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CONFUSION IN THE REMOVAL OF DIRECTORS BY SHAREHOLDERS UNDER THE COMPANIES ACT 71 OF 2008: *MILLER v NATMED DEFENCE (PTY) LTD*

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This note critically analyses the judgment in Miller v Natmed Defence (Pty) Ltd *2022 (2) SA 554 (GJ), in which the court ruled on the validity of the removal of a director by the company's sole shareholder. Three issues were in contention: whether a shareholder must furnish the director with reasons for the proposed resolution to remove a director from office under s 71 of the Companies Act 71 of 2008; whether a shorter notice period for the shareholders' meeting was legally acceptable; and whether the meeting that was held telephonically was valid. The court ruled that the director's removal from office was valid and dismissed his request to be reinstated as a director. This note critically analyses the judgment and argues that the court misinterpreted some aspects of s 71 of the Act.*

Removal of directors – shareholder removal – reasons for removal – notice period of meetings – telephonic meetings – damages for loss of office – s 71 of the Companies Act 71 of 2008

INTRODUCTION

In *Miller v Natmed Defence (Pty) Ltd* 2022 (2) SA 554 (GJ) ('*Miller*'), the Gauteng Local Division, Johannesburg, was confronted with an application to set aside a decision by a shareholder to remove a director from office under s 71 of the Companies Act 71 of 2008 ('the Companies Act'). The affected director raised three arguments in disputing the validity of his removal: first, that he was entitled to be furnished with reasons for his intended removal; secondly, that the notice period for the shareholders' meeting was inadequate; and, thirdly, that in this case it was impermissible to hold the shareholders' meeting telephonically. The court ruled that the director's removal from office was valid and dismissed his request to be reinstated as a director. This note scrutinises the judgment and argues that the court erred in certain respects in its reasoning. This judgment is

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noteworthy in that it highlights certain areas of contention in the legal processes when shareholders purport to remove directors from office under s 71 of the Companies Act.

THE FACTS

The Kalafit Trust, registered under the Trust Property Control Act 57 of 1988, owned Natmed Medical Defence (Pty) Ltd ('Natmed') and Chalcid (Pty) Ltd ('Chalcid'). The third respondent, Kellerman, a Kalafit Trust trustee, was also the authorised shareholder representative of Natmed and Chalcid. Miller, the applicant, was appointed a non-executive director of Natmed and Chalcid in 2017. In October 2018, he resigned from Chalcid by agreement, and Natmed took over the director's fees that Chalcid was paying him. The director's fees he was owed were in dispute, and he maintained he was still owed R95 000 in outstanding director's fees. He argued that Natmed and Chalcid had also not paid him a discretionary bonus of R100 000 for the financial year ending February 2018. Kellerman argued that Miller had rejected the offer of a discretionary bonus of R100 000, and so a discretionary bonus agreement had not been concluded.

After these disputes arose, on 24 April 2019 Miller was notified of a shareholders' meeting to be held telephonically on 30 April 2019 (*Miller* para 25). The main resolution proposed was his removal as a director of Natmed by the Kalafit Trust, the sole shareholder of Natmed. The notice stated that the notice period arising from statute (being the Companies Act) was waived, and that, before the removal resolution was considered and voted on, Miller had the opportunity to make representations, either personally or through a representative (ibid). The day before the meeting, on 29 April 2019, Miller's attorney sent a letter to Kellerman, alleging that the notice was defective for various reasons and in breach of certain provisions of the Companies Act (para 26). This letter also highlighted that Miller 'has had difficulties with conference calls and video conference calls, as there is [sic], from time to time, difficulties in hearing people that have dialled in and a loss of communication during such calls' (ibid). Natmed responded to this letter on 30 April 2019, denying that it had breached the Companies Act, and recorded that the meeting would proceed that day (para 27). Miller failed to attend the telephonic meeting, which proceeded in his absence (ibid). The Kalafit Trust passed a resolution at the meeting removing Miller as a Natmed director (ibid).

Miller argued that his removal breached s 71(2)*(b)* of the Companies Act for three reasons: (i) he had not been provided with reasons in advance for his proposed removal, which he maintained he required in order to make representations to the Kalafit Trust before the vote on the removal resolution; (ii) the notice of the meeting given was short of the ten-day period set by s 62(1)*(b)* of the Companies Act; and (iii) the telephonic

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meeting took place in breach of s 63(2) of the Companies Act (para 28). He sought an order setting aside the resolution of the Kalafit Trust to remove him as a Natmed director, and reinstating him with retrospective director's fees.

THE JUDGMENT

The court, per Matojane J, ruled in Miller's favour on the dispute about the director's fees owed to him and ordered Natmed to pay him R95 000 in outstanding director's fees (para 16). It found, too, that he had made out a case for his entitlement to a discretionary bonus of R100 000 and ordered Natmed and Chalcid jointly and severally (the one paying the other to be absolved) to pay him the bonus for the financial year ending in February 2018 (para 19). The respondents were also ordered to pay the costs of the matter.

By contrast, Miller was unsuccessful in sustaining his arguments relating to his removal from office. The court found that shareholders need not give reasons in advance to directors for their proposed removal from office (para 39). It also held that it was irrelevant that a short notice period had been given to Miller because, even if the full notice period had been given, Miller 'would still not have taken the opportunity to make representations at the meeting, as his attitude was that he could not have participated and made representations when he did not know what exactly he needed to address' (para 40). As regards the short notice period, the court decided that under s 71 of the Companies Act, Miller was entitled to claim 'damages for loss of office as a director, for non-compliance with the required notice period' (para 41). The court also ruled that the telephonic meeting did not prejudice Miller because he was entitled to instruct his attorney to participate in the meeting on his behalf if he had personal difficulties with attending the telephonic meeting (para 43).

The court found that a director could not insist on remaining a director when the shareholder no longer trusted that he could conduct the company's affairs to its liking (para 44). It found that the relationship of trust between Miller and the Kalafit Trust had broken down irretrievably, and that the appropriate remedy was a claim for damages for loss of office as a director, as contemplated in s 71(9) of the Companies Act (ibid). The court consequently dismissed Miller's request for a declaratory order that he be reinstated as a director of Natmed with retrospective director's fees (ibid).

ANALYSIS AND DISCUSSION

Furnishing reasons for the shareholders' removal of the director

The removal of a director by the shareholders is a powerful weapon in their hands. This power applies despite anything to the contrary in a company's

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Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director (s 71(1) of the Companies Act). Section 71(1) prevents directors from being entrenched in office and further prevents a company from contracting out of its statutory power to remove a director from office. Directors may not prevent the shareholders from passing a resolution to remove them from office, nor may they apply for an interdict to restrain the shareholders from doing so (*Desai v Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A) ('*Desai*'); *Bentley-Stevens v Jones* [1974] 2 All ER 653 ('*Bentley-Stevens*'); *James North (Zimbabwe) (Pvt) Ltd v Mattinson* 1990 (2) SA 228 (ZHC) at 235 ('*James North*')).

There are many differences between a removal of a director by the shareholders and a removal by the board of directors, demonstrating the extent of the power conferred on shareholders to remove a director. First, s 71(1) of the Companies Act does not stipulate any grounds or cause for removal that are required when the shareholders remove a director. By contrast, s 71(3) of the Companies Act stipulates specific grounds for the removal of directors by the board. Secondly, s 71(4)*(a)* of the Companies Act states that for a removal by the board of directors, the board must provide the affected director with a statement setting out the reasons for the proposed removal resolution, with sufficient specificity to permit the director to prepare and present a reasonable response. No such equivalent requirement is prescribed in s 71(2) for removal by the shareholders. Thirdly, shareholders may exercise their vote to remove a director in whatever way they desire (provided that the majority do not act in a manner that is oppressive or unfairly prejudicial to the minority in terms of s 163 of the Companies Act) because shareholders do not owe their company a fiduciary duty and their right to vote is a proprietary one (*Pender v Lushington* (1877) 46 LJ Ch 317 at 319; *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 680; *Desai* (supra) at 519; *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187 (PC) at 221; *CDH Invest NV v Petrotank South Africa (Pty) Ltd* [2018] 1 All SA 450 (GJ) para 44 ('*CDH*')). It follows that a resolution by the shareholders' meeting to remove a director from office may not be impeached on the ground that it was not exercised in good faith in the interests of the company (*CDH* ibid para 44; M S Blackman et al *Commentary on the Companies Act* vol 2 (RS 9, 2012) 285). By contrast, when the board of directors purports to remove a director, it must do so in good faith, in the best interests of the company and not for an improper purpose or for ulterior reasons (*Lee v Chou Wen Hsien* [1984] 1 WLR 1202 (PC) at 1206; *Jackson v Dear* [2014] 1 BCLC 186 para 33; see further Rehana Cassim 'An analysis of directors' fiduciary duties in the removal of a director from office' (2019) 30 *Stellenbosch LR* 212 for a discussion of the directors' fiduciary duties in removing a director). Fourthly, the shareholders' decision to remove a

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director from office is not subject to judicial review, as is the removal of a director by the board of directors (see s 71(5) of the Companies Act; for a detailed discussion of s 71(5), see Rehana Cassim 'A critical analysis of the judicial review procedures under section 71 of the Companies Act 71 of 2008' (2018) 30 *SA Merc LJ* 302).

It is evident that the shareholders of a company, acting through a shareholders' meeting, have a wider discretion and power to remove directors than does the company itself, acting through its board of directors (*Steenkamp v Central Energy Fund SOC Ltd* 2018 (1) SA 311 (WCC) para 31). As the court emphasised in *Miller* para 36, directors serve at the behest of the shareholders who elected them, and so shareholders can remove at will directors whom they no longer support. In sum, s 71 attempts to embody the essence of shareholder democracy (F 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 LR* 151 at 154).

Section 71(2) of the Companies Act prescribes procedures to be followed when shareholders purport to remove directors from office. These procedures are that the affected director must be given notice of the shareholders' meeting, a copy of the proposed removal resolution, and a reasonable opportunity to make a presentation to the meeting, in person or through a representative, before a vote on the resolution is taken. In practice, either the board will convene the shareholders' meeting or the shareholders will requisition the company to call the meeting. The power conferred on the board to call a shareholders' meeting is a fiduciary one and therefore it must be exercised in good faith and in the interests of the company as a whole (*Pergamon Press Ltd v Maxwell* [1970] 2 All ER 809 (Ch) at 813; *Umfolozi Co-Operative Sugar Planters Ltd v St Lucia Sugar Farms (Pty) Ltd* 1983 (1) SA 792 (N) at 796 and 798). The prescribed procedures must be strictly followed. These procedures are intended to ensure that a majority of shareholders assent to a decision to dismiss a director; that there is procedural fairness in the removal of directors; that the directors are not removed on impulse; that the directors are given an opportunity to put forward relevant information; and that the shareholders are appropriately informed before making a far-reaching decision (*Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 79 ('*Motau*')).

For the shareholders to remove a director without cause, all that is required is sufficient votes to pass an ordinary resolution at a shareholders' meeting by the persons entitled to exercise voting rights in an election of that director (s 71(1) of the Companies Act). Since s 65(8) of the Companies Act explicitly prohibits the Memorandum of Incorporation of a company from increasing the threshold to pass an ordinary resolution for the removal of a director under s 71, the vote of a simple majority (50 per cent plus one) is required. This threshold is easily reached when

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a company has only one shareholder, as in this instance where the Kalafit Trust was the sole shareholder of Natmed.

Even though s 71(2) does not expressly require shareholders to provide directors with reasons for their proposed removal from office, in *Pretorius v Timcke* [2015] ZAWCHC 215 ('*Pretorius*') the Western Cape Division, Cape Town held that such reasons must still be provided. The court reasoned that the requirement in s 71(2)*(b)* of the Companies Act that the director be afforded a reasonable opportunity to make a presentation is to be interpreted as requiring shareholders to provide the director with reasons for the proposed removal resolution in advance so that the director could make representations in respect thereof, and to be apprised of the information to place before the shareholders which would be relevant to the reasons for his or her intended removal (para 11).

In *Miller* para 33, the court disagreed with the ruling in *Pretorius* (supra). The court in *Miller* ruled that since s 71(1) does not require shareholders to have a reason for wanting to remove a director, shareholders cannot be obliged to give such reasons to directors in advance, as this was not the legislature's intention (para 39). The court further held that *Pretorius* had impermissibly resorted to the remedy of reading-in in circumstances where the Companies Act is clear and such reading-in is not warranted (para 33).

It is respectfully submitted that the court in *Miller* was correct in ruling that shareholders need not furnish directors with reasons in advance for their removal, since this is not a legislative requirement (see Rehana Cassim 'Governance and the board of directors' in Farouk H I Cassim (man ed) et al *Contemporary Company Law* 3 ed (2021) 595). There is, of course, nothing to prevent shareholders from voluntarily providing directors with the reasons for their proposed removal, as in *Steenkamp* (supra).

Miller was presided over by a single judge in the Gauteng Local Division, Johannesburg, and *Pretorius* by a single judge in the Western Cape Division, Cape Town. According to the doctrine of judicial precedent, as both courts were presided over by a single judge, the decision in *Miller* does not overrule that in *Pretorius*. Consequently, *Miller* is binding in the Gauteng Local Division, Johannesburg, and *Pretorius* remains binding in the Western Cape Division, Cape Town. A decision of a superior court is thus required to resolve this anomaly.

A further anomaly is created by two Practice Notes issued by the Companies and Intellectual Property Commission ('CIPC'). In terms of s 188(2)*(b)*(i) of the Companies Act and reg 4(2)*(b)* of the Companies Regulations, 2011 ('the Companies Regulations'), the senior officer of a regulatory agency may issue a Practice Note at any time setting out, inter alia, its interpretation of, or intended manner of applying, a provision of the Companies Act or the Companies Regulations. A Practice Note must be consistent with both the Companies Act and the Companies

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Regulations (reg 4(3)). If there is any inconsistency between the Companies Act or Companies Regulations and a Practice Note, the Companies Act or Companies Regulations (as applicable) prevails (ibid). Pursuant to these statutory provisions and the *Pretorius* judgment, the CIPC issued a Practice Note on 20 November 2018, titled 'Notice to Customers (Notice No. 74 of 2018) To Provide Reason(s) or Not for Removal of Director by the Shareholders' (available at *http://www.cipc.co.za/files/3915/4280/7010/Notice_74_of_2018.pdf*, accessed on 13 April 2022), which stipulates that shareholders must provide reasons for the removal of directors in the notice of the meeting, failing which their application to the CIPC to change the directors of the relevant entity will be rejected. The CIPC issued a subsequent Practice Note on 24 June 2019 titled 'Notice to Customers (Notice No. 42 of 2019) Processing Requirements for the Removal of Directors' (available at *http://www.cipc.co.za/files/9115/6137/7082/Notice_42_of_2019.pdf*, accessed on 13 April 2022), which specifies the documents that must be lodged with it to enable it to process the removal of the director from office. One of these documents is a statement setting out the reasons for the removal of the director. The other documents are: (i) the notice of the meeting; (ii) proof that the relevant director was given an opportunity to make a presentation; (iii) the minutes of the meeting or a copy of the removal resolution; (iv) proof that the requisite quorum was present at the meeting; (v) proof of the shareholding of the shareholder; and (vi) a CoR 39 Form (Notice of Change of Directors) reflecting that this director was removed from office.

Regrettably, the court in *Miller* failed to address the practical effects of its decision in the light of the two Practice Notes by the CIPC, which stand at the time of writing this note. The CIPC may amend or withdraw its Practice Notes by publishing a subsequent notice in the *Government Gazette* (reg 4(2)*(b)*). Unless the CIPC amends or withdraws these Practice Notes, companies wishing to amend the status of their directors who are removed by shareholders under s 71(1) and (2) of the Companies Act must submit to the CIPC a copy of the notice of the meeting sent to the directors which includes a statement setting out the reasons for the proposed removal. A failure to do this may lead to the CIPC's rejecting the application. While it may be cogently arguable that the CIPC's Practice Notes conflict with s 71(2)*(b)* of the Companies Act, which does not require shareholders to provide these reasons, the ruling in *Miller* does not overrule that in *Pretorius*, as discussed above. Clarification of this second anomaly by a superior court is urgently required.

Failure to give adequate notice of the meeting

Section 71(2)*(a)* of the Companies Act requires the affected director to be given notice of the meeting that is at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the

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director is a shareholder of the company. Unless the Memorandum of Incorporation provides for longer or shorter minimum periods, the notice period for a shareholders' meeting is ten business days in the case of a private company (s 62(1)*(b)* of the Companies Act). It is necessary to consult the Memorandum of Incorporation of a company to determine whether this notice period has been extended or reduced. A company may call a meeting with shorter notice, but only if every person who is entitled to exercise voting rights in respect of any item on the meeting agenda is present at the meeting and votes to waive the required minimum notice of the meeting (s 62(2A) of the Companies Act).

Miller was informed on 24 April 2019 that the meeting was to be held on 30 April 2019. The meeting notice stated that the notice period arising from the Companies Act was waived. Since Natmed is a private company, the statutorily required notice period was ten business days, or fourteen calendar days. Miller was given only four business days' notice. According to s 5(3) of the Companies Act, this period is calculated by excluding the day on which the notice was given as well as Saturdays and Sundays, and including the day on which the meeting was set to occur. No mention is made in the judgment of whether Natmed's Memorandum of Incorporation had shortened the notice period stipulated in s 62(1)*(b)*.

Since the Kalafit Trust was the sole shareholder of Natmed, it would have been entitled under s 62(2A) to waive the minimum notice period of the meeting, as it was the only person entitled to exercise voting rights in respect of an item on the meeting agenda. The court did not consider whether s 62(2A) applied in this case. It is arguable that waiving the minimum notice period under s 62(2A) would defeat the purpose of s 71(2)*(a)* of the Companies Act, which requires that a director receives notice which is 'at least' equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company.

Natmed could conceivably have also relied on s 57(2)*(a)* of the Companies Act to justify its short notice period, unless its Memorandum of Incorporation prohibited reliance on this provision. Under s 57(2)*(a)*, a single-shareholder profit company (other than a state-owned company) may exercise the voting rights pertaining to that company on any matter and at any time without notice or compliance with any other internal formalities, except to the extent that the Memorandum of Incorporation provides otherwise. Sections 59 to 65 of the Companies Act do not apply to the governance of such a company (s 57(2)*(b)*). As the Kalafit Trust was the sole shareholder of Natmed and s 62 is one of the provisions that have been exempted, it is arguable that, under s 57(2), the stipulated notice period of ten business days did not have to be given to Miller. Nonetheless, since there is no prescribed notice period because of the exclusion of ss 59 to 65, the notice period should be reasonable (Piet Delport *Henochsberg*

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on the Companies Act 71 of 2008 (SI 27, 2021) 276). It is submitted that the four business days' notice given to Miller was not reasonable in the circumstances. It does not appear from the judgment that Natmed tried to rely on s 57(2)*(a)*, nor was the applicability of s 57(2) considered by the court. Despite this, even if Natmed had attempted to rely on s 57(2)*(a)*, it is submitted that the notice period given to Miller would still have been defective.

Even though the court conceded that the notice period was short of what is statutorily required, it held that the notice period did not prejudice Miller in a way that warranted setting aside the removal resolution (para 41). The court reasoned that even if Miller had been given the entire statutory notice period, he would not have taken the opportunity to make representations at the shareholders' meeting, 'as his attitude was that he could not have participated and made representations when he did not know what exactly he needed to address' (para 40). The court stated further that Miller could 'claim damages for loss of office as a director, for non-compliance with the required notice period' under s 71 of the Companies Act (para 41).

It is respectfully submitted that the court's reasoning is erroneous. The court impermissibly assumed that Miller would not have made representations at the meeting based on what the court perceived Miller's 'attitude' to be, and ruled that Miller was consequently not prejudiced. Even though Miller's attorney had requested reasons for his proposed removal, this step did not entitle the court to assume that Miller would not have taken the opportunity at the meeting to make representations, once he learned at the meeting of the reasons for his proposed removal. In any event, whether or not Miller would have made representations at the meeting is irrelevant — he had to have been given the statutorily required notice period. It is further submitted that the court was mistaken in ruling that Miller's remedy for non-compliance with the required notice period was to bring a claim for damages under s 71 of the Companies Act for loss of office as a director. This, with respect, is an egregious misinterpretation of the remedy in s 71(9), as discussed below.

The validity of the telephonic meeting

Section 63(2) of the Companies Act permits shareholders' meetings to be conducted electronically, or for one or more shareholders or their proxies to participate by electronic communication in all or part of a shareholders' meeting held in person. This position is subject to compliance with the following provisos: (i) the holding of the meeting electronically must not be prohibited by the company's Memorandum of Incorporation; (ii) all participants or their proxies must be able to communicate concurrently with each other without an intermediary; and (iii) all participants or their

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proxies must be able to participate reasonably effectively in the meeting (s 63(2)*(b)*).

The notice to Miller had stated that the meeting was to be held telephonically. A telephone conference call is a form of electronic communication, and so the provisos in s 63(2) of the Companies Act had to be satisfied for the meeting to be valid. The court did not state whether Natmed's Memorandum of Incorporation prohibited shareholders' meetings from being held electronically. The letter that Miller's attorney sent to Kellerman on 29 April 2019 pointed out that Miller had experienced difficulties in the past with telephone and video conference calls, owing to difficulties with hearing people and a loss of communication during such calls (*Miller* para 26). Consequently, it was clear that a telephonic meeting would not have enabled Miller to participate without an intermediary, or to participate reasonably effectively in the meeting.

Nevertheless, the court found that the telephonic meeting had not prejudiced Miller. The court reasoned that since s 71(2)*(b)* of the Companies Act affords a director an opportunity to make a representation in person or through a representative to the meeting before the removal resolution is put to the vote, Miller should have instructed his attorney to participate in the telephonic meeting on his behalf if he personally had difficulties in doing so (para 43). Since Miller's attorney was entitled to attend or participate telephonically and 'raise the applicant's [Miller's] complaint at the meeting', the court decided that Miller was not prejudiced by the telephonic meeting (ibid).

It is respectfully submitted that the court's reasoning is erroneous for two reasons. First, the court misconstrued the question before it. The question was not whether Miller had been prejudiced by the meeting taking place telephonically but whether the electronic meeting itself was validly constituted. Section 63(2) is clear about the provisos that must be satisfied for a meeting to be held electronically. These provisos are designed to ensure that the meeting participants are not excluded from the electronic meeting. Since Miller's attorney had made it clear in advance that Miller could not participate reasonably effectively in the meeting, Natmed should not have held the meeting telephonically. It is submitted that by ruling that Miller should have instructed his attorney to attend the meeting on his behalf, the court erroneously condoned both the convening of the invalid meeting and the exclusion of Miller from the meeting.

Secondly, it is submitted that the court was mistaken in ruling that the telephonic meeting did not prejudice Miller because he could have instructed his attorney to attend the meeting on his behalf. Section 71(2)*(b)* of the Companies Act gives a director the option to make the presentation in person or through a representative. By proceeding with the meeting telephonically while knowing that Miller could not participate in the meeting, Natmed denied Miller the option of giving the presentation

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himself, in breach of s 71(2)*(b)*, which conduct the court condoned. Even if a director elects to give a presentation to the shareholders through a representative, this choice does not mean that the director is not also entitled to attend the meeting. It is crucial that directors personally attend a shareholders' meeting that is being held to remove them from office since directors are not entitled in advance to the reasons for the removal and thus may learn of these reasons at the meeting itself. Directors should consequently be present at the meeting to respond to any allegations made against them by the shareholders and to put forward relevant information — something which their representative may be unable to do, owing to a lack of knowledge of all the facts of the matter. Thus, directors may well be prejudiced if they do not personally attend a shareholders' meeting for their removal, contrary to the court's ruling in this case.

Section 71(2)*(b)* of the Companies Act states that a director must be given a 'reasonable opportunity' to make a presentation. The purpose of the presentation is to give directors an opportunity to state their case, put forward relevant information, ensure that shareholders are appropriately informed before voting on the removal resolution, and ensure that they are not removed from office on an impulsive vote (*Motau* (supra) para 79; Rehana Cassim 'Contesting the removal of a director by the board of directors under the Companies Act 71 of 2008' (2016) 133 *SALJ* 133 at 143). Whether the opportunity given to a director to make a presentation is reasonable will depend on the facts of each case. It is submitted that, in essence, the director must be given a fair and meaningful opportunity to address the allegations made against him or her (see Rehana Cassim *The Removal of Directors and Delinquency Orders under the South African Companies Act* (2020) 64).

The importance of the director's right to make a presentation to the meeting before the vote is underscored by the fact that the CIPC requires evidence to be lodged with it, proving that the affected director was given an opportunity to make a presentation at the meeting. If this proof is not submitted, the CIPC is entitled to reject the CoR 39 application to change the company's directorship (refer to the CIPC's Notice 42 of 2019 of 24 June 2019, discussed earlier). Its importance is further underscored by the fact that the ordinary resolution to remove a director from office must be passed by the shareholders at a shareholders' meeting and may not be passed informally as a written resolution without holding a meeting under s 60 of the Companies Act, because this would deprive a director of the right to be heard (Cassim 2013 *Banking and Finance LR* op cit at 166; Delport op cit at 275).

It is submitted that the meeting convened by Natmed breached both ss 63(2) and 71(2)*(b)* of the Companies Act. The meeting was convened on only four business days' notice. It was held telephonically despite Miller's attorney's pointing out his difficulties with such a meeting. Miller was

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not given a reasonable opportunity to make a presentation to the Kalafit Trust before it voted on the removal resolution. These facts all point to the decision to remove Miller being made impulsively — which is precisely what the legislature wished to avoid.

(d) Claiming damages for loss of office

As stated above, the court held that Miller could 'claim damages for loss of office as a director, for non-compliance with the required notice period' under s 71 of the Companies Act (*Miller* para 41). The relevant provision under s 71 that entitles a director to claim damages for loss of office as a director is s 71(9). It is respectfully submitted that the court misinterpreted s 71(9).

Section 71(9) states that nothing in s 71 deprives a person removed from office as a director in terms of s 71 of any right that person may have at common law or otherwise to apply to a court for damages or other compensation for loss of office as a director or loss of any other office as a consequence of being removed as a director. Section 71(9) preserves and encapsulates the equivalent right under s 220(7) of the former Companies Act 61 of 1973. It is well-established that for a director to have a remedy under s 71(9) of the Companies Act, his or her removal from office must constitute a breach of his or her service contract with the company or a breach of the Memorandum of Incorporation (Blackman et al op cit at 8-285; Caroline B Ncube 'You're fired! The removal of directors under the Companies Act 71 of 2008' (2011) 128 *SALJ* 33 at 47; J L Yeats (man ed) et al *Commentary on the Companies Act of 2008* (OS, 2020) 2-1309). For the claim to be sustainable, either the director's service contract with the company or the Memorandum of Incorporation must provide that the company will not, for a specified period, terminate his or her office of directorship or any appointment terminating with the termination of his or her office as a director (Cassim 'Governance and the board of directors' in Cassim et al *Contemporary Company Law* op cit at 616).

It is consequently only where a company has appointed a director for a fixed period in terms of either a service contract or the Memorandum of Incorporation, and that period has not expired at the time the director is removed from office, that the director is entitled to claim damages or other compensation from the company (*Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701; *Read v Astoria Garage* (*Streatham*) *Ltd* [1952] 2 All ER 292 (CA); *De Villiers v Jacobsdal Saltworks* (*Michaelis & De Villiers*) (*Pty*) *Ltd* 1959 (3) SA 873 (O)). To sustain an action for damages or compensation against the company for loss of office as a director, the director must not have breached his or her service contract or the Memorandum of Incorporation in a way that gives cause to the company to cancel the contract (*Farmers' Associated Dairies Ltd v Goldstein* 1924 WLD 181 at 183; Blackman et al op cit at 8-286). In the event of such a breach by a director,

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the claim for damages or compensation for loss of office falls away (*Knopp v Thane Investments Ltd, Knopp v Tomlinson* [2003] 1 BCLC 380 para 131; *Item Software (UK) Ltd v Fassihi* [2003] 2 BCLC 1 para 97). If a company has agreed to compensate a director a fixed amount in the event of his or her removal from office before the expiry of his or her term of office, a director who has so been removed from office may claim the agreed compensation from the company. But where the agreement does not contain any specific provision for compensation, the director must prove that he or she has suffered loss as a result of the termination of his or her appointment (*Hayes v Bristol Plant Hire Ltd* [1957] 1 All ER 685; Ncube op cit at 48). This loss would be the amount of remuneration that the director would have received had he or she not been removed from office (see *Beach v Reed Corrugated Cases, Ltd* [1956] 2 All ER 652; *Bold v Brough, Nicholson & Hall Ltd* [1963] 3 All ER 849; *Yetton v Eastwoods Froy Ltd* [1966] 3 All ER 353 for examples of the calculation of these damages, and Cassim *The Removal of Directors and Delinquency Orders* op cit at 341–2 for a discussion of these cases). It follows that the longer the appointment period, the greater the damages that may be payable (Cassim 2013 *Banking and Finance LR* op cit at 166).

A director may also claim damages for loss of any other office as a consequence of being removed as a director (s 71(9)*(b)*). For example, if the removal of the director from office breaches a second contract, such as his appointment also as a managing director of a company, which the person could perform only while concurrently serving as a director, a claim for the loss of the office of managing director may also be brought under s 71(9)*(b)* of the Companies Act (*Southern Foundries* (supra); *Read* (supra); *Shindler v Northern Raincoat Co Ltd* [1960] 2 All ER 239). Under s 71(9)*(b)*, a director who holds an ex officio directorship (as envisaged in s 66(4)*(a)*(ii) of the Companies Act) in any other company by virtue of his or her directorship in the company from which he or she is removed may also claim damages for the loss of the ex officio directorship (Ncube op cit at 47).

It is clear from the discussion above that the remedy in s 71(9) cannot be used to claim damages for a breach of a procedural requirement in s 71 of the Companies Act, as the court postulated in *Miller*. The court contradicted itself in stating, on the one hand, that Miller was not prejudiced by the short notice, but stating, on the other hand, that his remedy for non-compliance with the notice period lay in a claim for damages. Surely, if Miller was not prejudiced by the short notice, as the court ruled, he would not have suffered any loss. If the procedures for the removal of a director are not complied with, then the resolution is simply unlawful — this unlawful result cannot be overcome by the director's claiming damages under s 71(9) of the Companies Act. Notably, even if all the procedural requirements in s 71(2) of the Companies Act have been observed, a director may still rely on s 71(9) to claim damages

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for loss of office if the relevant requirements discussed above to sustain a claim for damages under s 71(9) have been satisfied.

The dismissal of the request to reinstate the improperly removed director

The court dismissed Miller's request for a declaratory order that he should be reinstated and held that the appropriate remedy was a claim for damages for loss of office as a director as contemplated in s 71(9) of the Companies Act (para 44). As discussed above, the court's reasoning is flawed because the remedy in s 71(9) cannot be used to claim damages for a breach of the procedural requirements in s 71 of the Companies Act.

In *Motau*, the Constitutional Court had found that the conduct of the Minister of Defence and Military Veterans ('the Minister') in removing two directors from the board of the Armaments Corporation of South African SOC Ltd was unlawful because the Minister had failed to comply with s 71(2) of the Companies Act. The court stated that the setting aside of the decision and the reinstatement of the director would usually follow from a finding that the removal of a director was procedurally defective (*Motau* (supra) para 86). For example, in *Pretorius* the court found that the resolution to remove two directors from office under s 71(2) of the Companies Act was taken without proper compliance with s 71 of the Companies Act (*Pretorius* (supra) para 12). The *Pretorius* court ruled that the resolution was invalid and set it aside (ibid para 13).

But it does not follow that a court would inevitably reinstate a director when his or her removal under s 71 was procedurally defective. If directors wish to be reinstated, they must demonstrate that their relationship with the company remains sustainable. For example, in *Motau*, the Constitutional Court did not reinstate the directors even though their removal was found to have been unlawful owing to the non-compliance with the procedures in s 71(2) of the Companies Act. The court found that the 'very exceptional circumstances' of the case meant that it would not be just and equitable to reinstate the directors (*Motau* (supra) para 86). It stated that, despite the procedural defects of the Minister's decision to remove the directors from office, she had substantively good and compelling reasons to terminate the membership of the two directors (ibid para 89), whose relationship with her had irreparably disintegrated (ibid para 90).

If, however, the defect in the removal relates not to a procedural defect but to the substantive reasons for the removal, such as when the board of directors removes a director from office in breach of its fiduciary duties or in the absence of one of the grounds set out in s 71(3) of the Companies Act applying, it would be difficult to justify not reinstating the improperly removed director (Cassim 2019 *Stellenbosch LR* op cit at 226). Since shareholders may remove a director without cause under s 71(1), it is unnecessary to ascertain whether there was a substantive basis for removing the director, as is the case when the board of directors removes a director under s 71(3).

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In *Bentley-Stevens*, the court had to consider the irregularities in convening an extraordinary general meeting of a company to remove a director from office by the shareholders under s 184 of the United Kingdom Companies Act 1984 (c 38). The board of directors of a company had convened an extraordinary general meeting of a subsidiary company to remove a director from the board of the subsidiary company, but there were irregularities in convening the meeting. Moreover, the affected director did not receive the notice of the meeting until after the company had requisitioned the extraordinary general meeting to remove him from office. At the extraordinary general meeting, the votes were cast in favour of removing the director from office. The director sought an interlocutory injunction to restrain the company from acting on the removal resolution, and a declaration that, owing to the irregularities, the removal resolution was a nullity (*Bentley-Stevens* (supra) at 655). The Chancery Division held that even if the director's complaint of irregularities were justified, the court would not grant an interlocutory injunction when the irregularities could be cured by going through the proper processes and the ultimate result would inevitably be the same (ibid). In *James North*, the Zimbabwe High Court concurred with this approach ((supra) at 236). These decisions are both of persuasive authority in South Africa.

In *Miller*, the court found that the relationship of trust between Miller and the Kalafit Trust had broken down irretrievably, as evidenced by the dispute over salary and bonuses and the eventual decision to remove Miller from Natmed (para 44). It is submitted that on the basis of the reasoning in *Motau* that reinstatement is not sustainable where the director's relationship with the shareholder had irreparably disintegrated, despite the procedural defects in Miller's removal, a reinstatement order would not have been appropriate. Furthermore, if the *Bentley-Stevens* approach were to be applied, it is arguable that if the procedural irregularities in convening the meeting to remove Miller could be cured by going through the proper processes — that is, giving Miller the proper notice period, holding a physical meeting, and giving Miller a reasonable opportunity to make a presentation to the Kalafit Trust before it voted on the resolution — the ultimate result would be the same. This is because the Kalafit Trust, as the sole shareholder of Natmed, would still be able to exercise its vote successfully to remove Miller as a director. It is conceivable that Miller might have been able to persuade the Kalafit Trust to change its mind about voting in favour of his removal had he been given a reasonable opportunity to make a presentation to the Kalafit Trust before it had voted, but this is debatable in the light of the court's finding that the relationship of trust between Miller and the Kalafit Trust had irretrievably broken down. It is thus arguable that the court in *Miller* reached the correct decision in not reinstating Miller as a director, despite the flaws in its reasoning.

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CONCLUSION

The importance of the judgment in *Miller* is that it brings to light certain contentious matters in the provisions relating to the removal of directors by shareholders under s 71 of the Companies Act. A particularly contentious matter is whether shareholders are required to give directors reasons for their removal from office. Contrary to the ruling in *Pretorius*, the *Miller* court held that the shareholders are not required to do so. It is submitted that the *Miller* court was correct in its ruling. But its ruling has created an anomaly since it does not overrule *Pretorius*, which remains binding in the Western Cape Division. A further anomaly is that the *Miller* court failed to address the practical effects of its decision in the light of the Practice Notes issued by the CIPC that require shareholders to provide directors with reasons for their removal, failing which the application to change the status of the directors in the company may be rejected. An authoritative decision of a superior court is urgently required to resolve both these anomalies.

It is respectfully submitted that the *Miller* court erred in ruling that the remedy for non-compliance with the statutorily required notice period is a claim for damages under s 71(9) of the Companies Act. This finding is a grave misinterpretation of s 71(9). It is further submitted that the court erred in condoning the telephonic meeting, which had failed to comply with the provisos in s 63(2) of the Companies Act, and also had the effect of denying the affected director a reasonable opportunity to make a presentation to the shareholder before the vote was taken. Even though the removal of a director by the shareholders is a powerful weapon in their hands, the procedures to do so must be strictly followed, as they are intended to ensure procedural fairness in the removal of directors and to prevent directors from being impulsively removed from office by the shareholders. It is submitted that convening the meeting on a mere four business days' notice, holding a telephonic meeting without complying with the statutory provisos to do so, and denying the affected director a reasonable opportunity to make a presentation to the shareholder before its vote, all point to the shareholder's taking an impulsive decision to remove the director, which is precisely what the legislature wished to avoid and what the *Miller* court regrettably appeared to condone.

Despite these flaws in its reasoning, though, it is arguable that the court reached the correct decision in not reinstating the applicant as a director because his relationship with the shareholder had irretrievably broken down. Arguably, if the procedural irregularities were cured by going through the proper processes, the ultimate result would have been the same. While the judgment commendably provides some clarity on whether shareholders must provide reasons to directors for their removal, courts must still apply the correct legal principles in their reasoning, even if the eventual outcome is the same, as a failure to do so may set doubtful legal precedents.

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