

If we can have alternate directors, can we have directors by proxy?

The Companies Act, No 71 of 2008 (the Act) explicitly grants shareholders the right to appoint proxies to participate in, speak and vote at shareholders meetings. Unless prohibited by the company's memorandum of incorporation or by their instrument of appointment, proxies may, in turn, delegate their authority to act on behalf of the shareholders concerned to third parties.

However, the Act does not explicitly permit directors to appoint proxies to represent them at meetings of the board of directors. Nonetheless, are directors implicitly entitled to appoint proxies to act on their behalf? And if directors can appoint proxies, would such proxies merely be agents who simply do what the appointing directors instructs them to do? Or would such proxies have discretion to do as they please should the appointing director not have provided instructions?

The 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. While in certain overseas jurisdictions it is possible for a director to be a juristic entity, in respect of South African commercial law a director must be a natural person.

In addition, the Act defines an alternate director as a person elected or appointed to serve, as the occasion requires, as a member of the board of a company in substitution for a particular elected or appointed director of that company.

It provides further that the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Companies Act or the company's memorandum of incorporation provides otherwise.

If the memorandum of incorporation allows for the appointment of alternate directors, each director is usually empowered to nominate any person, who is not disqualified from acting as a director, to be their alternate director to act in their place during their absence or inability to act.

In terms of the Act, the powers granted to the directors are granted to them collectively as a board, to be exercised by a majority vote or unanimous decision. Directors, in their capacity

as such, have no power to act individually as agents for the company, unless specifically empowered to do so by resolution of the board or by the memorandum of incorporation.

The board of directors can, in limited circumstances, delegate specific powers to a specific individual (such as the chief executive officer) or to a committee of the board. The delegation by a board of directors of a specific power does not divest the directors of their accountability. A director cannot divest themselves of their fiduciary or other duties to the company.

So, if directors can appoint alternate directors, why can they not appoint proxies? What is the difference between an alternate director and a proxy?

Where the board of directors delegates specific powers, the persons to whom the powers are delegated derive their powers not from the board, but from the provision of the company's memorandum of incorporation that allows for the delegation; hence those persons are not agents of the directors, but exercise the company's powers, and are consequently considered an organ of the company

The Act and common law set out the standards of directors' conduct.

A director of a company must exercise their powers, and act, in good faith and for a proper purpose; in the best interests of the company; and with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that director; and having the general knowledge, skill and experience of that director. A director also has a duty to disclose personal financial interest in respect of matters to be considered by the board of the company.

A director of a company may be held personally liable relating to breach of a duty, for any loss sustained by the company as a consequence of any breach by the director of a duty.

The Act only briefly deals with the appointment or election of alternate directors. Generally, alternate directors are in the eyes of the law in the same position as any other director, when acting in place of a director, and as such are, when acting as such, subject to the duties that a director owes to a company.

When acting in place of a director, an alternate director does not serve as a representative or proxy of the original director, but serves as if they had been personally appointed as a

director. Accordingly, when acting as such, an alternate director assumes all the duties of a director, including the fiduciary duties and requirements set out in the Act and at common law. It is therefore appropriate that an alternate director would need to consent in writing to act as such in the same way that a director would need to do so.

Allowing shareholders to appoint proxies makes sense - proxies perform primarily mechanical functions such as attending meetings and voting on resolutions in accordance with the instructions that they have received. Shareholders do not have fiduciary duties to the company in which they hold shares, in fact there is no duty on a shareholder to apply their mind to matters at hand, shareholders can act in their own interests or even to their own detriment,

This is not the case with directors because directors owe duties to their company. The role of a director is not just to provide binary answers to issues – it involves detailed and dynamic analysis of matters as and when they arise and even before they arise. A director could never appoint a proxy with a set of instructions on how to act on each issue that could arise and with their duty being personal and ongoing, could never be delegated to a proxy.

Accordingly, directors are not permitted to appoint proxies.

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