualifications must be reasonable as applied to the corporation, and must be lawful. It is submitted that if an additional ground of ineligibility or disqualification or minimum qualification provided for in a MoI were unreasonable or unlawful, it could well be challenged for validity or lack of validity. It is nevertheless submitted that an amendment is necessary in order to avoid any ambiguity regarding the type of permissible qualifications that may be inserted in the MoI of a company. This amendment will provide clarity and guidance on the nature of additional permissible qualifications. As reinforced by s 5(2) of the Companies Act, s 69(6) of the Companies Act ought to be amended then to specify, as in s 8.02*(a)* of the MBCA, that any additional minimum qualification requirements or additional grounds of ineligibility or disqualification specified in the MoI of a company, must be both reasonable and lawful.

The question arises how a director would be affected by the introduction of a new ground of ineligibility or disqualification or minimum qualification in the MoI of the company during his or her term of office.[58] The Companies Act does not regulate this matter. It would appear that a director may immediately cease to be eligible to be a director if a new ground of ineligibility or disqualification or a new minimum qualification, which would make him or her ineligible to be a director or disqualify him or her from office, were to be introduced during the term of his or her appointment.

[57] See *Model Business Corporation Act with Official Comments and Reporter's Annotations* 4 ed (2013) 8–28.

[58] The MoI of a company may be amended at any time by a special resolution of the shareholders if such special resolution is proposed by the board of directors or by shareholders entitled to exercise at least ten per cent of the voting rights that may be exercised on such a resolution, or in accordance with any other requirements imposed by a company's MoI (s 16 of the Companies Act).

The Companies Act does not contain any provision guarding against the introduction of qualification requirements being used for improper purposes, such as to remove directors.

Section 8.02*(e)* of the MBCA guards against the misuse of the introduction of new qualification requirements. It does so by stating that a qualification for a director prescribed before a director has been elected or appointed may apply only at the time an individual becomes a director or may apply during a director's term, but a qualification prescribed after a director has been elected or appointed shall not apply to that director before the end of his or her term. It is submitted that s 69(6) of the Companies Act should adopt similar provisions as those contained in s 8.02*(e)* of the MBCA. This would prevent a new ground of ineligibility or disqualification being abused as a means to remove a director under s 71(3) of the Companies Act.

IV DISQUALIFICATION

Section 69(8) of the Companies Act sets out the grounds for the disqualification of a director of a company. If a shareholder or director alleges that a director has become disqualified to be a director of the company, that director may be removed from office by the board under s 71(3)*(a)*(i) of the Companies Act. The following persons are disqualified by s 69(8) of the Companies Act from being a director of a company:

(i) a person prohibited by a court from becoming a director;
(ii) a person declared to be delinquent by a court in terms of s 162 of the Companies Act or s 47 of the Close Corporations Act 69 of 1984;
(iii) an unrehabilitated insolvent;
(iv) a person prohibited in terms of any public regulation to be a director of a company;
(v) a person removed from an office of trust, on the grounds of misconduct involving dishonesty; and
(vi) a person convicted, in South Africa or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount,[59] for theft, fraud, forgery, perjury or an offence
- involving fraud, misrepresentation or dishonesty;
- in connection with the promotion, formation or management of a company, or in connection with any act contemplated in subsec (2) or (5) of s 69; or
- under the Companies Act, the Insolvency Act 24 of 1936, the Close Corporations Act 69 of 1984, the Competition Act 89 of 1998; the Financial Intelligence Centre Act 38 of 2001, the Financial Markets Act 19 of 2012,[60] or Chapter 2 of the

[59] The prescribed amount, in terms of reg 39(4) of the Companies Regulations, 2011, is R1000.

[60] Section 69(8)*(b)*(iv)*(cc)* of the Companies Act refers to the Securities Services

Prevention and Combating of Corrupt Activities Act 12 of 2004.[61]

Under s 71(3)*(a)*(i) of the Companies Act, a shareholder or director may allege that a director of the company has become disqualified in terms of s 69 'other than on the grounds contemplated in s 69(8)*(a)*' of the Companies Act. Section 69(8)*(a)* of the Companies Act has been specifically excluded as a ground of removal that may be raised by a shareholder or a director under s 71(3) of the Companies Act. Section 69(8)(*a*) disqualifies a person from being a director of a company if a court has prohibited that person to be a director or declared the person to be delinquent, either in terms of s 162 of the Companies Act or in terms of s 47 of the Close Corporations Act. In *Kukama v Lobelo*[62] the court stated that if a person has been declared delinquent by a court, it is not necessary to also order his or her removal as a director of a company because of the 'automatic inherent effect' of the order declaring a person to be delinquent.[63] It is likely for this reason that s 69(8)*(a)* of the Companies Act has been specifically excluded as a ground of removal that may be raised by a shareholder or director under s 71(3)*(a)*(i) of the Companies Act. In terms of s 69(11) of the Companies Act a court may exempt a person from any of the grounds of disqualification set out in s 69(8)*(b)* of the Companies Act, but it may not exempt a person if a court has prohibited that person to be a director, or if a court has declared that person to be delinquent.

V INCAPACITATED

Under s 71(3)*(a)*(ii) of the Companies Act, a director may be removed from office by the board of directors if he or she is incapacitated. Before a director may be removed from office on this ground, he or she must be incapacitated; the incapacity must be to the extent that the director is unable to perform the functions of a director; and the director must be unlikely to regain that capacity within a reasonable time. These requirements are discussed below.

Act 36 of 2004, but this Act has been repealed and replaced by the Financial Markets Act 19 of 2012.

[61] Section 69(8)*(b)*(iv)*(cc)* refers to the 'Prevention and Combating of Corruption Activities Act, 2004'. This is an error, and should be a reference to the 'Prevention and Combating of Corrupt Activities Act, 2004'. A disqualification in terms of grounds (v) and (vi) listed above ends at the later of five years after the date of removal from office or the completion of the sentence imposed for the relevant office, as the case may be, or at the end of one or more extensions, as determined by a court from time to time, on application by the Companies and Intellectual Property Commission.

[62] 2012 JDR 0062 (GSJ) para 21.

[63] See also *Msimang NO v Katuliiba* 2012 JDR 2391 (GSJ) para 32, where this was affirmed.

(a) The director must be incapacitated

The Companies Act does not define or provide any guidance on the meaning of the term 'incapacitated' in the context of s 71(3)*(a)*(ii). The *Oxford English Dictionary* defines the term 'incapacity' as the 'physical or mental inability to do something or to manage one's affairs',[64] while 'incapacitate' is defined as 'prevent from functioning in a normal way'.[65]

Further guidance on the meaning of the term 'incapacity' may be gleaned from the Labour Relations Act 66 of 1995 ('LRA'). In *PG Group (Pty) Ltd v Mbambo NO*[66] the Labour Court found the definition of an 'employee' in s 213 of the LRA to be wide enough to include most, if not all, directors.[67] The court stated that the argument that the LRA does not apply to company directors is largely premised on the argument that employment is characterised by an imbalance in bargaining power or insubordination, and that this characterisation is not applicable to financial directors, managing directors or ordinary directors.[68] The Labour Court rejected this argument on the basis that this imbalance is not capable of being described in such precise terms as to particularly exclude directors from the definition of 'employees' in s 213 of the LRA, and proclaimed that company law too is concerned with the disparity in power between ownership and control.[69] In *Whitcutt v Computer Diagnostics & Engineering (Pty) Ltd*[70] the former Industrial Court[71] found that it could not have been the intention of the legislature that the behests of the Companies Act 61 of 1973 could have curtailed any rights of employees covered by the LRA. In a similar vein, in *PG Group (Pty) Ltd v Mbambo NO*[72] the court remarked that neither the LRA nor the Companies Act 61 of 1973 (which was in force at the time of this decision) specifically preclude a director from the protection of the LRA. The current Companies Act likewise does not preclude a director from the protection of the LRA. Accordingly, when a director holds a dual position in a company as a director

[64] *Oxford English Dictionary* on-line ed s v 'incapacity'

[65] Ibid s v 'incapacitate'.

[66] [2005] 1 BLLR 71 (LC) para 24.

[67] Section 213 of the LRA defines an 'employee' as follows: '"employee" means — any person, excluding an independent contractor who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any matter assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of "employee".'

[68] *PG Group (Pty) Ltd v Mbambo NO* supra note 66 para 28.

[69] Ibid.

[70] (1987) 8 *ILJ* 356 (IC) at 362.

[71] The former Industrial Court was established under the now repealed Labour Relations Act 28 of 1956.

[72] Supra note 66 para 29.

and employee, his or her rights as an employee are not affected by the fact that he or she also holds the office of a director in the company.[73] In light of the fact that company law and labour law are closely intertwined, it is submitted that it is useful and instructive to seek guidance from the LRA on the meaning of the term 'incapacity' under the Companies Act.

Section 188 of the LRA recognises that incapacity is a valid reason for dismissal provided that the employer is able to show that the dismissal was for a fair reason and that a fair pre-dismissal procedure was followed. In order to determine whether or not the reason for the dismissal was fair, or whether or not the dismissal was effected in accordance with a fair procedure, any relevant code of good practice issued under the LRA must be taken into account.[74] The Code of Good Practice: Dismissal in Schedule 8 of the LRA ('the LRA Code of Good Practice') distinguishes between three types of incapacity, namely, poor work performance, ill health, and injury.[75] In the context of employment law, incapacity means that, unrelated to any intentional or negligent conduct or performance, the employee is not able to meet the standard of performance required by the employer.[76] It involves a form of behaviour, conduct or inability which is not intentional or negligent, and accordingly, a dismissal based on incapacity is known as a 'no-fault' dismissal.[77] Incapacity must be distinguished from misconduct, which involves situations in which the employee is able to comply with the standard of performance required by the employer but, either deliberately or through neglect and carelessness, fails to do so.[78] The employee is therefore 'at fault'.

Incapacity in s 71(3)*(a)*(ii) of the Companies Act would, it is submitted, comprise ill health and injury, as is the case under the LRA. So, in accordance with the definition of the term 'incapacity' in the *Oxford English Dictionary,* it would comprise a physical or a mental inability to perform the functions of a director. To the extent that incapacity in s 71(3)*(a)*(ii) includes poor work performance, on a no-fault basis, it must also be established, as required by s 71(3)*(a)*(ii), that the director is 'unlikely to regain that capacity within a

[73] *Chillibush v Johnston* [2010] 6 BLLR 607 (LC) para 28.

[74] Section 188(2) of the LRA.

[75] Items 9 and 10 of the LRA Code of Good Practice.

[76] See further A C Basson, P A K le Roux & E M L Strydom *Essential Labour Law* 5 ed (2009) 135; A van Niekerk, M Christianson, M McGregor, E Smith & B P S van Eck *Law@work* 3 ed (2015) 293–4; and Sonia Bendix *Labour Relations: A Southern African Perspective* 6 ed (2015) 311–12 on the meaning of incapacity in the context of employment law.

[77] Basson et al op cit note 76 at 135; M McGregor, A Dekker, M Budeli-Nemakonde, W Germishuys & E Manamela *Labour Law Rules!* 2 ed (2014) 176; Barney Jordaan & Ulrich Stander *Effective Workplace Solutions: Employment Law from a Business Perspective* (2016) 73.

[78] Jordaan & Stander ibid at 142.

reasonable time'.[79] In other words, the director must have been able at one stage to meet the required performance standard but is now unlikely, within a reasonable time, to regain that ability. Note that if a director were to display poor work performance which is intentional or negligent, then the grounds of neglect or dereliction laid down in s 71(3)*(b)* of the Companies Act, would be applicable, and not the no-fault ground of incapacity.

(b) The incapacity must be to the extent that the director is unable to perform the functions of a director

This requirement envisages that the board of directors must consider the extent of the incapacity of the director, and whether such incapacity prevents the director from performing the functions of a director. If the incapacity does not prevent the director from performing the functions of a director, he or she may not be validly removed from office under s 71(3)*(a)*(ii) of the Companies Act. Section 66(1) of the Companies Act states that the business and affairs of a company must be managed by or under the direction of the board, which has the authority to exercise all of the powers and perform any of the functions of the company (save to the extent that the Companies Act or the company's MoI provides otherwise). Accordingly, the functions of a director, broadly, are to manage the business and affairs of a company.

Notably, s 71(3)*(a)*(ii) of the Companies Act states that the incapacity must prevent a director from performing 'the functions of a director'. The provision envisages that the functions of the director must be objectively ascertained. If the provision had stated that the incapacity must prevent the director from performing 'his or her functions' as a director, or that the incapacity must prevent the director from performing the functions of 'the director', this would have been a subjective standard. The functions of a director are discussed further in part VI(a) below.

(c) The director must be unlikely to regain that capacity within a reasonable time

Section 71(3)*(a)*(ii) does not provide any guidance on what a 'reasonable time' would be for an incapacitated director to regain his or her capacity. It is submitted that whether the duration of the incapacity is reasonable or unreasonable would depend on the circumstances of each case, and particularly whether the director is an executive director or a non-executive director. Unlike an executive director, a non-executive director is not bound to give continuous attention to the affairs of the company and his or her duties are of an intermittent nature to be performed at periodic board meetings.[80]

[79] This phrase is discussed further in part V (c) below.

[80] *In re City Equitable Fire Insurance Co Limited* [1925] 1 Ch 407 at 429; *Fisheries Development Corporation of SA Ltd v Jorgensen* supra note 11 at 165; *Howard v Herrigel NNO* 1991 (2) SA 660 (A) at 678; *AWA Ltd v Daniels t/a Deloitte Haskins & Sells* (1992) 7 ACSR 759 at 867; *Protect a Partner (Pty) Ltd v Laura Machaba-Abiodun* [2013] JOL 31048 (LC) para 48;

Accordingly, a longer duration of incapacity may be reasonable in the case of a non-executive director than for an executive director.

Item 10 of the LRA Code of Good Practice distinguishes between temporary and permanent illness or injury. If the incapacity is temporary, the employer is required, by item 10(1) of the LRA Code of Good Practice, to investigate the extent of the incapacity or the injury. If the period of incapacity is likely to be unreasonably long, the employer must investigate all the possible alternatives short of dismissal, before considering dismissal itself. When alternatives are considered, relevant factors would include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee.[81]

In the case of a permanent incapacity, different considerations become relevant. Here, the employer is required, in terms of item 10(1) of the LRA Code of Good Practice, to ascertain the possibility of securing alternative employment for the employee, or adapting the duties or work circumstances of the employee in order to accommodate the employee's disability. Item 10(3) of the LRA Code of Good Practice provides further that both the degree of incapacity and the cause of the incapacity are relevant to the fairness of any dismissal. For example, in the case of alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider instead of dismissal.[82] There is an onerous duty on an employer to accommodate the incapacity of an employee who is injured at work or who is incapacitated by a work-related illness.[83] In ascertaining whether a dismissal arising from ill health or injury is unfair, one must consider, in terms of item 11 of the LRA Code of Good Practice, whether or not the employee is capable of performing the work. If the employee is not so capable, one must consider the extent to which the employee is able to perform the work, the extent to which his or her work circumstances might be adapted to accommodate his or her disability, or (where this is not possible) the extent to which his or her duties might be adapted, and the availability of any suitable alternative work.[84]

Since dismissal for incapacity is a form of no-fault dismissal under the LRA, the process for dismissal is more accommodating and collaborative compared to the process for dismissal on the basis of misconduct.[85] Items 10 and 11

Kaimowitz v Delahunt 2017 (3) SA 201 (WCC) paras 19 and 25.

[81] Item 10(1) of the LRA Code of Good Practice.

[82] Item 10(3) of the LRA Code of Good Practice; Jordaan & Stander op cit note 77 at 168–9.

[83] Item 10(4) of the LRA Code of Good Practice.

[84] For a detailed discussion of these factors see Jordaan & Stander op cit note 77 at 166–9.

[85] McGregor et al op cit note 77 at 177.

of the LRA Code of Good Practice, dealing with incapacity and dismissals arising from incapacity, aim to provide job security in that they compel an employer to consider alternatives before dismissal and to obtain input from the employee on alternatives before the employee is dismissed.[86] The Labour Courts tend to adopt an empathetic approach to incapacity arising from ill health.[87] For example, in *Spero v Elvey International (Pty) Ltd*,[88] the medical evidence indicated that if the employee in question, who had suffered from depression and stress, were to take his medication correctly he would be able to do his work. The court found that the employee's incapacity was of a temporary nature. It held that the dismissal of the employee by the employer because of the employee's depression was unfair.

It was shown above that incapacity in the employment-law context is a form of no-fault dismissal. It is submitted that a similar approach should be adopted with regard to removing a director from office on the basis of incapacity. The board of directors has a discretion whether or not to remove a director from office on the basis of his or her incapacity,[89] and accordingly there is scope for the board to consider other alternatives before removing an incapacitated director from office. According to s 71(5) of the Companies Act, a director who has been removed from office by the board in terms of s 71(3) because he or she is incapacitated, or a person who appointed that director as contemplated in s 66(4)*(a)*(i) of the Companies Act, may apply to a court within twenty business days to review the board's determination.[90] Since the board's decision to remove a director from office on the basis of his or her incapacity is subject to review by a court, and in light of the fact that labour law and company law are closely intertwined, as discussed above, it is important to be aware of the approach adopted by the courts to dismissal arising from incapacity, albeit with regard to matters of labour law.

On this account, some guidance may be obtained under the LRA with regard to removing a director of a company on the ground of incapacity. For instance, before the board of directors removes a director on this basis, it should consider the degree of the incapacity, the cause of the incapacity, and the possibility of securing a temporary replacement for the ill or injured director. A viable alternative to consider, as directed by item 10(1) of the LRA Code of Good Practice with regard to employees who are likely to be absent for an unreasonably long time, is whether an alternative director

[86] Ibid at 178.

[87] *Nehawu v SA Institute for Medical Research* [1997] 2 BLLR 146 (IC) at 149.

[88] (1995) 16 *ILJ* 1201 (IC).

[89] Section 71(3) of the Companies Act states that the board of directors 'may' remove a director whom it has determined to be incapacitated.

[90] For a further discussion of s 71(5) of the Companies Act see Ncube op cit note 2 at 46.

may be appointed to serve on the board in substitution for the particular director, while he or she recovers from his or her incapacity. Section 1 of the Companies Act defines an 'alternate director' as a person elected or appointed to serve, as the occasion requires, as a member of the board of a company in substitution for a particular elected or appointed director of that company. An alternate director does not serve as an agent of the director who appointed him or her,[91] is subject to all the duties a director owes to the company, and must exercise and discharge all the powers and functions of a director.[92] An alternate director may only be appointed if the MoI makes provision for a director to nominate an alternate director to act in his or her stead, and the alternate director may act as a director only in the absence of the director who appointed him or her.[93]

In terms of item 10(2) of the LRA Code of Good Practice, the employer must give the employee an opportunity to state his or her case before the employee is dismissed on the ground of incapacity. Section 71(4)*(b)* of the Companies Act similarly gives the director an opportunity to make a presentation to the meeting before the resolution for his or her removal is put to the vote. The presentation could be to dispute an allegation of incapacity against him or her, or to dispute whether the incapacity renders him or her unable to perform the functions of a director, or whether he or she is unlikely to regain his or her capacity within a reasonable time. Considering the fact that incapacity is largely a question of fact, the opportunity provided to a director by s 71(4)*(b)* to make a presentation to the board meeting before his or her removal, is of considerable importance. It is here that a director would be able to provide the board of directors with any relevant medical information that may assist in preventing his or her removal from office.

(d) Assessment of incapacity

Under s 71(3)*(a)*(ii) of the Companies Act, the assessment as to whether a director is incapacitated to the extent that he or she is unable to perform the functions of a director is left in the hands of the board of directors. It is submitted that whether or not a director is incapacitated is a question of fact. In certain instances, a medical assessment may be necessary to ascertain whether a director is physically or mentally incapacitated. It is imperative that the board of directors does not invoke this ground malevolently where tension or conflicts arise between the directors.[94] Evidence by the shareholder or director who alleged that the director in question is incapacitated must

[91] *Australian Securities & Investments Commission v Doyle* [2001] WASC 187.

[92] *Markwell Bros Pty Ltd v CPN Diesels (Qld) Pty Ltd* (1982) 7 ACLR 425 (SC) (Qld) 433.

[93] Section 66(4)*(a)*(iii) of the Companies Act.

[94] Ncube op cit note 2 at 42.

be presented to the board. This evidence must be used to substantiate an allegation that the director is incapacitated to the extent that he or she is unable to perform the functions of a director and is unlikely to regain that capacity within a reasonable time.[95] In light of the fact that the board may not be properly qualified in all instances to make an assessment regarding whether or not a fellow board member is indeed incapacitated and whether he or she is unlikely to regain that capacity within a reasonable time, it is submitted that it would be preferable for a medical practitioner or for a court to make this assessment.

Under art 18*(d)* of the UK Model Articles for Private Companies Limited by Shares and art 22*(d)* of the Model Articles for Public Companies,[96] a person will cease to be a director if a registered medical practitioner who is treating that person gives a written opinion to the company stating that the person has become physically or mentally incapable of acting as a director and may remain so for more than three months. Article 18*(e)* of the Model Articles for Private Companies Limited by Shares and art 22*(e)* of the Model Articles for Public Companies state further that a person ceases to be a director if, by reason of that person's mental health, a court makes an order which wholly or partly prevents that person from personally exercising any powers or rights which that person would otherwise have. Under these provisions, a registered medical practitioner or the court must be involved in ascertaining the physical and mental capabilities of the director in question. In the USA, in the states of Ohio,[97] California,[98] Alaska[99] and Pennsylvania,[100] a director may be removed from office by the board of directors if, by order of court, he or she is found to be of unsound mind. None of the above-mentioned jurisdictions leave the determination of the incapacity of a director in the hands of the board of directors; instead a medical practitioner or a court is involved in this assessment.

It is submitted that the Companies Act should require the input of a registered medical practitioner or a court in assessing whether a director is indeed incapacitated and is unlikely to regain that capacity within a reasonable time. This would guard against this ground of removal being improperly applied in instances where the board is not properly qualified to make the relevant assessment. It would also guard against this ground of removal being abused where conflicts arise between the directors. It would furthermore

[95] Ibid.

[96] The Model Articles for Private Companies Limited by Shares and the Model Articles for Public Companies are set out in schedules 1 and 3 respectively of the Companies (Model Articles) Regulations, 2008.

[97] Section 1701.58 of the Ohio Revised Code.

[98] Section 302 of the California Corporations Code.

[99] Section 10.06.458 of the Alaska Corporations Code.

[100] Section 1726*(b)* of the Pennsylvania Business Corporation Law.

bring s 71(3)*(a)*(ii) of the Companies Act in line with the equivalent provisions in the UK and in various states of the USA which have adopted such an approach. This approach is reinforced by s 5(2) of the Companies Act which, as discussed earlier, encourages our courts to look further afield and to have regard in appropriate circumstances to the law in other corporate-law jurisdictions. It is, however, important to balance the company's interests with those interests of the director in question, since that director may potentially harm the company pending his or her assessment by a registered medical practitioner or by a court. For this reason it is important to take steps to guard against harm being done to the company by the director pending this process.

VI HAS NEGLECTED, OR HAS BEEN DERELICT IN, THE PERFORMANCE OF THE FUNCTIONS OF DIRECTOR

Under s 71(3)*(b)* of the Companies Act, a further ground may be raised by a director or a shareholder of a company as a basis to remove a director from office. This ground is that the director has neglected or has been derelict in the performance of 'the functions of director'. These requirements are discussed below.

(a) The functions of a director

In order for this ground of removal to apply, the director must have neglected or have been derelict in the performance of 'the functions of director'. As discussed earlier, the phrase 'the functions of director' indicates that an objective standard of assessment is used, and not a subjective standard. Consequently, in order to ascertain whether a director has neglected or has been derelict in the performance of the functions of a director, one would have to objectively ascertain whether he or she has failed to fulfil the functions of a director. The issue is not whether the director has failed to fulfil his or her own specific functions as a director of the particular company.

The phrases 'perform the functions of director' and 'performance of the functions of director' also appear in subsecs 76(3) and (4) of the Companies Act. Section 76(3) requires a director, when acting in that capacity, to exercise the powers and perform 'the functions of director' in accordance with the standards set out in s 76(3).[101] Section 76(4) (known as the business judgment rule) provides that in respect of any particular matter arising in the exercise of the powers or the performance of 'the functions of director', a particular

[101] In terms of s 76(3) of the Companies Act, a director must exercise the powers and perform the functions of director in good faith and for a proper purpose, in the best interests of the company, and with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that director and having the general knowledge, skills and experience of that director.

director of a company will be deemed to have acted in the best interests of the company and with the necessary degree of care, skill and diligence, if he or she meets the requirements set out in that provision.[102] Accordingly, a director is required to perform the functions of a director in compliance with the standards of directors' conduct set out in s 76(3) of the Companies Act. He or she will be deemed to have acted in the best interests of the company and with the necessary degree of care, skill and diligence if he or she complies with the requirements set out in the business judgment rule in s 76(4) of the Companies Act. While these provisions set out how a director must perform his or her function of managing the business and affairs of the company, the question still remains: what are the functions of a director?

In *AWA Ltd v Daniels t/a Deloitte Haskins & Sells*[103] the Supreme Court of New South Wales stated that, apart from statutory functions, the board's functions are said to be usually four-fold: (i) to set goals for the corporation; (ii) to appoint the corporation's chief executive; (iii) to oversee the plans of managers for the acquisitions and organisation of financial and human resources towards attainment of the corporation's goals; and (iv) to review, at reasonable intervals, the corporation's progress towards attaining its goals.

While these may be the general broad functions of the board of directors, it is difficult to state with accuracy the functions of a specific director of a particular company. There is no profession of directors.[104] The functions of a director would vary depending on the type of company of which he or she is a director, the type of director he or she is, and on the nature of the company's business. For instance, the functions of a director of a public company would differ from those of a director of a private company. The board of directors of a public company would be unable to manage the company's day-to-day business to the same extent as the board of directors of a private company.[105] In a public company the board of directors would delegate certain matters

[102] These requirements are that: (i) the director had taken reasonably diligent steps to become informed about the matter; (ii) either the director had no material personal financial interest in the subject matter of the decision and had no reasonable basis to know that any related person had a personal financial interest in the matter, or the director complied with the requirements of s 75 with regard to any material personal financial interest; and (iii) the director made a decision or supported the decision of a board committee, with regard to the matter, and the director had a rational basis for believing and did believe that the decision was in the best interests of the company.

[103] Supra note 80 at 866–7.

[104] In *Gihwala v Grancy Property Ltd* 2017 (2) SA 337 (SCA) para 146 the Supreme Court of Appeal stated that the proposition that a director of companies is an occupation, trade or profession 'is by no means obvious'. This was stated in the context of the court ascertaining whether s 162(5) of the Companies Act infringes the constitutional right to freely choose a trade, occupation or profession.

[105] *AWA Ltd* supra note 80 at 866.

to the managers and other staff members, while in a private company such matters may be attended to by the directors themselves.[106] It is submitted that this fact is acknowledged by s 66(1) of the Companies Act, which states that the business and affairs of a company must be managed 'by or under the direction of its board'. In other words, the board may manage the business or affairs of the company directly, or it may give instructions how this is to be done. Thus the extent to which the board manages the business or affairs of a company would vary from company to company.

By the same token, the functions of an executive director would differ from those of a non-executive director. An executive director who is a full-time director and an employee of the company would be more involved in the day-to-day running of the business of a company than a non-executive director, who is a part-time director, is not an employee of the company, and is not involved in the management of the company. Non-executive directors play an important role in providing objective judgement, independently of management, on issues facing the company.[107] They are not bound to give continuous attention to the affairs of the company, and their duties are of an intermittent nature to be performed at periodic board meetings and at other meetings which may require their attention.[108]

In order to ascertain the functions of a director, it is also necessary to consider the nature of the company's business. The example given in *In re*

[106] *In re City Equitable Fire Insurance Co Limited* supra note 80 at 426; *AWA Ltd* supra note 80 at 866; *Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson* (1995) 16 ACSR 607 para 667; *Australian Securities and Investments Commission v Healey* [2011] FCA 717 para 166. Individual directors only have such authority as the board delegates to them, or that are delegated to them by someone authorised to do so (*Makate v Vodacom (Pty) Ltd* [2014] ZAGPJHC 135 para 166; *Kaimowitz* supra note 80 paras 19, 21, 26 and 27). In *Kaimowitz* para 21 the court stated that the day-to-day management of a company may be delegated to a managing director and/or to committees of the board as chosen by the board, as opposed to each director, as of right, having the power to involve himself or herself in the day-to-day operations of the company. See further on this case Rehana Cassim 'The right of a director to participate in the management of a company: *Kaimowitz v Delahunt* 2017 (3) SA 201 (WCC)' (2018) 30 *SA Merc LJ* 172.

[107] According to the King IV Report on Corporate Governance for South Africa 2016 (principle 7, recommended practice 27) non-executive directors may be categorised by the board as independent if it concludes that there is no interest, position, association or relationship which, when judged from the perspective of a reasonable and informed third party, is likely to influence unduly or cause bias in decision-making in the best interests of the organisation.

[108] *In re City Equitable Fire Insurance Co Limited* supra note 80 at 429; *Fisheries Development Corporation* supra note 11 at 165; *Howard v Herrigel* supra note 80 at 678; *AWA Ltd* supra note 80 at 867; *Protect a Partner* supra note 80 para 48.

City Equitable Fire Insurance Co Limited[109] is that the position of a director carrying on a small retail business would be very different from that of a director of a railway company. Likewise, the functions of a director of a bank may differ widely from those of a director of an insurance company, and the functions of a director of one insurance company may differ from those of a director of another insurance company. In *In re City Equitable Fire Insurance Co Ltd* Romer CJ proclaimed that it 'is indeed impossible to describe the duty of directors in general terms, whether by way of analogy or otherwise'.[110]

Section 71(3)*(b)* of the Companies Act, in imposing an objective test, and not a subjective one, does not distinguish between the functions of a director of a public, private, personal liability, non-profit or state-owned company, or between an executive and a non-executive director. Furthermore, the section does not require the nature of the company's business to be considered in ascertaining whether the director in question has neglected or has been derelict in the performance of the functions of a director. In striking contrast, a subjective standard has been imposed with regard to ascertaining the delinquency of directors. Section 162(5)*(c)*(iv)*(aa)* of the Companies Act provides that a court must make an order declaring a person to be a delinquent director if the person, while a director, acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the 'performance of the director's functions within, and duties to, the company'. This latter standard is a subjective one because it requires one to assess the performance of the particular director's functions within the specific company. It is odd that the legislature imposed an objective standard in s 71(3)*(b)* but imposed a subjective standard in s 162(5)*(c)*(iv)*(aa)*, when both provisions require one to assess the director's performance and whether his or her performance has been deficient.

It is submitted that, in light of the fact that the functions of a director would vary depending on the type of company of which he or she is a director, the type of director he or she is, and the nature of the company's business, a subjective standard and not an objective standard ought to have been imposed by s 71(3)*(b)* of the Companies Act. It is accordingly submitted that s 71(3)*(b)* must be amended to replace the phrase 'functions of a director' with the phrase 'the director's functions within the company'. The addition of these words would make the standard of assessment subjective in that they would require one to take into account the type of company, the type of director and the nature of the company's business, in assessing whether the director has neglected or has been derelict in the performance of his or her functions,

[109] Supra note 80 at 426.

[110] Ibid. See further *AWA Ltd* supra note 80 at 866, where the Supreme Court of New South Wales agreed with this dictum.

or to ascertain the extent of his or her incapacity. The suggested amendment would furthermore result in harmony with ss 71(3)(*b*) and 162(5)(*c*)(iv)(*aa*) of the Companies Act. It is essential that there be consistency between these two provisions since, as affirmed in s 71(10) of the Companies Act, the right of removal of a director is in addition to the right of a person to apply to a court in terms of s 162 of the Companies Act for an order declaring a director delinquent.

(b) The meaning of the terms 'neglected' and 'been derelict'

The terms 'neglected' and 'been derelict' have not been defined in the Companies Act in the context of the director's performance. The precise conduct to which 'neglect' and 'derelict' relate are not clear. Accordingly, it is necessary to consider other authorities that have defined these terms in order to ascertain the type of conduct that would allow the board of directors to legitimately rely upon these grounds for removal in terms of s 71(3) of the Companies Act.

The *Oxford English Dictionary* defines 'neglect' as meaning 'the failure to do something',[111] while *Stroud's Judicial Dictionary of Words and Phrases* defines the term 'neglect' as meaning the 'omission to do some duty which the party is able to do'.[112] One may conceivably neglect the functions of a director by acting negligently or intentionally. For example, a director may fail to attend to some task which the board requested him or her to do because he or she forgets to attend to it (which would be a negligent neglect of the functions of director) or a director may deliberately and consciously decide not to attend to that task (which would be an intentional failure to comply with the functions of director).

What is the difference in meaning between the terms 'neglect' and 'derelict', and does the fault element of 'derelict' encompass a negligent and/or an intentional act? The *Collins Dictionary* defines the term 'derelict' as meaning 'neglectful of duty or obligation; remiss', while the term 'dereliction' is defined as the 'deliberate, conscious, or wilful neglect (esp in the phrase dereliction of duty)'.[113] *The Wolters Kluwer Bouvier Law Dictionary* defines the phrase 'dereliction of duty' as follows: 'Failure to perform a duty. Dereliction of duty, or to be derelict in one's duties, is the failure to perform a duty without excuse or justification for the non-performance.'[114] In *O'Neill v Printing*

[111] *Oxford English Dictionary* on-line ed s v 'neglect'.

[112] John S James *Stroud's Judicial Dictionary of Words and Phrases* 5 ed (1986) 1668 s v 'neglect'.

[113] *Collins Dictionary* 11 ed (2011) 453 s v 'derelict' and 'dereliction'.

[114] Stephen Michael Sheppard (ed) *The Wolters Kluwer Bouvier Law Dictionary* (2011) 326 s v 'dereliction of duty'.

Industry Employees Union of Australia[115] the court stated the following with regard to the meaning of the term 'dereliction':

> 'The *Shorter Oxford English Dictionary* defines "dereliction" as "a reprehensible abandonment or neglect", and uses the phrase "dereliction of duty" to exemplify its use. We think this phrase in this context involves the notion that not only has a duty not been performed but that the non-performance is fairly to be regarded as reprehensible, blameworthy, or worthy of censure, as opposed to trivial or due to excusable inadvertence or some other extenuating factor.'

It is evident from the above definitions that 'derelict' is more serious and blameworthy than 'neglect', and that, with a 'dereliction' of one's functions, the neglect of such functions must be reprehensible, blameworthy and worthy of censure. It must not be trivial.

What is not clear though is whether the term 'derelict' as used in s 71(3)*(b)* of the Companies Act would encompass the fault element of negligence and/or intention. As set out above, the *Collins Dictionary* defines the term 'dereliction' as the 'deliberate, conscious, or wilful neglect (esp in the phrase *dereliction of duty*)'.[116] This envisages that the fault element must be that of intention. On the other hand, *The Wolters Kluwer Bouvier Law Dictionary* states that 'dereliction may be either wilful or negligent'.[117]

The phrase 'derelict in the performance of the functions of director' is similar to the phrase 'dereliction of duty', one which is frequently used in the labour-law context with regard to the conduct of employees. In the labour-law context, the term 'dereliction of duty' is understood to mean an intentional or conscious failure of an employee to do his or her duty.[118] In order for an employer to bring a charge of dereliction of duty against an employee, there must be an element of intent or consciousness on the part of the employee in failing to do his or her duty.

However it appears from case law that courts envisage that a dereliction of duty may also be negligent, and not necessarily intentional. For example, one of the issues before the Supreme Court of Appeal in *Universiteit van Stellenbosch v JA Louw (Edms) Bpk*[119] was whether a building contractor had committed a negligent dereliction of duty by not properly supervising a sub-contractor. In *Minister of Justice and Constitutional Development v X*[120] the Supreme Court of Appeal found that there was a negligent dereliction of duty by a prosecutor in failing to put all the relevant information before the court in a bail application.

[115] (1965) 7 FLR 488 at 492.

[116] *Collins Dictionary* at 453 s v 'dereliction'.

[117] *The Wolters Kluwer Bouvier Law Dictionary* at 326 s v 'dereliction'.

[118] Ivan Israelstam 'Dereliction of duty charges must be proven' *The South African Labour Guide* available at *http://www.labourguide.co.za/discipline-dismissal/244-dereliction-is-a-serious-offence-know-what-it-is*, accessed on 7 May 2019.

[119] 1983 (4) SA 321 (A).

[120] 2015 (1) SA 25 (SCA).

It consequently is not clear whether the term 'derelict' as used in s 71(3)*(b)* of the Companies Act is to be interpreted in the manner in which it is used in the labour law context — that is, with the element of fault being intention — or whether, as defined in *The Wolters Kluwer Bouvier Law Dictionary* in the USA context, a director could be found guilty of being derelict in the performance of the functions of director if he or she had acted negligently. In the absence of any guidelines from the Companies Act, and in light of the fact that a negligent dereliction of duty is recognised in our case law, it is submitted that, until the courts clarify this matter, a negligent dereliction of duty would suffice as a valid ground of removal under s 71(3)*(b)* of the Companies Act, provided that both the elements of 'negligence' and 'dereliction' are clearly present, based on the facts and circumstances of the case. If these elements are not clearly present, then a director or a shareholder under s 71(3)(*b*) of the Companies Act should rely on the ground of 'neglect' rather than that of 'dereliction' as a ground for proposing the removal of a director from office.

Due to the vagueness and imprecision of the term 'derelict', until the legislature or our courts clarify the meaning of this term, it is important to guard against this ground being invoked vexatiously by shareholders or by the directors as a ground for the removal of a director in the case of conflicts arising between the shareholders and the directors or between the directors themselves. It is further important to guard against this ground being used as a 'catch-all' ground where cases are pushed into the mould of 'dereliction of duty' when they do not really fit there.

(c) 'Negligence' as a ground for the removal of a director

Section 71(3) of the Companies Act states that if an allegation by a shareholder or a director is made against another director, the board of directors must determine the matter by resolution and that it may remove a director whom it has determined to be 'ineligible or disqualified, incapacitated, or *negligent* or derelict, as the case may be' (emphasis supplied). Curiously, it is not neglect but negligence that is referred to in s 71(3) of the Companies Act. Likewise, subsecs 71(5), 71(6)*(a)* and 71(6)*(b)*(ii) of the Companies Act refer to the term 'negligent' even though this ground is not referred to at all in s 71(3)*(a)* or *(b)* as one of the grounds for the removal of a director.

It is odd that the legislature has used the term 'negligent' in subsecs 71(3), 71(5), 71(6)*(a)* and 71(6)*(b)*(ii) instead of the term 'neglect', when the term 'neglect' is used in s 71(3)*(b)* as a ground for the proposed removal of a director. The terms 'neglect' and 'negligent' do not have the same meaning. They are not synonymous. As discussed earlier, 'neglect' refers to the failure to do something or the omission to do some duty which the party is able to do. While 'neglect' is the act, negligence is an element of fault.[121]

[121] See also Delport op cit note 2 at 276.

On the wording of s 71(3) read with subsecs 71(5), or 71(6)*(a)* or 71(6)*(b)*(ii), it appears that in order to determine if a director has neglected the performance of the functions of director, one must ascertain whether he or she has been negligent in the performance of his or her functions. It is submitted that this would be anomalous since a director could conceivably neglect his or her functions by acting negligently or by acting intentionally, as discussed above. Since the terms 'neglect' and 'negligence' have different meanings, the term 'negligent' cannot properly be substituted for the term 'neglect', as the legislature seems to have done.

It is not clear whether the legislature has confused the terms 'neglect' and 'negligent' by referring to the term 'negligent' in subsecs 71(3), 71(5), 71(6)*(a)* and 71(6)*(b)*(ii) and omitting to refer to the term 'neglect' in these provisions. In light of the fact that 'negligence' is not listed as one of the grounds in s 71(3) of the Companies Act, one wonders whether the legislature intended to use the term 'neglectful' in ss 71(3), 71(5), 71(6)*(a)* and 71(6)*(b)*(ii), but inadvertently used the term 'negligence' instead. This confusion must be clarified by the legislature. Until this perplexity is clarified, it appears that there may well be an additional statutory ground which a shareholder or director may invoke for the removal of a director — that is, that the director of the company has been negligent.

VII ADDITIONAL GROUNDS FOR THE REMOVAL OF A DIRECTOR

Section 71(3) of the Companies Act does not state whether the grounds for the removal of a director by the board of directors are the sole grounds or are limited to those provided in that section, or whether additional grounds of removal may validly be inserted in the MoI of a company. In contrast, s 220(7) of the Companies Act 61 of 1973 provided that nothing in those sections should be taken as 'derogating from any power to remove a director which may exist apart from this section'. This provision made it clear that the statutory method of removing a director from office was not the only ground on which a director could be removed from office. There is no similar provision in s 71 of the Companies Act.

It is arguable that additional grounds for the removal of a director may, in terms of s 15(2)*(a)*(iii) of the Companies Act, be validly included in the MoI. This provision states that the MoI of a company may impose on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement than would otherwise apply to the company in terms of an unalterable provision of the Companies Act. It is a question of statutory interpretation, but it is arguable that additional grounds for the removal of a director could well qualify under s 15(2)*(a)*(iii) of the Companies Act on the basis that they impose a higher standard than would otherwise apply to the company under s 71(3) of the Companies Act.

As discussed earlier, s 69(6)*(a)* of the Companies Act states that the MoI of a company may impose additional grounds of ineligibility or disqualification of directors. For example, a company may state in its MoI that a director will be disqualified to be a director of a company if he or she is, for more than six months, absent without consent of the directors from meetings of directors held during that period. Should a director be so absent for more than six months, then a director or a shareholder would be entitled to invoke s 71(3)*(a)*(i) of the Companies Act as a ground for the proposed removal of that director from office on the basis that he or she has become disqualified to be a director.

Accordingly, additional grounds of ineligibility or disqualification may be inserted by a company in its MoI, and in this way, additional grounds for the removal of a director may indirectly be imposed. Whether additional grounds for the removal of a director may validly be directly inserted in the MoI of a company, is not clear. This must be clarified by the legislature or the courts. Notably, in terms of s 15(1)*(a)* of the Companies Act, each provision of a company's MoI must be consistent with the Companies Act. A provision in the MoI will be void to the extent that it contravenes, or is inconsistent with, the Companies Act.[122] Consequently, to the extent that such additional grounds are inserted in the MoI they will be void to the extent that they contravene, or are inconsistent with the Companies Act.

VIII PROPOSALS FOR LEGISLATIVE AMENDMENT OF SECTION 71(3) OF THE COMPANIES ACT

In light of the fact that certain grounds of removal of directors by the board of directors in s 71(3) of the Companies Act are ambiguous or poorly worded, while other grounds have the potential to be abused, it is recommended that the wording of these grounds of removal be amended by the legislature so as to clarify and strengthen the grounds for the removal of directors by the board. Suggestions for the legislative amendments of these grounds are set out below. In addition suggestions are made on the interpretation of certain ambiguous grounds of removal.

(a) Section 69(6) of the Companies Act, which provides that the MoI of a company may impose additional grounds of ineligibility or disqualification or minimum qualifications to be met by directors of a company, should specify that any such grounds and qualifications must be reasonable as applied to the company and must be lawful. In addition, s 71(3)*(a)* of the Companies Act, which provides that a director may be removed by the board of directors if he or she is ineligible or disqualified to be a director, should contain safeguards against this ground being used for improper purposes, such as a means of removing directors from office who do not meet any new ground

[122] Section 15(1)*(b)* of the Companies Act.

of ineligibility or disqualification or a new qualification requirement that is introduced during their term of office. It is further submitted that s 69(6) should incorporate a requirement which guards against the misuse of the timing of the qualification requirements by providing that a new ground of ineligibility or disqualification or a new minimum qualification prescribed during a director's term shall not apply to that director before the end of that director's term. It is recommended that s 69(6) of the Companies Act be amended as follows (consistent with Parliamentary style, the recommended insertions to sections of the Companies Act are underlined, while the recommended deletions are 'struck out'):

> '(6) Subject to subsection (6A), ~~I~~in addition to the provisions of this section, the Memorandum of Incorporation of a company may impose —
>
> *(a)* additional grounds of ineligibility or disqualification of directors; or
>
> *(b)* minimum qualifications to be met by directors of that company~~.~~, provided that such additional grounds or minimum qualifications are reasonable as applied to the company and~~a~~re lawful.
>
> (6A) Any additional grounds of ineligibility or disqualification or any minimum qualifications to be met by directors, as referred to in subsection (6), which are prescribed after a director has been elected or appointed, shall not apply to that director before the end of that director's term.'

(b) It would be too disruptive to the running of a company's business and its affairs if the past acts of an ineligible or disqualified director were not regarded as valid. In the interests of clarity and certainty it is submitted that a provision similar to s 214 of the previous Companies Act 61 of 1973 and s 161 of the UK Companies Act should be inserted in the Companies Act, to the effect that the acts of a person acting as a director will be valid notwithstanding that it is afterwards discovered that there was a defect in his or her appointment, or that he or she was disqualified from holding office.

(c) Incapacity in the employment law context is a form of no-fault dismissal. In light of the fact that company law and labour law are closely intertwined, it is proposed that a similar approach be adopted to the ground of incapacity in s 71(3)*(a)*(ii) of the Companies Act. Under this approach, before the board of directors removes a director from office on the ground of incapacity, it should consider the degree of the incapacity, the cause of the incapacity, and the possibility of securing a temporary replacement, such as an alternative director, for the ill or injured director while he or she recovers from his or her incapacity. In order to guard against this ground being improperly applied to remove directors from office in instances where the board

of directors is not properly qualified to make the relevant incapacity assessment, it is recommended that a registered medical practitioner or a court should assess whether a director is incapacitated to the extent that he or she is unable to perform the functions of a director, and whether he or she is incapacitated to the extent that he or she is unlikely to regain that capacity within a reasonable period of time. This approach would further guard against this ground of removal being abused when conflicts arise between the directors. Reinforcing s 5(2) of the Companies Act, this would also bring s 71(3)*(a)*(ii) in line with the equivalent provisions in the UK and in various states in the USA, which have adopted such an approach. It is recommended that s 71(3)*(a)*(ii) be amended as follows:

> '(ii) incapacitated 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, as assessed by a registered medical practitioner or by a court; or'

(d) In light of the fact that the functions of a director vary depending on the type of company of which he or she is a director, the type of director he or she is, and the nature of the company's business, a subjective standard of assessment must be imposed in both subsecs 71(3)*(a)*(ii) (incapacity) and 71(3)*(b)* (neglect or dereliction) of the Companies Act, instead of an objective standard. A subjective standard would furthermore result in there being consistency between subsecs 71(3)*(b)* and 162(5)*(c)*(iv)*(aa)* of the Companies Act, which imposes a subjective standard in ascertaining whether a director is delinquent. It is submitted that subsecs 71(3)*(a)*(ii) and 71(3)*(b)* should read as follows:

> 'If a company has more than two directors, and a shareholder or director has alleged that a director of the company —
>
> *(a)* has become –
>
> (i) ...
>
> (ii) incapacitated to the extent that the director is unable to perform the ~~functions of a director~~director's functions within the company, and is unlikely to regain that capacity within a reasonable time, as assessed by a registered medical practitioner or by a court; or
>
> *(b)* has neglected, or been derelict in the performance of, ~~the functions of director~~the director's functions within the company;'

(e) Clarity must be provided about whether the term 'derelict' as used in s 71(3)*(b)* of the Companies Act contemplates the fault element of intention, or whether a director could be found guilty of being derelict in the performance of the functions of a director if he or she had acted negligently. In the absence of any guidelines from the

Companies Act and in light of the fact that a negligent dereliction of duty is recognised in South African case law, it is submitted that a negligent dereliction of duty should suffice as a valid ground of removal under s 71(3)*(b)* of the Companies Act, provided that both the elements of 'negligence' and 'dereliction' are clearly present, based on the facts and circumstances of the case. Due to the vagueness and imprecision of the term 'derelict', which is not defined by the Companies Act, until the legislature or our courts clarify the meaning of this term as used in s 71(3)*(b)* of the Companies Act, it is important to guard against this ground being invoked vexatiously by shareholders or the directors as a ground for the removal of a director in the case of conflicts arising between the shareholders and directors or between the directors themselves. Care must be taken that this ground is not used as a 'catch-all' ground where cases are pushed into the mould of 'dereliction of duty' when they do not really fit there.

(f) Clarity must be provided on whether the ground of negligence is an additional ground for the removal of a director by the board of directors, or whether the legislature inadvertently confused the terms 'neglect' and 'negligent' by referring to the term 'negligent' in subsecs 71(3), 71(5), 71(6)*(a)* and 71(6)*(b)*(ii) but omitting to refer to the term 'neglect' in these provisions. It is recommended that the legislature clarify this perplexity by amending legislation. Until such clarity is provided, it appears that negligence may be an additional statutory ground which a shareholder or a director may invoke for the removal of a director.

(g) Clarity must be provided by the legislature or the courts whether the grounds for the removal of a director by the board of directors are limited to those grounds set out in s 71(3) of the Companies Act, or whether additional grounds of removal may validly explicitly be provided by a company in its MoI.

IX CONCLUSION

The Memorandum on the Objects of the Companies Bill, 2008 stated that cl 71 of the Bill (now the Companies Act 71 of 2008) provides 'a more certain and nuanced scheme for the removal of directors from office'.[123] It is respectfully submitted that the provisions of s 71(3) on the removal of directors by the board of directors do not provide unqualified certainty. This article has demonstrated that some aspects of s 71(3) have been poorly drafted or are

[123] See the Memorandum on the Objects of the Companies Bill, 2008 [B 61D-2008] (2008) para 8.

ambiguous, while other aspects of the provision leave room for the grounds of removal by the board of directors to be abused. For instance, there is much scope for the ground of incapacity to be abused; there are no provisions guarding against the introduction of new qualification requirements being improperly used to remove directors; the meaning of the term 'derelict' is not clear; an objective standard and not a subjective standard has been imposed to ascertain whether a director has properly performed his or her functions; it is not clear whether negligence is an additional ground for the removal of a director, nor is it clear whether additional grounds of removal may validly be explicitly inserted in a company's MoI.

The recommendations set out in this article are intended to accord with the purposes of the Companies Act to promote the development of the South African economy by encouraging transparency,[124] and to encourage the efficient and responsible management of companies.[125] Certain of these recommendations are reinforced by s 5(2) of the Companies Act, which encourages a court to consider foreign law, to the extent appropriate, in interpreting or applying the Companies Act. It is imperative that directors have clarity on the grounds of removal to remove a fellow board member and that the legislature provide such clarity. It is hoped that the recommendations set out in this article will clarify certain ambiguities in s 71(3), guard against the abuse of this provision by the board of directors and improve and strengthen the grounds of removal of a director by the board of directors.

[124] Section 7*(b)*(iii) of the Companies Act.
[125] Section 7*(j)* of the Companies Act.