

THE REMOVAL OF DIRECTORS UNDER THE COMPANIES ACT

Category: Commercial Law
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What is directorship under the Companies Act?

Section 1 of the Companies Act, 71 of 2008 (“**the Companies Act**”) defines a director as a member of the board of a company, as contemplated in section 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. There are various ways in which a person can be a director. A person can become a director by election or appointment. A person may be elected a director by vote by the persons entitled to exercise voting rights in such an election, to serve for an indefinite term, or for a term as set out in a company’s Memorandum of Incorporation or appointed upon incorporation of a company or any time thereafter.

When can a person be removed from directorship under the Companies Act?

There must be cause to remove a person from directorship. A person can be removed from directorship if he/she becomes ineligible, disqualified, incapacitated or has neglected or been derelict in his/her performance of functions as a director.

Section 69 of the Companies Act sets out when a person is regarded as ineligible, disqualified from being appointed/elected, consenting to being appointed or elected as a director and/or from acting as a director. In some instances, disqualification from being a director lapses at the end of the specified time. Over the years, the Companies and Intellectual Property Commission has introduced and implemented stringent rules when it comes to stripping a person of directorship. This approach serves to minimise fraudulent removal of people from directorship. The director’s duties include, but not limited to, governing the company’s business and affairs. The director may also facilitate a shareholders meeting. When carrying out his/her duties, the director is required to:

- (a) act in good faith and for a proper purpose;
- (b) act in the best interests of the company; and
- (c) act with the degree of care, skill and diligence that may reasonably be expected of a person—
 - (i) carrying out the same functions in relation to the company as those carried out by that director; and
 - (ii) having the general knowledge, skill and experience of that director.

How to remove a person from directorship?

Section 71 of the Companies Act deals with removal of directors. It provides for a director's removal by a resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director. The director must be given a notice of the meeting and a copy of the proposed resolution. In addition, the director is entitled to make representations as to why he/she should not be removed as a director of a company.

Recourse against unlawful removal as director

It is important to get down to the nitty-gritty of the process. An aggrieved director may bring an application to the relevant court for reinstatement as a director.

Conclusion

Prior to removing a person from directorship, it is imperative to ensure that the company dots the i's and crosses the t's. Likewise, an aggrieved director who brings an application to court for reinstatement, he/she may be ordered to compensate the company, and any other party, for costs incurred in relation to the application, where a court confirms his/her directorship removal. The exception will be if the court reverses the decision of the board. In addition, the company must ensure that it retains a minimum number of director/s on board at all times in order to comply with the provisions of the law.

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