

# Confusion in the Judicial Review of Board Decisions to Remove Directors Under Section 71 of the *Companies Act 71 of 2008*

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## Abstract

A significant innovation of the *Companies Act 71 of 2008*, contained in section 71(3), is that the board of directors of companies is empowered to remove directors from office. Within twenty business days directors so removed may apply to court under section 71(5) of the *Companies Act* to have the board's decision reviewed. Section 71(5) is an essential remedy for directors. More than ten years after the promulgation of the *Companies Act* South African courts are beginning to develop the jurisprudence on the interpretation of section 71(5). This article examines recent cases in which courts had to interpret section 71(5) of the *Companies Act*. It discusses the following issues that these cases canvassed: (i) whether the board's power to remove a director under section 71(3) of the *Companies Act* constitutes administrative action and whether the *Promotion of Administrative Justice Act 3 of 2000* applies to the review of these decisions under section 71(5) of the *Companies Act*; (ii) the ambit of a section 71(5) review and whether courts may review both the procedural aspects and the merits of the board's decision; (iii) the trigger for the twenty-business-day period to run; (iv) whether a court may condone a section 71(5) review application brought after the twenty business days expire; and (v) the awarding of costs in a successful section 71(5) review. As this article shows, courts have disagreed with and contradicted one another on the correct interpretation of section 71(5). This disagreement has led to confusion in South African law regarding the judicial review of board decisions to remove directors.

## Keywords

Company law; removal of directors by the board of directors; section 71(5) of the *Companies Act 71 of 2008*; judicial review of board decisions to remove a director; types of judicial review; awarding of costs in a section 71(5) review application.

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## 1 Introduction

A significant innovation of the *Companies Act 71 of 2008* (hereafter the Act), contained in section 71(3), is that the board of directors of companies is empowered to remove directors from office. Previously, under the *Companies Act 61 of 1973*, section 220 empowered only the shareholders to remove directors from office. Although this power given to the shareholders still remains under section 71(1) of the Act,<sup>1</sup> section 71(3) of the *Companies Act* now also empowers boards to remove directors from office.

A director removed by the board may apply to court under section 71(5) of the Act to have the board's decision reviewed. This application must be brought within 20 business days of that decision. Section 71(5), therefore, grants directors an essential remedy to oppose their removal.

More than ten years after the Act came into force in 2011, South African courts are beginning to develop the jurisprudence on the interpretation of section 71(5). This article examines recent cases in which courts had to interpret section 71(5). It discusses the following issues that these cases canvassed: (i) whether the board's power to remove a director under section 71(3) of the Act constitutes administrative action and whether the *Promotion of Administrative Justice Act 3 of 2000* (hereafter PAJA) applies to the review of these decisions under section 71(5) of the *Companies Act*; (ii) the ambit of a section 71(5) review and whether courts may review both the procedural aspects and the merits of the board's decision; (iii) the trigger for the 20-business-day period to run; (iv) whether a court may condone a section 71(5) review application brought after the 20 business days expire; and (v) the awarding of costs in a successful section 71(5) review. As this article shows, courts have disagreed with and contradicted one another on the correct interpretation of section 71(5). This disagreement has confused our law on the judicial review of board decisions to remove directors.

## 2 Background to sections 71(3) and 71(5) of the Act

Section 71(3) of the Act grants the board of directors the power to remove a director from office. It reads:

If a company has more than two directors, and a shareholder or director has alleged that a director of the company—

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<sup>1</sup> Under section 71(1) of the *Companies Act 71 of 2008* (hereafter the Act), shareholders may remove a director from office by an ordinary resolution adopted at a shareholders' meeting.

- (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.

As is evident from section 71(3), the board may remove a fellow director from office only on the grounds specified in section 71(3). These grounds are that the director: (i) has become ineligible or disqualified; (ii) has become 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; or (iii) has neglected or has been derelict in the performance of the functions of a director. If any of these grounds are present, the board (other than the director concerned) must vote on the matter by resolution and may remove from office a director who it has determined has met one of these grounds.<sup>2</sup>

The board must comply strictly with the procedural requirements in section 71(4) of the Act to remove the director from office. Accordingly, the director concerned must be given notice of the board meeting, together with a copy of the proposed resolution to remove him or her from office. The board must also provide a statement of the reasons for the proposed resolution, to be included in the meeting notice. The reasons must be set out with sufficient specificity to reasonably permit the director to prepare and present a response.<sup>3</sup> Finally, the director must be given a reasonable opportunity to make a presentation to the board meeting, in person or through a representative, before the vote on the removal resolution takes place.<sup>4</sup>

If the board determines that a director is ineligible, disqualified, incapacitated or has been negligent or derelict, as the case may be, then, in terms of section 71(5) of the Act, either the affected director or the person who appointed the director in accordance with section 66(4)(a)(i) of the Act,<sup>5</sup>

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<sup>2</sup> Section 71(3) of the Act. A detailed discussion of the grounds for removing directors under s 71(3) of the Act is beyond the scope of this article, but see further Cassim *et al Contemporary Company Law* 600-603; Cassim 2019 *SALJ* 513-549.

<sup>3</sup> Section 71(4)(a) of the Act.

<sup>4</sup> Section 71(4)(b) of the Act.

<sup>5</sup> In terms of section 66(4)(a)(i) of the Act, a company's Memorandum of Incorporation may provide for the direct appointment and removal of one or more directors by any person who is named in, or determined in terms of, the Memorandum of Incorporation.

may apply to court to have the board's decision reviewed, provided the application is made within 20 business days.

The following part of this paper discusses certain matters regarding the interpretation of section 71(5) as canvassed in recent case law on this provision.

### **3 Interpretation of section 71(5) of the Act**

#### **3.1 Does the board's power to remove a director under section 71(3) of the Act read with section 71(5) constitute administrative action?**

In *Pityana v Absa Group Limited*<sup>6</sup> (hereafter *Pityana v Absa Group*), Pityana sought to have a decision of the board of Absa Bank Limited (hereafter Absa) to remove him as a non-executive director reviewed and set aside. Under Rule 53 of the *Uniform Rules of Court* (hereafter Rule 53), he requested Absa to dispatch the record of its decision to remove him from office. Rule 53 deals with reviews and requires the decision-maker to deliver the full record of proceedings sought to be corrected or set aside.<sup>7</sup> It provides for the review of a "decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions".<sup>8</sup> The main issue before the court was whether Rule 53 applies to review proceedings under section 71(5) because the Act does not prescribe whether it applies or excludes it. Absa argued that Rule 53 did not apply because the board's decision to remove Pityana as a non-executive director did not constitute the performance of a judicial, quasi-judicial or administrative function as contemplated in Rule 53.<sup>9</sup>

Before deciding whether Rule 53 applied to review proceedings under section 71(5) of the Act, the court, per Snyman AJ, first determined whether the board's decision to remove a director under section 71(3) of the Act constitutes administrative action and whether, under a section 71(5) review, PAJA applies to the board's decision under a section 71(5) review. To determine whether an act constitutes administrative action under PAJA, the

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<sup>6</sup> *Pityana v Absa Group Limited* 2024 1 SA 491 (GP) (hereafter *Pityana v Absa Group*) 31.

<sup>7</sup> *Pityana v Absa Group* para 36. The primary purpose of Rule 53 (GN R48 in GG 999 of 12 January 1965 (*Uniform Rules of Court*, 1965, as amended)) is to facilitate and regulate the review of administrative orders, and to create the procedural means whereby the aggrieved party seeking to review a decision could bring the relevant evidential material before the court (*S v Baleka* 1986 1 SA 361 (T) 397-398; *Jockey Club of South Africa v Forbes* 1993 1 SA 649 (A) 661). See further Delpont *Henochsberg on the Companies Act* 280(3) on the application of Rule 53 in court proceedings.

<sup>8</sup> See Rule 53(1).

<sup>9</sup> *Pityana v Absa Group* para 6.

act must meet the definition of "administrative action" as set out in section 1 of PAJA,<sup>10</sup> which reads as follows:

any decision taken, or any failure to take a decision, by–

- (a) an organ of state, when–
  - (i) exercising a power in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect

The definition of "administrative action" in PAJA may be distilled into seven requirements, as enunciated by the Constitutional Court in *Minister of Defence and Military Veterans v Motau*:<sup>11</sup>

(a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.

In *Pityana v Absa Group* the court found that the board's decision to remove a director from office under section 71(3) of the Act satisfies all the requirements above, save for the requirements that the decision must be of an administrative nature and must constitute the exercise of a public power or performing a public function.<sup>12</sup> The court held that there is nothing bureaucratic about the board's decision to remove a director from office, and it does not involve the application of policy.<sup>13</sup> Instead, the court held that the board's decision to remove Pityana as a non-executive director was commercial or managerial in nature, rather than administrative and was made in the course of running and managing Absa.<sup>14</sup> The court concluded that the board's power to remove a director from office was not made in exercising public power or a public function and that its conduct was not governmental.<sup>15</sup> Consequently, the court ruled that the decision of a board of directors to remove a director in terms of section 71(3), as read with section 71(5) of the Act, is not an administrative decision or administrative

<sup>10</sup> *Minister of Defence and Military Veterans v Motau* 2014 5 SA 69 (CC) para 33.

<sup>11</sup> *Minister of Defence and Military Veterans v Motau* 2014 5 SA 69 (CC) para 33.

<sup>12</sup> *Pityana v Absa Group* paras 16-21.

<sup>13</sup> *Pityana v Absa Group* para 20.

<sup>14</sup> *Pityana v Absa Group* para 20.

<sup>15</sup> *Pityana v Absa Group* para 29.

action, as defined in PAJA or section 33 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution).<sup>16</sup>

Despite this finding, the court ruled that Rule 53 would apply to a review under section 71(5) of the Act. The court dismissed Absa's argument that Rule 53 would not apply because the board's decision to remove a director was not a judicial, quasi-judicial or administrative action.<sup>17</sup> The court said that this argument was misplaced since courts have never interpreted Rule 53 in this way.<sup>18</sup> Although the reasons for the removal would be available to the director before the board meeting under the section 71(4)(a) procedural requirements, the court said that another person may also rely on section 71(5) to review the board's removal decision who had no access to these reasons — the person entitled to appoint the director under section 66(4)(a)(i) of the Act.<sup>19</sup> As there is no requirement in section 71 for this person to be informed of the reasons for the director's removal, this person could be left in the dark.<sup>20</sup> For this reason, the court held that Rule 53 is available to any applicant applying for a review of the board's decision under section 71(5),<sup>21</sup> including the removed director, because it would be illogical to exclude the director from making use of the advantages of Rule 53 but permit this for the person who appointed the director.<sup>22</sup> The court consequently ordered Absa to provide the record of the board's decision to remove Pityana from office.<sup>23</sup>

*Jones v Delport*<sup>24</sup> (hereafter *Jones v Delport*) approved the dictum in *Pityana v Absa Group* that the board's determination under section 71(3) of the Act to remove a director does not amount to administrative action and may not be reviewed in terms of PAJA. In *Peter v Mimosa Court Shareblock RF (Pty) Ltd*<sup>25</sup> (hereafter *Peter v Mimosa*), the court, per Pangarker AJ, also agreed with *Pityana v Absa Group* that an applicant under section 71(5) is entitled to use Rule 53 to seek the record of the board meeting.

In light of the *dicta* above, boards of directors must be aware that even though their act of removing a director from office may not constitute

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<sup>16</sup> Section 33 of the *Constitution of the Republic of South Africa*, 1996 (the Constitution) provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

<sup>17</sup> *Pityana v Absa Group* para 72.

<sup>18</sup> *Pityana v Absa Group* para 72.

<sup>19</sup> *Pityana v Absa Group* paras 61 and 69.

<sup>20</sup> *Pityana v Absa Group* para 61.

<sup>21</sup> *Pityana v Absa Group* para 70.

<sup>22</sup> *Pityana v Absa Group* para 73.

<sup>23</sup> *Pityana v Absa Group* para 97.

<sup>24</sup> *Jones v Delport* 2025 2 SA 193 (GP) (hereafter *Jones v Delport*) para 42.

<sup>25</sup> *Peter v Mimosa Court Shareblock RF (Pty) Ltd* (7651/2024) [2024] ZAWCHC 242 (5 September 2024) (hereafter *Peter v Mimosa*) para 43.

administrative action and may not be reviewed in terms of PAJA, during a section 71(5) review they may be required to dispatch the record or minutes of their proceedings under Rule 53. This document would contain details of their deliberations on the removal of the director. If, for example, a director were removed for an ulterior motive or improper purpose, this might well be reflected in the record or minutes of the board meeting that resulted in the removal. Additionally, the requirement to provide the record could expose the company's sensitive and confidential business dealings, as the record would become a public document once filed.

Notably, there is no equivalent statutory provision to section 71(5) empowering a director removed by the shareholders under section 71(1) of the Act to apply to court to review the shareholders' decision. In *Litabe v Di Thabeng Wholesale Fuel Supply (Pty) Ltd*<sup>26</sup> (hereafter *Litabe v Di Thabeng*), the court, per Daffue J, held that despite the absence of an express statutory right in the Act empowering a court to review a decision of the shareholders to remove a director, a court may still do so, based either on the principle of legality or on the common law, as this right is provided under section 34 of the Constitution.<sup>27</sup>

Regarding the review based on the principle of legality, in *Jones v Delpont*<sup>28</sup> the court, per Oosthuizen AJ, said that since boards of companies did not exercise a public power in terms of section 71(3) of the Act, it was not appropriate to rely on the principle of legality as a ground of review under section 71(5) of the Act.<sup>29</sup> Arguably a similar argument may be made about the review of a decision of the shareholders to remove directors: that is, that the decision does not involve the exercise of a public power in terms of section 71(1), and that, therefore, reliance on the principle of legality as a

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<sup>26</sup> *Litabe v Di Thabeng Wholesale Fuel Supply (Pty) Ltd* 2023 JDR 3808 (FB) para 22.

<sup>27</sup> Section 34 of the Constitution deals with the right to access to courts, and states as follows: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

<sup>28</sup> *Jones v Delpont* para 45.

<sup>29</sup> The principle of legality operates as a residual source of review jurisdiction and one of the pathways to review, but it also has a broader meaning, being the constitutional principle governing the use of all public power (*Jones v Delpont* para 43). The principle of legality is an aspect of the rule of law and expresses the fundamental idea that the exercise of public power is legitimate only where lawful (*Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 56). It is an evolving concept in South African jurisprudence (*Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 614). A detailed discussion of the principle of legality is beyond the scope of this article, but for such a discussion, see further *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 17; *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) para 148; Konstant 2015 CCR 68-90; Hoexter and Penfold *Administrative Law* 151-181.

ground of the review of shareholders' decisions to remove directors would not be appropriate. As the court said in *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange*,<sup>30</sup> decisions of companies, commercial banks and building societies formed under their respective statutes affect their own members or persons in contractual privity with them, unlike decisions of a stock exchange committee, which affect the general public. In *Pennington v Friedgood*<sup>31</sup> the court also said that a meeting of the shareholders of a company is not subject to review by a court because it does not constitute administrative action.<sup>32</sup>

A superior court, such as a Full Bench of the High Court or the Supreme Court of Appeal, needs to clarify whether shareholders' decisions to remove directors under section 71(1) of the Act may be reviewed by a court on the principle of legality. Even if this were permitted, the review would arguably be limited to considering whether the shareholders followed the correct procedure to remove the director from office, because shareholders are not required to provide reasons to directors for their removal, as is the case when the board removes directors from office.<sup>33</sup>

### **3.2 The ambit of a section 71(5) review**

Section 71(5) of the Act does not clarify the ambit of the court review under this provision. This part of the article discusses three recent court decisions in which the respective courts dealt with the ambit of a court's review under section 71(5). The courts had to determine whether they were empowered to review both the procedural correctness and merits of the board's decision to remove a director or were confined to examining the procedural requirements stated in section 71(4) of the Act.

#### **3.2.1 Wait v Marais**

In *Wait v Marais*<sup>34</sup> (hereafter *Wait v Marais*) the two directors on the board removed the third director, Wait, on the basis that he had neglected or been derelict in his duties as a director. They had provided Wait with reasons for the proposed removal, but he found the reasons vague and requested

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<sup>30</sup> *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 3 SA 344 (W) 364.

<sup>31</sup> *Pennington v Friedgood* 2002 1 SA 251 (CC) para 38.

<sup>32</sup> In *Pennington v Friedgood* 2002 1 SA 251 (C) para 38, the court added that the proceedings of an annual general meeting of a medical scheme are also not subject to the review of the High Court, as they do not constitute administrative action.

<sup>33</sup> See *Pretorius v Timcke* (15479/14) [2015] ZAWCHC 215 (2 June 2015); *Miller v Natmed Defence (Pty) Ltd* 2022 2 SA 554 (GJ) paras 33-39; and *Weir v Wiehahn Formwork Solutions (Pty) Ltd* (19494/2024) [2025] ZAWCHC 74 (4 March 2025); and Cassim 2022 SALJ 743-747 on the provision of reasons by shareholders to directors when removing them from office.

<sup>34</sup> *Wait v Marais* (1707/2021) [2022] ZAECQBHC 41 (1 November 2022) (hereafter *Wait v Marais*) para 7.

further information to permit him to prepare a response.<sup>35</sup> The board failed to provide this information.<sup>36</sup> Wait attended the board meeting under protest without being furnished with the information that he had requested to prepare his presentation.<sup>37</sup> The board resolved at the board meeting to remove Wait from the office of director.<sup>38</sup> Wait applied to court to have the board's decision under section 71(5) reviewed, and he contended that the board's decision was substantively and procedurally unfair.<sup>39</sup>

In determining whether it was empowered to consider both the merits and procedural aspects of the board's decision under the section 71(5) review, the court, per Potgieter J, examined the difference between an appeal and a review. The court pointed out that the term "review" lacks a fixed or singular meaning.<sup>40</sup> The court drew attention to the time-honoured classification of a review in the South African legal system by Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council*<sup>41</sup> (hereafter *JCI v Johannesburg Town Council*), identifying three forms of review:

- (i) a review of the decisions of the inferior courts;
- (ii) a common-law (inherent) review of decisions of administrative authorities; and
- (iii) a wider form of statutory review.<sup>42</sup>

As for the meaning of an "appeal", the court in *Wait v Marais* acknowledged that the terms "review" and "appeal" have been ambiguous and confusing.<sup>43</sup>

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<sup>35</sup> *Wait v Marais* para 10.

<sup>36</sup> *Wait v Marais* para 14.

<sup>37</sup> *Wait v Marais* para 15.

<sup>38</sup> *Wait v Marais* para 16.

<sup>39</sup> *Wait v Marais* para 17.

<sup>40</sup> *Wait v Marais* para 40.

<sup>41</sup> *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 115-117.

<sup>42</sup> See *Wait v Marais* para 40. Since the advent of the Constitution, additional forms of review have been developed. Another form of review is judicial review in the constitutional sense, where courts have the authority to declare unconstitutional any legislation infringing on constitutional rights or the rights protected by the Bill of Rights. Under a further type of review, known as automatic review, specific statutes provide for the decisions of magistrates or other judicial officers to be reviewed automatically by judges without the need for a formal application for review. The former common-law review in administrative law has now been constitutionalised mainly by section 33 of the *Constitution and by Promotion of Administrative Justice Act 3 of 2000 (PAJA)* (*Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) paras 44-45; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 22; Hoexter and Penfold *Administrative Law* 142-143).

<sup>43</sup> *Wait v Marais* para 41.

It set out the three broad categories of an appeal identified in *Tikly v Johannes*<sup>44</sup> (hereafter *Tikly v Johannes*), as follows:

- (i) an appeal in the wide sense, that is, a complete rehearing of and fresh determination on the merits of the matter with or without additional evidence or information;
- (ii) an appeal in the ordinary strict sense, that is, a rehearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong; and
- (iii) a review, that is, a limited rehearing with or without additional evidence or information to determine, not whether the decision under appeal was correct, but whether the arbiters had exercised their powers and discretion honestly and openly.

*Wait v Marais*<sup>45</sup> identified two factors to determine the sense in which the term "review" is used in section 71(5) of the Act. The first factor is to apply a purposive interpretation to section 71(5) and consider the purposes of the Act when interpreting this provision.<sup>46</sup> Relevant purposes highlighted by the court are encouraging transparency and high standards of corporate governance as embodied in section 7(b)(iii), and encouraging the efficient and responsible management of companies as embodied in section 7(j), and the underlying purpose of providing adequate safeguards for the rights of the affected director.<sup>47</sup> The second factor is to consider the nature of the functions entrusted to the persons whose decision is under review. On this factor the court said that boards of directors are often not endowed with the requisite adjudicatory skills to properly make a determination which requires complex factual and legal conclusions to be drawn on complex questions, such as whether neglect or dereliction of duties by the affected director has been established.<sup>48</sup> It said that the fact that the removal has potentially far-reaching consequences for the affected director and that there was potential for abuse of the removal power must also be factored in.<sup>49</sup>

Taking these factors into consideration, the court ruled that a proper interpretation of the term "review" in section 71(5) requires the court to undertake a complete reconsideration, in the wide sense, of the board's

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<sup>44</sup> *Tikly v Johannes* 1963 2 SA 588 (T) (hereafter *Tikly v Johannes*) 590-591.

<sup>45</sup> *Wait v Marais* para 46.

<sup>46</sup> *Wait v Marais* paras 46 and 47.

<sup>47</sup> This is illustrated by the rights to adequate notice, sufficiently specified reasons for the proposed resolution and a reasonable opportunity to make a presentation to the meeting before the vote on the resolution takes place (*Wait v Marais* para 47).

<sup>48</sup> *Wait v Marais* para 46.

<sup>49</sup> *Wait v Marais* para 46.

determination to remove the director.<sup>50</sup> In other words, the review is not limited to whether any procedural irregularities vitiated the board's decision, but extended to a review of the merits of the board's decision to remove the director.<sup>51</sup>

In reviewing the board's decision to remove Wait from office, the court found that the board's failure to provide the requested documents and information to Wait breached its duty in terms of section 71(4)(a) of the Act because the reasons provided lacked the sufficient specificity required by this provision.<sup>52</sup> This inadequacy, the court said, rendered the board's decision to remove Wait fatally flawed.<sup>53</sup> Consequently, it set aside the board's decision and reinstated Wait to the board of directors.<sup>54</sup>

### 3.2.2 *Pityana v Absa Group*

In *Pityana v Absa Group* the court also emphasised that a purposive approach must be adopted in interpreting section 71(5).<sup>55</sup> The court found that the legislature's intention must be found in the wording of this provision.<sup>56</sup> It held that a review under section 71(5) is *sui generis*.<sup>57</sup> It said that a court is empowered to inquire not only into the procedural correctness of the decision but also at least whether the factual finding is correct that there was indeed negligence or dereliction.<sup>58</sup>

The court compared the review power under section 71(5) with that under section 71(6) of the Act. Under section 71(6)(a) of the Act, where the board has determined that a director is *not* ineligible, disqualified or incapacitated or has not acted negligently or been derelict (as the case may be), a director who voted otherwise on the resolution or a holder of voting rights entitled to be exercised in the election of that director may apply to court to review the board's decision. A court has the discretion to either uphold the board's decision not to remove the director, or, if "satisfied" that one of the removal grounds in section 71(3) exists, it may itself remove the director.<sup>59</sup> The court said that this word "satisfied" indicates that when reviewing the board's decision not to remove a director, a court is empowered to consider both the merits and procedural aspects of the decision.<sup>60</sup> It said that a court's powers under a section 71(5) review are not as extensive as a review under

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<sup>50</sup> *Wait v Marais* para 48.

<sup>51</sup> *Wait v Marais* para 39.

<sup>52</sup> *Wait v Marais* para 49.

<sup>53</sup> *Wait v Marais* para 49.

<sup>54</sup> *Wait v Marais* para 53.

<sup>55</sup> *Pityana v Absa Group* para 52.

<sup>56</sup> *Pityana v Absa Group* para 55.

<sup>57</sup> *Pityana v Absa Group* paras 73 and 83.

<sup>58</sup> *Pityana v Absa Group* para 77.

<sup>59</sup> Section 71(6)(b) of the Act.

<sup>60</sup> *Pityana v Absa Group* para 78; Ncube 2011 SALJ 47.

section 71(6) of the Act.<sup>61</sup> It remarked that the legislature "clearly knew" when drafting sections 71(5) and 71(6) that the powers of the court would be limited in a normal review process and granted the court more extensive powers under section 71(6).<sup>62</sup>

In assessing the ambit of a review under section 71(5), the court held that the review falls into the third category listed in *Tikly v Johannes*,<sup>63</sup> that is, a limited rehearing with or without additional evidence or information, not whether the decision was correct, but whether the first instance hearing was conducted correctly.<sup>64</sup> It said that a court's powers under section 71(5) are limited and that a court cannot interfere in an application under section 71(5) simply because it does not agree with the outcome.<sup>65</sup> As support for its view that a section 71(5) review is of a limited nature the court relied on an article by Cassim, which it said concluded that a section 71(5) review is *sui generis*.<sup>66</sup>

### 3.2.3 *Jones v Delport*

In *Jones v Delport* the board of directors of two companies removed from office three of its directors who were directors of both companies on the ground that they had neglected or been derelict in their duties as directors.<sup>67</sup> The affected directors, the applicants, applied to court under section 71(5) to have the board's determination reviewed. The respondents argued that the court was limited in its section 71(5) review to considering whether the procedural requirements had been met and could not inquire whether the board's determination under section 71(3) was correct.<sup>68</sup>

In considering the scope of a section 71(5) review, the court declined to follow the dictum in *Pityana v Absa Group* on the ambit of a section 71(5) review for three main reasons:

- (i) As section 71(5) refers to a "review" and not an "appeal", this implies that the decision in *Tikly v Johannes*,<sup>69</sup> which dealt with the three types of appeal and on which the court in *Pityana v Absa Group* based its decision, is irrelevant.<sup>70</sup>

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<sup>61</sup> *Pityana v Absa Group* para 79.

<sup>62</sup> *Pityana v Absa Group* para 79.

<sup>63</sup> *Tikly v Johannes* 591.

<sup>64</sup> *Pityana v Absa Group* para 81.

<sup>65</sup> *Pityana v Absa Group* para 92.

<sup>66</sup> *Pityana v Absa Group* para 75. The article on which the court relied was Cassim 2016 SALJ 133.

<sup>67</sup> *Jones v Delport* para 23.

<sup>68</sup> *Jones v Delport* para 40.

<sup>69</sup> *Tikly v Johannes* 590-591.

<sup>70</sup> *Jones v Delport* para 36.1.

- (ii) The article by Cassim, on which the court in *Pityana v Absa Group* had relied as support for the view that the review under section 71(5) is *sui generis*, does not, in fact, support the finding that the review is of a limited nature.<sup>71</sup> The court found that in this article Cassim had instead argued that it was unclear whether a court would be empowered to review the merits of the board's decision under a section 71(5) review or only the procedural aspects of the decision but also that arguably a court could be empowered to consider both the merits and the procedural aspects of the decision.<sup>72</sup>
- (iii) The court's earlier finding in *Pityana v Absa Group* that a court reviewing the board's determination would be empowered to inquire whether the factual finding is correct that there was negligence or dereliction<sup>73</sup> contradicts its later finding that the purpose of a review is to determine not whether the decision was correct but whether the arbiters had exercised their powers and discretion honestly and properly.<sup>74</sup>

For these reasons the court rejected the ruling in *Pityana v Absa Group* on the scope of a section 71(5) review<sup>75</sup> and instead adopted the ruling in *Wait v Marais* that in a section 71(5) review a court is entitled to undertake a complete reconsideration, in the broad sense, of the board's determination.<sup>76</sup>

During its section 71(5) review the court considered the merits of the board's determination to remove the applicants and found that the applicants had not been negligent or derelict in the performance of their functions of directors of the two companies.<sup>77</sup> It consequently set aside the board's determination to remove the applicants as directors and reinstated them to the board.<sup>78</sup>

### 3.2.4 *Analysing the judicial interpretations on the ambit of a section 71(5) review*

Each of the decisions of the above three courts was delivered by a single judge, with *Pityana v Absa Group* and *Jones v Delport* both emanating from the Gauteng Division, Pretoria and *Wait v Marais* emanating from the Eastern Cape Division, Gqeberha. Based on the doctrine of judicial

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<sup>71</sup> *Jones v Delport* para 36.2.

<sup>72</sup> *Jones v Delport* para 36.3. See Cassim 2016 SALJ 153.

<sup>73</sup> See *Pityana v Absa Group* para 77.

<sup>74</sup> See *Pityana v Absa Group* para 81; *Jones v Delport* para 36.6.

<sup>75</sup> *Jones v Delport* para 36.

<sup>76</sup> *Jones v Delport* para 40.

<sup>77</sup> *Jones v Delport* para 57.

<sup>78</sup> *Jones v Delport* para 60.

precedent,<sup>79</sup> even though *Jones v Delport* disagreed with the dictum in *Pityana v Absa Group*, it does not overrule this decision, as single judges gave both decisions.

It is noteworthy that although *Wait v Marais* found that a court may review both the merits and procedures of the board's determination to remove a director under a section 71(5) review, it reinstated the affected director on the basis that the procedural requirements under section 71(4)(a) had not been adhered to by the board; that is, that the reasons for the removal were not sufficiently specified and did not actually consider the merits of the decision to remove the director. This aspect arguably renders its finding on the ambit of a section 71(5) review *obiter*.

It is respectfully submitted that although the three reasons provided by the court in *Delport v Jones* for rejecting the finding in *Pityana v Absa Group* are convincing, the court's point in *Pityana v Absa Group* that the legislature "clearly knew" when drawing sections 71(5) and 71(6) "that the powers of the court would be limited in a normal review process and granted the court more extensive powers under section 71(6)"<sup>80</sup> cannot be overlooked. As Mokgoro J emphasised in *Bertie van Zyl (Pty) Ltd v Minister for Safety and Security*,<sup>81</sup> "[a] contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute". Cognisance must be taken of the fact that the legislature chose not to grant courts more extensive powers in a review under section 71(5) than it did in a review under section 71(6).

As *Wait v Marais*<sup>82</sup> acknowledged, the terms "review" and "appeal" have been ambiguous and confusing. In the strict traditional sense a review involves an inquiry into the procedural aspects of a decision,<sup>83</sup> while the

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<sup>79</sup> The doctrine of judicial precedent, or *stare decisis*, requires courts to stand or abide by cases already decided, subject to an exception where the earlier decision is held to be clearly wrong, such as where it was arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding (*Patmar Explorations (Pty) Ltd v Limpopo Development Tribunal* 2018 4 SA 107 (SCA) para 3). The doctrine of judicial precedent is not simply a matter of respect for courts of higher authority but is a manifestation of the rule of law itself, which is a founding value of our Constitution (*Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 4 SA 42 (CC) para 28; *Ayres v Minister of Justice and Correctional Services* 2022 2 SACR 123 (CC) para 16).

<sup>80</sup> *Pityana v Absa Group* para 79.

<sup>81</sup> *Bertie van Zyl (Pty) Ltd v Minister for Safety and Security* 2010 2 SA 181 (CC) para 22.

<sup>82</sup> *Wait v Marais* para 41.

<sup>83</sup> See *Tikly v Johannes* 590-591; *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd*; *Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 6 SA 407 (SCA) para 52.

question in an appeal is whether the decision was right or wrong.<sup>84</sup> But in practice the distinction between questions of procedure and merits is not always clear because it may be that the term "appeal" or "review" is used in legislation when the legislature's intention is, in substance, to confer a narrower or a broader power on the courts.<sup>85</sup> The third type of review classified by Innes CJ in *JCI v Johannesburg Town Council*, being the wider form of statutory review, confers powers of both appeal and review on the court, with the additional power, if required, of receiving new evidence and of entering into and deciding the whole matter afresh.<sup>86</sup> In *Nel v The Master*<sup>87</sup> the Supreme Court of Appeal approved the classification of a wider form of statutory review than in *JCI v Johannesburg Town Council* and said that the extent of any statutory review type of power depends on the particular statutory provision concerned and on the nature and extent of the functions entrusted to the person or body making the decision under review.<sup>88</sup> It is submitted that a review under section 71(6) exemplifies the blurring of the lines between an appeal and a review, as the term "review" is not used in the traditional sense and may be construed as a wider form of statutory review because it confers powers of both an appeal and review on the court.<sup>89</sup>

In the same vein it is arguable that since the review power contemplated in section 71(5) is also a statutory power of review, a court should have the authority to assess both the procedural aspects and merits of the board's decision to remove a director. This approach would align with the adoption of a purposive approach and of considering the relevant purposes of the Act of encouraging transparency and high standards of corporate governance embodied in section 7(b)(iii), encouraging the efficient and responsible management of companies embodied in section 7(j), and the underlying purpose of providing adequate safeguards for the rights of the affected director.<sup>90</sup> It would further have regard to the consideration emphasised in

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<sup>84</sup> *Tikly v Johannes* 590; *Thuketana v Health Professions Council of South Africa* 2003 2 SA 628 (T) 634-635; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 1 SA 576 (SCA) para 30.

<sup>85</sup> *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 1 SA 576 (SCA) para 31.

<sup>86</sup> *Nel v The Master* 2005 1 SA 276 (SCA) para 23 (hereafter *Nel v The Master*); *Twala v MEC for Education, Eastern Cape* 2016 2 SA 425 (ECB) para 11.

<sup>87</sup> *Nel v The Master* para 22.

<sup>88</sup> A statutory power of review may be wider than a judicial review of administrative action, as it combines aspects of both a review and an appeal. Still, it may also be narrower if the court is confined to particular grounds of review or particular remedies (*Nel v The Master* para 23). See further on the topic of statutory review Hoexter and Penfold *Administrative Law* 143-144.

<sup>89</sup> See Cassim 2019 SA Merc LJ 308.

<sup>90</sup> See *Wait v Marais* para 47.

*Wait v Marais*<sup>91</sup> that the board may not necessarily be endowed with the requisite adjudicatory skills to properly make a determination which requires complex factual and legal conclusions to be drawn in complicated matters. It would be anomalous for a court to review the board's decision to remove a director in instances where the board acted with improper motives or violated its fiduciary duties, and yet find itself unable to overturn the decision simply because the board followed the correct procedure.<sup>92</sup> Empowering a court to evaluate the merits of the board's decision to remove a director in a section 71(5) review provides a crucial safeguard against misuse of that power by the board. For these reasons it is submitted that the approach adopted in *Wait v Marais* and *Jones v Delport* on the ambit of a section 71(5) review extending to a court considering both the merits and procedure of the board's determination should be followed.

It is noteworthy that the respondents in *Jones v Delport* applied for leave to appeal the court's decision setting aside the board's determination to remove the applicants as directors.<sup>93</sup> One of the grounds of appeal was that the court in *Jones v Delport* was bound to follow the earlier decision in *Pityana v Absa Group* unless it found that decision to be clearly wrong.<sup>94</sup> In dismissing the application for leave to appeal, the court, per Oosthuizen AJ, held that it was not bound by the decision in *Pityana v Absa Group* as its comments on the ambit of a section 71(5) review were *obiter*, given that the court had no need to decide this issue in determining whether Rule 53 applied to a section 71(5) review.<sup>95</sup> This ruling reinforces the judgment in *Jones v Delport*, but highlights the need for guidance on the ambit of a section 71(5) review by a Full Bench of the High Court or the Supreme Court of Appeal, to resolve the inconsistencies in the interpretation of section 71(5) across High Court decisions.

### **3.3 Trigger for the 20-business-day period to run**

In *Peter v Mimosa* the court was tasked with determining when the 20-business-day period to institute a section 71(5) review application was triggered. The applicant was removed as a director of the company on the ground that he had been derelict in performing his duties.<sup>96</sup> He launched a review application under section 71(5) of the Act, but the respondents contended that the application was brought after the expiry of the 20 business days stipulated in section 71(5) and could not be entertained by

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<sup>91</sup> *Wait v Marais* para 46.

<sup>92</sup> Cassim *Removal of Directors* 337.

<sup>93</sup> *Jones v Delport* (GP) (unreported) case number 2023/082594 of 20 November 2024.

<sup>94</sup> *Jones v Delport* (GP) (unreported) case number 2023/082594 of 20 November 2024 para 2.1.

<sup>95</sup> *Jones v Delport* (GP) (unreported) case number 2023/082594 of 20 November 2024 para 6.

<sup>96</sup> *Peter v Mimosa* para 6.

the court.<sup>97</sup> The applicant, in turn, contended that he had brought the application within 20 business days of its coming to his notice that the board had resolved to remove him as a director.<sup>98</sup> His version was that he was at sea on the date of his removal and became aware of the decision to remove him two days after the decision had been taken.<sup>99</sup>

The court said that although a purposive approach must be adopted to interpreting section 71(5) and that the purpose and aims of the Act must be considered, a purposive approach must remain faithful to the language of the statute.<sup>100</sup> It found that section 71(5) makes it clear that the significant moment that triggers the commencement of the period is the determination of the board to remove the director.<sup>101</sup> The word "determine", the court said, means to come to a decision.<sup>102</sup> Thus, the 20-business-day period, the court said, is triggered by the board's decision to remove the director and begins to run from the consecutive business day after the day on which the board's determination is made, having regard to section 5(3) of the Act.<sup>103</sup>

The court agreed with *Pityana v Absa Group* that an applicant under section 71(5) is entitled to use Rule 53 to seek the record of the board's deliberations in the board meeting, but said that the record is not needed before the 20-day period is triggered, nor is it needed to launch a section 71(5) review, as had been argued by the applicant.<sup>104</sup> To interpret section 71(5) in this way, the court said, would lead to potential abuse of the review procedure, would fail to encourage the efficient and responsible management of companies embodied in section 7(j) of the Act, and would be unfaithful to the wording of section 71(5).<sup>105</sup> This is because the reasons for the removal would already have been known to the director before the board meeting under the procedure in section 71(4) of the Act, which requires the affected director to be given a statement of reasons for the proposed removal.<sup>106</sup>

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<sup>97</sup> *Peter v Mimosa* para 14.

<sup>98</sup> *Peter v Mimosa* para 16.

<sup>99</sup> *Peter v Mimosa* para 16.

<sup>100</sup> *Peter v Mimosa* para 34. See further *Bertie van Zyl (Pty) Ltd v Minister for Safety and Security* 2010 2 SA 181 (CC) para 22.

<sup>101</sup> *Peter v Mimosa* para 35.

<sup>102</sup> *Peter v Mimosa* para 22.

<sup>103</sup> *Peter v Mimosa* para 42. Section 5(3) of the Act provides that in calculating a particular number of business days between the happening of one event and another, the number of days is calculated by excluding the day on which the first such event occurs, including the day on or by which the second event is to occur, and excluding any public holiday, Saturday or Sunday that falls on or between these days.

<sup>104</sup> *Peter v Mimosa* paras 35, 43 and 44.

<sup>105</sup> *Peter v Mimosa* para 42.

<sup>106</sup> See *Peter v Mimosa* para 44.

Regarding a director who had no knowledge of the board's determination to remove him from office, the court said that the 20-business-day period is triggered from the date on which the director obtained actual knowledge, in whichever manner, including informally, of the board's determination.<sup>107</sup> This "actual knowledge interpretation", the court said, would apply only in exceptional situations where the facts indicate that the director did not know, or was not aware, of the board's determination.<sup>108</sup> This interpretation was necessary, the court said, so as not to infringe the director's constitutional right to access to court under section 34 of the Constitution.<sup>109</sup>

Based on the facts, the court found that the applicant had in all probability obtained knowledge of the board's determination on 12 March 2024, which was the day after the board meeting, and not two days after this decision as claimed by the applicant. It said that the 20-business-day period was triggered on 11 March 2024, and the calculation of the period thus began on 12 March 2024, having regard to section 5(3) of the Act. Therefore the last day to have delivered the review application was 11 April 2024. The applicant delivered the review application on 16 April 2024, which the court found was after the 20-business-day period had expired. As a result, the court dismissed the applicant's request for the board's determination to be reviewed under section 71(5) of the Act.

The 20-business-day period limits the time given to a director to bring a section 71(5) review application, which brings the matter to finality. It also provides clarity for the board to determine when it can fill the vacancy created by the director it removes. Under section 70(2) of the Act, once the board of directors removes a director from office it may not fill the vacancy left by the director until the 20-business-day period to file a section 71(5) review application expires or the court grants an order under a section 71(5) review application. *Peter v Mimosa* provides useful guidance on when the 20-business-day period under section 71(5) starts to run and how to calculate this period, particularly when the affected director did not know of the board's decision on the date of the decision, given that section 71(5) is silent on these matters. For example, if a director is incapacitated, such as being in a coma, at the time of the board meeting and is unaware of the decision taken to remove him or her from office and becomes aware of this at some later date, then, according to *Peter v Mimosa*, the 20-business-day period would be triggered only from the date on which the director obtained actual knowledge of the board's decision.<sup>110</sup>

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<sup>107</sup> *Peter v Mimosa* para 41.

<sup>108</sup> *Peter v Mimosa* para 41.

<sup>109</sup> *Peter v Mimosa* para 40.

<sup>110</sup> See *Peter v Mimosa* para 41.

### 3.4 Condonation of a review application

In *Langeni v South African Women in Mining Association*<sup>111</sup> (hereafter *Langeni v SAWIMA*), two directors who had been removed from office applied for a review under section 71(5) of the Act more than 20 business days after the board's determination to remove them from office. The court, per Senyatsi J, condoned the late institution of the review application. It held that it would not be "in the interest of justice not to entertain the merits of the application simply because the filing of the application was out of time".<sup>112</sup>

In *Peter v Mimosa* the court refused to follow the decision in *Langeni v SAWIMA* and opted not to condone the lateness of a section 71(5) review application based on the interest of justice.<sup>113</sup> It said that the language of section 71(5) does not vest a court hearing the review with a discretion *mero motu* to grant condonation.<sup>114</sup> It criticised the finding in *Langeni v SAWIMA* because the judgment did not discuss the wording of section 71(5) in relation to the commencement of the running of the time period to launch the review application,<sup>115</sup> and no authority had been relied on by the court to sustain a finding that section 71(5) allows for the granting of condonation when an application is brought out of time.<sup>116</sup>

Both *Langeni v SAWIMA* and *Peter v Mimosa* were presided over by a single judge, the former in the Gauteng Division, Gauteng and the latter in the Western Cape Division, Cape Town. Thus, the decision in *Peter v Mimosa* does not overrule that in *Langeni v SAWIMA*. In agreement with *Peter v Mimosa*, it is respectfully submitted that it does not appear from the Act that condonation may be granted if an applicant files a section 71(5) review application after the stipulated 20-business-day period, but clarity is again required by a higher court to resolve this judicial conflict on the question of condonation.

### 3.5 Costs of a successful section 71(5) review application

The Act is silent on the payment of costs in a section 71(5) review application. By contrast, section 71(7) of the Act specifically deals with the

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<sup>111</sup> *Langeni v South African Women in Mining Association* 2023 JDR 4387 (GJ) (hereafter *Langeni v SAWIMA*).

<sup>112</sup> *Langeni v SAWIMA* para 28. In reviewing the matter the court found that the procedures to remove the directors had not been followed and that the grounds for removal were not valid. It set aside the board's decision to remove the directors and reinstated them to office (*Langeni v SAWIMA* para 32). The court did not investigate whether it was empowered to review the merits or only the procedures of the board's decision.

<sup>113</sup> *Peter v Mimosa* para 26.

<sup>114</sup> *Peter v Mimosa* para 24.

<sup>115</sup> *Peter v Mimosa* para 25.

<sup>116</sup> *Peter v Mimosa* paras 25 and 26.

payments of costs in relation to a section 71(6) review application.<sup>117</sup> Presumably the general principle in South African civil procedure that costs follow the event will apply, and costs will generally be awarded against the unsuccessful party.<sup>118</sup> For example, this general principle was followed in *Peter v Mimosa*,<sup>119</sup> where the section 71(5) review application was unsuccessful, and the court dismissed the application with costs on scale B.<sup>120</sup> But courts do, of course, have a discretion to depart from this principle in appropriate cases.<sup>121</sup>

In the three cases discussed in this article where a section 71(5) review application was successful, that is *Wait v Marais*,<sup>122</sup> *Langeni v SAWIMA*<sup>123</sup> and *Jones v Delport*,<sup>124</sup> the courts ordered the directors on the board of directors to pay the costs of the section 71(5) review application on a party and party scale, together with the company. But in *Wait v Marais*, the court ordered all the costs to be paid by the directors who voted in favour of the removal and did not impose any cost order on the company in question.

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<sup>117</sup> Under section 71(7) of the Act, if a person with *locus standi* to bring a s 71(6) review application applies to court to review the board's decision not to remove a director from office, the applicant is required to compensate the company and any other party for any costs incurred in relation to the application, unless the court reverses the board's decision.

<sup>118</sup> See *Nxumalo v Mavundla* 2000 4 SA 349 (D) 354; *Gauteng Provincial Legislature v Kilian* 2001 2 SA 68 (SCA) para 24; and *Nzimande v Nzimande* 2005 1 SA 83 (W) para 75.

<sup>119</sup> *Peter v Mimosa* para 49.

<sup>120</sup> Uniform Rule 67A, which came into operation on 12 April 2024, requires a costs order to indicate the scale, whether A, B or C, under which counsel's fees may be recovered when party and party costs are granted. Scale A refers to the maximum amount of R375 per quarter of an hour or part thereof; scale B refers to a maximum amount of R750 per quarter of an hour or part thereof; and scale C refers to a maximum amount of R1 125 per quarter of an hour or part thereof (see Rule 69(7)). Courts may have regard to various factors when determining the relevant scale under which party and party costs are awarded, as set out in Rule 67A(3). If a cost order does not specify the relevant scale, the lowest scale, scale A, will apply (Rule 67A(3)).

<sup>121</sup> *Gelb v Hawkins* 1960 3 SA 687 (A) 694; *Ward v Sulzer* 1973 3 SA 701 (A) 706; *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 SA 1045 (SCA) para 25; *Antoy Investments v Rand Water Board* 2008 JDR 0290 (SCA) para 9; *Wanderers Club v Boyes-Moffat* 2012 3 SA 641 (GSJ) 643-644.

<sup>122</sup> The court ordered the first and second respondents, being the directors on the board who voted in favour of the removal, to pay the costs of the section 71(5) review application on a party and party scale (see para 53 of the judgment).

<sup>123</sup> The court ordered the fifth to seventh respondents, being the current directors of SAWIMA, to pay the costs of the application, together with SAWIMA, the first respondent (see para 32 of the judgment).

<sup>124</sup> The court ordered the first to eighth respondents to pay the costs of the application on scale B (see para 59 of the judgment). The first to sixth respondents were the company directors who made the determination to remove the directors from office, and the seventh and eighth respondents were the relevant companies from which the directors were removed.

Directors must be aware that voting to remove a fellow director may have personal costs implications for them if a section 71(5) review application is successful. Generally a majority vote of directors and not a unanimous vote is required to remove a director from office, although this may be amended in the company's Memorandum of Incorporation.<sup>125</sup> This means that it is not necessary for all the directors on the board to vote in favour of the removal resolution for it to be passed. It is unclear whether the courts in *Langeni v SAWIMA* and *Jones v Delport* distinguished between the directors who had voted in favour of the removal and those who had abstained or voted against it. In *Langeni v SAWIMA* the directors ordered to pay the costs were the current directors on the board, so it appears that all the directors on the board were ordered to pay the costs of the application even though a particular director may not have voted in favour of the removal. In *Jones v Delport* the directors ordered to pay the costs were the directors who made the determination to remove the directors from the office, but it is again unclear whether these were the directors who voted in favour of removing the directors or were all the directors on the board.

It is submitted that in awarding costs in a successful section 71(5) review application, courts should distinguish between directors who voted in favour of removing the director and those who abstained or voted against it. For example, in *Peter v Mimosa* the fourth respondent, one of the directors on the board, made it clear that she would not participate in the board meeting to remove the director in question and advocated a more collaborative and conciliatory approach among the board members.<sup>126</sup> She deposed to an affidavit wherein she indicated that she did not side with the applicant, being the director who was the subject of the removal proceedings, nor with the second respondent, being the director driving the removal proceedings, and raised concerns that she was being pressurised to resign as a director as she did not support the second respondent's actions against the applicant.<sup>127</sup> The court dismissed the section 71(5) application, as discussed earlier, but in a case such as this one, if the application is successful, it is submitted that a court should not order a director such as the fourth respondent to pay the costs together with the other directors since she did not participate in the removal proceedings and did not vote in favour of the removal.

## 4 Conclusion

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<sup>125</sup> Under section 73(5) of the Act, except to the extent that the Memorandum of Incorporation provides otherwise, a majority of the votes cast on a board resolution is sufficient to approve the resolution.

<sup>126</sup> *Peter v Mimosa* para 12.

<sup>127</sup> *Peter v Mimosa* para 12.

This article has discussed and analysed recent case law interpreting section 71(5) of the Act. It is evident from the discussion in this article that courts have disagreed with and contradicted one another on specific aspects of the interpretation of section 71(5). The judgments discussed in this article were handed down by single judges in various South African jurisdictions and, in some instances, in the same jurisdiction. This has created anomalies in our law since the conflicting judgments do not overrule one another. The effect of this is that differing interpretations of certain aspects of section 71(5) will apply across different jurisdictions, at least until a ruling from a higher court resolves these inconsistencies.

One anomaly relates to the ambit of a section 71(5) review and whether courts may review both the merits and procedural aspects of the board's decision or are confined to reviewing the procedural aspects. Although *Pityana v Absa Group* held that a court may review the procedural aspect only, *Wait v Marais* and *Jones v Delpport* held that a court is entitled to undertake a complete reconsideration of the board's decision and review both the merits and procedural aspects, although the decision in *Wait v Marais* is arguably *obiter*. The dictum in *Jones v Delpport* does not overrule that in *Pityana v Absa Group* as both decisions were handed down by single judges, both in the Gauteng Division, Pretoria, but it is arguable that the decision in *Pityana v Absa Group* on the ambit of a section 71(5) review is *obiter*, which reinforces the judgment in *Jones v Delpport*. It is submitted that courts should be able to review both the merits and procedure of the board's decisions as the review power under section 71(5) is a statutory power of review, which confers powers of both an appeal and a review on a court. Clarity on the ambit of a section 71(5) review is required by a higher court to resolve the confusion caused by the differing court interpretations of this provision.

It is also unclear whether the decisions of shareholders to remove directors under section 71(1) of the Act may be reviewed by courts under the principle of legality. Although *Litabe v Di Thabeng* held that this may be done, doubt is cast on this *dictum* by the finding in *Jones v Delpport* that the principle of legality as a ground of review is not appropriate to review board decisions to remove directors since boards do not exercise public power. A similar argument may be made regarding shareholder decisions not being an exercise of public power, which would render the principle of legality as a ground of review inapplicable. A higher court needs to clarify this matter.

A further issue of uncertainty arising from these judgments is whether a section 71(5) review application submitted after 20 business days may be condoned. According to *Langeni v SAWIMA*, this may be done, but *Peter v Mimosa* disagreed with this finding. It is respectfully submitted in agreement with *Peter v Mimosa* that it does not appear from the Act that condonation

may be granted, but clarity is again required by a superior court to resolve this matter.

Despite the inconsistencies arising from these cases, they provide valuable insight into interpreting certain aspects of section 71(5). First, they make it clear that the decision of the board of directors to remove a director does not constitute administrative action and may accordingly not be reviewed in terms of PAJA, as held in *Pityana v Absa Group* and *Jones v Delport*. As held in *Pityana v Absa Group* and concurred with in *Peter v Mimosa*, Rule 53 applies to a review under section 71(5). Boards of directors must thus be aware that they may be required to provide the removed director with the record or minutes of their proceedings under Rule 53, which would contain details of their deliberations on the removal of the director and may expose any ulterior motives or purpose for which the director may have been removed. Additionally, the company's sensitive and confidential business dealings could be exposed as the record would become a public document once filed.

Secondly, *Peter v Mimosa* clarifies that the 20-business-day period to institute a section 71(5) review application is triggered by the board's determination to remove the director and commences to run from the consecutive business day after the day on which the board's determination is made, having regard to section 5(3) of the Act. Where a director had no knowledge of the board's determination, the 20-business day period is triggered from the date on which the director obtained actual knowledge of the board's determination, in whichever manner, including informally.

Thirdly, as also clarified in *Peter v Mimosa*, although directors are entitled to request a copy of the record of the board's deliberations under Rule 53, they should not wait until receiving the record to institute a section 71(5) review application since the 20-business day period is not triggered upon receiving the record, but once the board makes the decision to remove the director from office.

The Act is silent on awarding costs in a section 71(5) review application. Based on the cost orders granted in the cases discussed in this article, directors should be aware that voting to remove a director from the board could have personal costs implications for them if a section 71(5) review application is successful. It is submitted that courts should distinguish between directors who voted in favour of removing the director and those who opposed it or abstained from voting when determining a cost order in a successful section 71(5) review application.

Removing a director from office can have significant and far-reaching consequences, including reputational harm, a negative impact on future opportunities for directorships, financial repercussions, and an affront to the

director's integrity and dignity.<sup>128</sup> Removed directors must have clarity on the interpretation of section 71(5) of the Act since this provision offers an essential remedy for them. Hopefully, clarity will soon be provided on some anomalies created by recent case law on section 71(5).

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**List of Abbreviations**

CCR

Constitutional Court Review

PAJA

Promotion of Administrative Justice Act 3 of 2000

SA Merc LJ

South African Mercantile Law Journal

SALJ

South African Law Journal

SAWIMA

South African Women in Mining Association