

Directors' Power To Appoint



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A look at section 68(3) of the Companies Act

A common way in which a shareholder's power is exercised is by appointing or electing directors. Such power is usually reserved for shareholders only, save for when a vacancy arises on the board.

Section 68(3) of the Companies Act No. 71 of 2008 (Companies Act) empowers a board to appoint an eligible person to serve as a director of a company on a temporary basis until such vacancy is filled in accordance with s68(2) of the Companies Act (dealing with the default procedure in respect of the election of directors). This article will look at how s68(3) should be correctly interpreted to give effect to its intended consequences and effect.

In the ordinary course, s68(3) is used to ensure continuity and the efficient running of the company by empowering the remaining directors to temporarily appoint a director until such vacancy is filled by the shareholders. A technical issue arises, however, when s68(3) is read in isolation. As stated above, an appointment under s68(3) is temporary until filled by an election under s68(2), which section does not provide time periods within which such election must take place. The danger then of reading s68(3) in

isolation is that absent time periods within which an election must take place, a "temporary" appointment would be tantamount to an indefinite appointment.

Considering that s68(3) specifically refers to a temporary appointment and that the right to appoint directors is usually within the purview of shareholders, not having a time limit within which such election must take place under s68(2) is an untenable position and could not have been within the contemplation of the drafters of such provision.

To prevent an absurd or unintended outcome, our view (supported by academics¹) is that s68(3) must be read in conjunction with s70(3), which provides that:

"(3) if a vacancy arises on the board, other than as a result of an ex officio director ceasing to hold that office, it must be filled by –

- (a) a new appointment, if the director was appointed as contemplated in section 66(4)(a)(i); or*
- (b) subject to subsection (4), by a new election conducted –*
 - (i) at the next annual general meeting of the company, if the company is required to hold such a meeting; or*
 - (ii) in any other case, within six months after the vacancy arose –*
 - (aa) at a shareholders meeting called for the purposes of electing the director; or*
 - (bb) by a poll of the persons entitled to exercise voting rights in the election of the director, as contemplated in section 60(3)."*

While s70(3)(a) deals with the appointment of a director to fill a vacancy on the board in respect of directors appointed by a person appointed or named in the memorandum of incorporation (MOI), s70(3)(b) imposes time limits by when an election must take place to fill such vacancy in other instances. It then follows that a temporary appointment by a board under s68(3) must be filled

for an indefinite period in accordance with either s70(3)(a) or s 70(3)(b) as applicable.

In addition to the above, not only should s68(3) be read in conjunction with s70(3), but, in our view, s70(3) only applies when directors exercise their right to make a temporary appointment under s68(3). If the directors do not fill the vacancy by making a temporary appointment in terms of s68(3), s70(3) will not, in our view, have any application and will not compel the shareholders to fill the vacancy at, for example, the next annual general meeting of the company.

Applying s70(3) in other circumstances where a vacancy arises would amount to forcing shareholders to appoint directors, which is incongruous with their power to appoint and elect directors as and when they decide to do so.

In respect of listed companies (in addition to the requirements of the Companies Act) the time period within which a temporary appointment must be replaced by an indefinite appointment is provided for in schedule 10 of the JSE Listings Requirements (JSE LR) which requires that all listed companies, inter alia, have the following provision in their MOI: *"(c) The appointment of a director, to fill a casual vacancy or as an addition to the board, must be confirmed by shareholders at the next annual general meeting."*

In conclusion, s68(3) must be read in conjunction with the provisions of s70(3), which section only applies if a vacancy has been filled by the board in terms of s68(3). Additionally, although not required, it is common for companies to include a provision substantially similar to that required by schedule 10.16(c) of the JSE LR in their MOI to avoid any uncertainty in respect of the above. ■

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¹ See Yeats, JL ; de la Harpe, R ; Jooste, R ; Stoop, H ; Cassim, R ; Seligmann, J ; Kent, L ; Bradstreet, R ; Williams, RC ; Cassim, MF ; Swanepoel, E ; Cassim, FHI ; Jarvis, K 'Commentary on the Companies Act of 2008' (2018) at 2-1258 and Piet Delpont "Henochsberg on the Companies Act 71 of 2008" (2018) at 264(3)