



REMOVAL OF DIRECTORS THE REVIEW STANDARD

Jones and Others v Hendrik Frederick Delport and Others [2024] ZAGPPHC 833 (28 Aug 2024)
By Ricardo Wyngaard

On 28 August 2024 the Gauteng Division of the High Court in Pretoria handed down a judgment in which it provided clarity on the review standard for the removal of directors pursuant to section 71 of the Companies Act.

Brief background: The applicants were accused of supporting a former director against whom criminal proceedings were instituted and acting against the interests of the relevant companies, which led to their removal as directors.

The applicants challenged the allegations, asserting that there was no substantial evidence of wrongdoing on their part. The applicants approached the court in terms of section 71(5) of the Companies Act to review the decision to have them removed as directors.

Justification for the removal: The decision to remove the directors was based upon section 71(3)(b) read with section 76. Section 71(3)(b) which provides: “(3) *If a company has more than two directors, and a shareholder or director has alleged that a director of the company-...(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 ... negligent or derelict...*”

The relevant part of section 76 provides that: “(2) A director of a company must (a) not use the position of director... (i) to gain an advantage ... for another person other than the company...; or (ii) to knowingly cause harm to the company... (3) ... a director of a company, when acting in that capacity must exercise the powers and perform the functions of director- ... (b) in the best interests of the company; and..”

The application to review: Section 71 (5) offers a removed director an opportunity to approach a court to review the determination of the board. It provides: “*If, in terms of subsection (3), the board of a company has determined that a director ... has been negligent or derelict ... the director concerned ... may apply within 20 business days to a court to review the determination of the board.*”

The forms of review in South Africa’s constitutional dispensation: The court stated that our law currently recognises the following five types of review, i.e.:

- (1) review of the proceedings of lower courts;
- (2) automatic review;
- (3) judicial review in the constitutional sense;
- (4) judicial review in the administrative-law sense; and
- (5) special statutory review.

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‘REMOVAL OF DIRECTORS’

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Interpreting 71(5) review: The court considered two conflicting judgments on the ambit of a section 71(5) special statutory review. The court concluded that section 71 must be interpreted through a purposive approach, considering the context within the Act. The review process must accordingly align with the purpose of the Act, which is to amongst other ensure fairness and proper exercise of discretion by the board of directors . The review process is also designed to provide adequate protection to the rights of the affected director. This includes considering whether negligence, neglect, or dereliction of duties has been established, ensuring that the director's rights are not unjustly compromised .

This statutory review mechanism considers the potential for abuse of power by the board of directors. Given the significant consequences of removing a director, such as reputational harm and financial implications, the review ensures that the board's decision is scrutinised for fairness and proper procedure. The court is therefore entitled to undertake a complete reconsideration of the board's determination, which involves a wide sense review. This means that the court can look into both the procedural and substantive aspects of the board's decision, ensuring a comprehensive assessment.

The court's finding: The court held, amongst other, that the conduct of supporting a former director and acting against the interests of the companies occurred prior to the applicants' appointment of directors. Accordingly, they did not act in their capacity as directors, as envisaged under section 76. In paragraph 57, Oosthuizen AJ, states: "I accordingly hold that the applicants were not negligent or derelict in the performance of their functions of directors of the companies, within the meaning of section 71(3)(b), and that the first to sixth respondents could not validly determine to remove the applicants as directors of the companies."

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