



An overview of the regulatory challenges of directors and shareholders' resolutions in Lesotho under the Companies Act 18 of 2011

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SOLEMN DECLARATION

I, Mamatlooane Sehloho, hereby declare that the dissertation entitled: **An overview of the regulatory challenges of directors and shareholders' resolutions under the Companies Act 18 of 2011**, is submitted in partial fulfilment of the requirements for the Master of Laws (LLM) degree at North West University (NWU). The dissertation is the product of my research and opinion except where otherwise it is stated and expressly acknowledged and I have not previously, in its entirety or in part, submitted it to any other university for any qualification.

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Signed at Potchefstroom on this 10th day of May 2025

Declared before me on this day of

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All thanks to God Almighty for taking me through the writing of this piece. It was the most challenging of my academic journeys, but through His amazing grace, I conquered.

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DEDICATION

To

My late Uncle

We had plans for my graduation and tombstone's unveiling in April 2025. It never crossed my mind that your loving soul would now be counted among the departed. Rest in peace and thank you very much for gracefully playing that fatherly role in my life.

ABSTRACT

Matters raised for decision making at a meeting are framed as resolutions and put to vote by directors and shareholders. Both directors and shareholders' resolutions are legally binding on the company, and function as compliance records to provide evidence of company decisions made by directors and shareholders under the *Companies Act*. Several provisions are provided under the *Companies Act* to govern the passing of directors and shareholders' resolutions in Lesotho. The provisions safeguard against abuse of power by directors and inconsistencies when passing company resolutions. However, the regulation of company resolutions under the *Companies Act* is not flawless. The collapse of Enrich Stores and other companies in Lesotho is a reflection of lack of accountability and transparency in passing company resolutions in Lesotho companies. This has been attributed to the abuse of power by company directors and limited awareness of shareholder decision making rights. The board's power to call for shareholders' meetings and make decisions is fiduciary in nature and needs to be exercised in good faith for the benefit of a company as a whole. Inherent in the ownership of shares are rights to participate and vote in company meetings. However, some shareholders are not adequately advised on this right and may end up not fully exercising their decision making rights. This has resulted in some directors acting in bad faith and making decisions that do not benefit the company. The researcher identifies regulatory challenges affecting the directors and shareholders' resolutions under the *Companies Act*. For instance, restricting a director's removal from office to be initiated by shareholders' meetings and excluding online participation in shareholders' meetings. These regulatory challenges often obstruct directors and shareholders from exercising their decision making duties optimally. The researcher recommends measures that can be implemented to curb challenges identified by this research. The recommended measures include amendment of the *Companies Act* and provision for alternative dispute resolutions under the *Companies Act*.

Key-words: Decision making rights; participation rights; majority and minority shareholders, shareholder activism

TABLE OF CONTENTS

SOLEMN DECLARATION	ii
ACKNOWLEDGEMENTS	iii
DEDICATION	iii
ABSTRACT	v
CHAPTER ONE	1
RESEARCH OUTLINE	1
1.1 Introduction.....	1
1.2 Problem Statement.....	5
1.3 Background	9
1.3.1 Motivation	13
1.3.3 Research Question	13
1.4 Aims and Objectives	14
1.4.1 Aims.....	14
1.4.2 Objectives.....	14
1.5 Research Methodology	14
1.6 Framework of Chapters.....	15
1.7 Relevance for Research Unit	17
1.8 Statement Regarding Ethics	17
CHAPTER TWO	18
HISTORICAL OVERVIEW OF THE REGULATION OF DIRECTORS AND SHAREHOLDERS' RESOLUTIONS IN LESOTHO	18
2.1 Introduction	18
2.2 The Passing of Directors and Shareholders' Resolutions under the 1967 Act	21
2.3 Procedural Requirements for Directors and Shareholders' Resolutions under the 1967 Act	23
2.3.1 Notice of Directors and Shareholders' Meetings under the 1967 Act.....	23
2.3.2 Requirements of Directors and Shareholders' Meetings under the 1967 Act.....	26
2.3.3 Directors and Shareholders' Quorums in Passing Company Resolutions under the 1967 Act.....	29
2.3.4 Directors and Shareholders' Voting Rights in Passing Company Resolutions under the 1967 Act.....	32
2.4 Conclusion.....	33
CHAPTER THREE	36
OVERVIEW OF THE CURRENT REGULATION OF THE DIRECTORS AND SHAREHOLDERS' RESOLUTIONS UNDER THE COMPANIES ACT 18 OF 2011	36
3.1 Introduction	36

3.2 The Passing of Directors and Shareholders' Resolutions under the Companies Act	37
3.3 Procedural Regulations of Directors and Shareholders' Resolutions under the Companies Act	40
3.3.1 <i>Notice of Directors and Shareholders' Meetings</i>	40
3.3.2 <i>The Regulation of Directors and Shareholders' Meeting Proceedings under the Companies Act</i>	44
3.3.3 <i>Requirements for Quorums for Directors and Shareholders' Meetings under the Companies Act</i>	45
3.3.4 <i>The Regulation of Directors and Shareholders' Voting Rights under the Companies Act</i>	47
3.4 Conclusion	48
CHAPTER FOUR	50
THE REGULATORY FLAWS AND CHALLENGES ASSOCIATED WITH THE DIRECTORS AND SHAREHOLDERS' RESOLUTIONS UNDER THE COMPANIES ACT 18 OF 2011	50
4.1 Introduction	50
4.2 Flaws and Challenges Affecting the Regulation of Directors and Shareholders' Resolutions under the Companies Act	51
4.2.1 <i>The Flawed Distribution of Company Resolution Notices</i>	51
4.2.3 <i>Inadequate Provisions Relating to Virtual Attendance to Shareholders' Meetings and Uncertainty of Proxies' Participation Rights</i>	54
4.2.4 <i>Inadequate Provisions and Guidelines for Requested Shareholders' Meetings under the Companies Act</i>	55
4.2.6 <i>The Lack of Alternative Dispute Resolution Forums under the Companies Act</i>	60
4.3 Conclusion	60
CHAPTER FIVE	62
RECOMMENDATIONS AND CONCLUSION	62
5.1 Introduction	62
5.2 Recommendations	63
5.3 Conclusion	68
Literature	71
Case Law	78
International Instruments	80
Internet sources	80
Legislation	81
Regulations	81

CHAPTER ONE

RESEARCH OUTLINE

1.1 Introduction

Corporate governance refers to the body of rules, processes, customs, policies, and institutions that direct and control the operations of a company.¹ Good corporate governance enhances the decision making process by establishing clear responsibilities and roles among stakeholders, including the board of directors and shareholders.² At the centre of each company is a board of directors that is responsible for the company's day-to-day running. The relationship between the board of directors and shareholders is governed by relevant corporate governance principles.³ Transparency, accountability and fairness are some of the essential principles that should be upheld by directors and shareholders in the operations of a company and in passing company resolutions.

Despite being landlocked by competitive economies such as South Africa and its close commercial ties with the latter, good corporate governance is a relatively new concept in Lesotho.⁴ There are currently some emerging discussions on issues relating to corporate

¹ Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J and Yeats J *Contemporary Company Law* 2nd ed (Juta and Co Ltd Claremont 2012) 642; Wixley T, Everingham G and Louw K *Corporate Governance* 5th ed (Siber Ink, South Africa 2019) 1,2; see related discussions in *South African Broadcasting Corporation Ltd v Mpofu* [2009] 4 All SA 169 (GSJ) para 64; *Mthimunya-Bakoro v Petroleum and Oil Corporation of South Africa (SOC) Ltd* 2015 (6) SA 338 (WCC) para 21.

² Khan H "A Literature Review of Corporate Governance" 2011 *Singapore: IACSIT Press* 1, 2; Vives X "Corporate Governance: Does it matter" 2000 *Corporate Governance: Theoretical and Empirical Perspectives* 1, 2; Dallas LL "Two Models of Corporate Governance: Beyond Berle and Means" 1988 *U Mich JL Reform* 19; Fiss PC "Institutions and Corporate Governance" 2008 *The Sage Handbook of Organizational Institutionalism* 390, 391.

³ King IV Report 11; Cassim *et al Contemporary Company Law* 642; see related discussions in *South African Broadcasting Corporation Ltd v Mpofu* [2009] 4 All SA 169 (GSJ) para 64; *Mthimunya-Bakoro v Petroleum and Oil Corporation of South Africa (SOC) Ltd* 2015 (6) SA 338 (WCC) para 21.

⁴ Kharlamova G and Olga V "The International Competitiveness of Countries: Economic-Mathematical Approach" 2013 *Economics & Sociology* 39, 42; African Development Bank Group "Kingdom of Lesotho Government Profile" 2006 <https://www.afdb.org> Accessed on 15 October 2024; African Development Bank Group "Lesotho Economic Outlook" 2024 <https://www.afdb.org> Accessed on 15

governance in Lesotho, particularly with efforts to enhance regulatory frameworks in both public and private sectors. Notably, the Institute of Directors in Lesotho launched the Mohlomi Corporate Governance Code in 2021 as a measure to promote good corporate governance and uphold accountability and oversight across organisations in Lesotho.⁵

The lack of accountability in the passing of director resolutions and appointment of directors in Lesotho companies contributed to the collapse of many enterprises, including state-owned companies (SOEs). For example, the collapse of the first native-owned company, Enrich and other substantial international scandals involving private and public companies informed the need to review and revise the laws governing director and shareholder resolutions in Lesotho. The collapse of the Enrich enterprises was allegedly due to bad leadership and financial mismanagement by the company directors.⁶ It was also revealed that out of the six thousand shareholders, only fourteen were officially recognised, by the Ministry of Trade.⁷ The controversy gave rise to inquiries into compliance with the established corporate code and principles relating to director and shareholder resolutions in Lesotho. Two issues surfaced, namely, the possibility that some shareholders are being denied decision making rights and that unauthorised persons are

October 2024; See related discussion Howard J "Economic Competition in the 21st Century" 2020 <https://www.rand.org> Accessed on 15 October 2024.

⁵ Mohlomi Corporate Governance Code (launched on 2 September 2021); (See related in Institute of Directors in Southern Africa "Fundamental Concepts" King IV Project Lead (1 November 2016); Business Roundtable "Principles of Corporate Governance" 2016 Havard Law School Forum on Corporate Governance corpgov.law.harvard.edu Accessed on 22 October 2024; Hawksford "The Core Principles of Good Corporate Governance" 2024 <https://www.hawksford.com> Accessed on 22 October 2024.

⁶ Senoko N May 4 2023 Struggling Enrich Suspends CEO <https://www.maserumetro.com> accessed on 4 October 2024; Mohono R November 10 2023 Enrich Stores Closes Down <https://www.maserumetro.com> accessed on 4 October 2024; The Reporter December 14 2023 Bad Financial Management Nearly Sank Enrich <https://www.thereporter.co.ls> accessed on 4 October 2024; Mohono R July 30 2024 Enrich Stores Set to Bounce Back <https://publiceyenews.com> accessed on 4 October 2024.

⁷ Mohono R November 10 2023 Enrich Stores Closes Down <https://www.maserumetro.com> accessed on 4 October 2024; The Reporter December 14 2023 Bad Financial Management Nearly Sank Enrich <https://www.thereporter.co.ls> accessed on 4 October 2024; Senoko N May 4 2023 Struggling Enrich Suspends CEO <https://www.maserumetro.com> accessed on 4 October 2024; Mohono R July 30 2024 Enrich Stores Set to Bounce Back <https://publiceyenews.com> accessed on 4 October 2024.

being mistaken for company shareholders and mistakenly granted decision-making rights in the operations of the company.⁸

The *Companies Act*⁹ provides for standard and adaptable requirements for decision making, incorporation, organisation, operation, and liquidation of companies to encourage transparent and accountable management of companies in Lesotho. Matters raised for decision making at a meeting are framed as resolutions and put to vote by shareholders. Shareholders' resolutions are divided into ordinary resolutions and special resolutions. Failure to vote for or against a resolution is considered a non-participation, and not an approval for the resolution.¹⁰ On the one hand, the *Companies Act* defines an ordinary resolution as a resolution that is approved by a majority of the votes of shareholders entitled to vote in person or by proxy.¹¹ On the other hand, a special resolution is defined as a resolution that is approved by at least seventy five per cent of the members entitled to vote in person or by proxy.¹² Directors' resolutions are decisions made by the board of

⁸ Mohono R November 10 2023 Enrich Stores Closes Down <https://www.maserumetro.com> accessed on 4 October 2024; The Reporter December 14 2023 Bad Financial Management Nearly Sank Enrich <https://www.thereporter.co.ls> accessed on 4 October 2024; Senoko N May 4 2023 Struggling Enrich Suspend CEO <https://www.maserumetro.com> accessed on 4 October 2024; Mohono R July 30 2024 Enrich Stores Set to Bounce Back <https://publiceyenews.com> accessed on 4 October 2024.

⁹ The Lesotho Companies Act No 18 of 2011 (*the Companies Act*); see discussions in Thamae 2016 Lesotho Law Journal 48, 50; Nwafor AO "Clearing the Doubts on the Concept of Derivative Action- Lesotho Court of Appeal Decision in Concrete Roots (Pty) Ltd v. Lebakeng Tigali-An Opportunity Lost" 2011 *Lesotho Law Journal* 117, 124; Nwafor 2007 Botswana Law Journal 82; Khoabane K Protection of the Interests of the Company through Derivative Action under the Lesotho Companies Act 18 of 2011 (LLM Dissertation University of Witwatersrand).

¹⁰ Section 53(1) and (3) of the *Companies Act*; see related in Cassim *et al Contemporary Company Law* 512-513; *DH Brothers Industries (Pty) Ltd v Gribnitz* 2014 (1) SA 103 (KZP) para 31.

¹¹ Section 52(3) of the *Companies Act*; Cassim *et al Contemporary Company Law* 505; see related discussions in Bottomley S "Rethinking the Law on Shareholder-Initiated Resolutions at Company Meetings" 2019 *Melbourne University Law Review* 95, 96; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 12; *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 para 18.

¹² Section 2 of the *Companies Act*; Cassim *et al Contemporary Company Law* 514; Bottomley 2019 *Melbourne University Law Review* 95, 96; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 12; *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 para 18.

directors and the actions relating to them.¹³ Both directors and shareholders' resolutions are legally binding on the company and function as compliance records to provide evidence of company decisions made by directors and shareholders under the *Companies Act*.¹⁴

Several provisions are provided under the *Companies Act* to govern the passing of directors and shareholders' resolutions in Lesotho. The provisions safeguard against abuse of power by directors, and inconsistencies when passing company resolutions. However, the regulation of company resolutions under the *Companies Act* is not flawless.¹⁵ The collapse of Enrich enterprises and other companies in Lesotho is a reflection of lack of accountability and transparency in passing company resolutions in Lesotho companies. This has been attributed to the abuse of power by company directors and limited awareness of shareholders' decision making rights.¹⁶ The board's power to call shareholders' meetings and to make decisions is fiduciary in nature and needs to be exercised in good faith for the benefit of a company as a whole. Inherent in the ownership of shares are rights to participate and vote in company meetings. However, some shareholders are not adequately advised on this right and may end up not fully exercising

¹³ Section 59(4) of the *Companies Act*; Cassim *et al Contemporary Company Law* 635-637; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 8; Singh VP "Directors' Fiduciary Duties to the Company: A Comparative Study of the UK and Indian Companies Act" 2021 *Trusts & Trustees* 132, 134.

¹⁴ Brownstein AR and Kirman I "Can a Board Say No When Shareholders Say Yes" 2004 *Business Lawyer* 23, 23; Bottomley 2019 *Melbourne University Law Review* 95, 96; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 12; *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 para 18.

¹⁵ Saez MI and Riano D "Corporate Governance and the Shareholders' Meeting: Voting and Litigation" 2013 *European Business Organization Law Review* 343, 346; Lindgren G "Shareholder and Shareholder Participation in the Larger Companies Meetings in Sweden" 1953 *Springer Nature* 281; Baums T and von Randow P "Shareholder Voting and Corporate Governance: the German Experience and a New Approach" 1995 *Corporate Governance in Transitional Economies, The World Bank, Washington* 435, 436.

¹⁶ Sections 49 and 50 of the *Companies Act*; Bottomley 2019 *Melbourne University Law Review* 95, 96; Lafarre A *The AGM in Europe* (Emerald Publishing Company 2017) 21; Lindgren 1953 *Springer Nature* 281.

their decision making rights. This has resulted in some directors acting in bad faith and making decisions that do not benefit the company.¹⁷

In this regard, this research identifies regulatory challenges affecting the directors' and shareholders' resolutions under the *Companies Act*. The research also seeks to recommend measures that can be implemented to curb the challenges identified and promote directors and shareholders' decision making rights in companies.

1.2 Problem Statement

Upon incorporation, a company becomes a distinct legal person that operates through its directors and shareholders.¹⁸ The two major organs of a company are its board of directors and its shareholders.¹⁹ The board of directors and the shareholders discharge their respective functions to the company by passing resolutions as provided under the *Companies Act*.²⁰ Directors and shareholders resolutions involve the passing of formal decisions on matters affecting the operation and governance of the company. However, the regulation of directors' and shareholders' resolutions under the *Companies Act* is not flawless. Notable challenges affect and prevent directors and/or shareholders from expeditiously exercising their decision making rights.²¹ For example, the exclusion of

¹⁷ Cassim *et al Contemporary Company Law* 492; *Umfoloji Co-operative Sugar Planters Ltd v St. Lucia Sugar Farms (Pty) Ltd* 1983 (1) SA 792 (N) 796; *Pergamon Press Ltd v Maxwell* [1970] 1 WLR 1167 at 1171-1172; *Smith v Sadler* [1997] NSWSC 525; Kaen FA *Blueprint for Corporate Governance: Strategy, Accountability and the Preservation of Shareholder Value* (New-York: AMACOM 2003) 120.

¹⁸ Section 9 of the *Companies Act*; Cassim *et al Contemporary Company Law* 41; Nwafo AO *Comparative Company Law* (Malthouse Press Ltd, Nigeria 2020) 179; Pickering MA "The Company as a Separate Legal Entity" *The Modern Law Review* 1968 481-511.

¹⁹ Lafarre *The AGM in Europe* (Emerald Publishing Company 2017) 21; Nwafor *Comparative Company Law* 179; Cassim *et al Contemporary Company Law* 41; Bottomley 2019 *Melbourne University Law Review* 95, 96.

²⁰ Section 53 of the *Companies Act*; Bottomley 2019 *Melbourne University Law Review* 96; Nwafor *Comparative Company Law* 179; Lafarre *The AGM in Europe* 21.

²¹ See related discussion by Cassim MF "When the Companies are Harmed by their Own Directors: Defects in the Statutory Derivative Action and the Cure (Part 1)" 2013 *SA Merc LJ* 168, 169; also see Nwafor *Comparative Company Law* 179; and also see Berkahm M "Derivative Action in Australia and New Zealand; Will the Statutory Provision Improve Shareholders' Enforcement Rights" 1998 *Bond Law Review* 74, 76.

online participation in company meetings under the *Companies Act*, denying proxy voting on a show of hands and many others. These regulatory challenges often obstruct directors and shareholders from exercising their decision making duties optimally.

Shareholders require mechanisms to assess managerial performance and to protect their equity in the company.²² More so, directors have substantial powers regarding the administration of a company on a day-to-day basis. It is through this power that they exercise virtuous leadership for the benefit of the company, without having to constantly consult with the shareholders for approval.²³ However, there are instances where shareholders' resolutions are strictly required for directors not to act *ultra vires*.²⁴ For example, both appointment and removal of directors from office are effected by ordinary resolutions of shareholders, whilst amendment of the articles of incorporation is effected by a special resolution.²⁵ Considering that shareholders may be geographically scattered, and some beyond the borders of Lesotho, it becomes challenging for such shareholders to convene and act as required. The *Companies Act* limits a quorum for the transaction of business at a meeting of shareholders to a majority of issued shares represented only in person or by proxy.²⁶ Therefore, it follows that electronic participation is omitted under

²² Kaen FA *Blueprint for Corporate Governance: Strategy, Accountability and the Preservation of Shareholder Value* (New-York: AMACOM 2003) 120; Stuart D and Crouch E *Director's Signpost: Your Guide to Directorship* (Australian Institute of Company Directors 2013) 1; Nwafor *Comparative Company Law* 179.

²³ Cassim *et al Contemporary Company Law* 468, Section 59 of the *Companies Act*; Institute of Directors in Southern Africa "Fundamental Concepts" King IV Project Lead (1 November 2016) 24; Stuart and Crouch *Director's Signpost* 1.

²⁴ Section 53 of the *Companies Act*; Kuehn C "Shareholders" 1972 *Kentucky Law Journal* 158-166; Esser I and Havenga M "Shareholder Participation in Corporate Governance" 2008 *Speculum Juris* 74, 78; Gillian S and Starks L "A Survey of Shareholder Activism: Motivation and Empirical Evidence" 1998 *Contemporary Financial Digest* 10, 18; Black BS "Shareholder Passivity Re-Examined" 1990 *Michigan Law Review* 520, 523.

²⁵ Sections 58(2) and 73(3) of the *Companies Act*; See related in *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Others* (483/2018) [2019] ZASCA 53 para 2; *Netcare Hospital Group (Pty) Ltd v Afri Nnai Health (Pty) Ltd and Others* (2530/2014) [2015] ZAFSHC 40 (26 February 2015) para 4.1; Cassim *et al Contemporary Company Law* 514.

²⁶ Section 52(3) of the *Companies Act*; Cassim *et al Contemporary Company Law* 509; Flamand and Troumpounis "Participation Quorums in Costly Meetings" 2014 *Public Choice* 53, 55; English "A

the *Companies Act* and its exclusion is a challenge to the passing of shareholders' resolutions in Lesotho.

In the recent case of *Yao v Meriti Holdings*,²⁷ an applicant, a Chinese investor in a company incorporated in Lesotho, lodged an application to challenge a resolution that was taken by a majority shareholder, without proper notices being issued in terms of the company's articles of incorporation.²⁸ However, the majority shareholder claimed to have given several notices of the meeting to the minority shareholder, yet the notices of meetings were found to have been delivered only after the meeting was held. It was held that meetings convened without proper notices being issued are irregular, and resolutions passed consequent thereto are null and void²⁹ From this case, several issues can be identified. Firstly, that foreign investors are willing to invest in local companies, if only the provisions of the *Companies Act* are commensurate with the needs of shareholders in order to boost investors' confidence. Secondly, provisions for electronic attendance and participation in company meetings would not only protect minority shareholders against the abuse of power by majority shareholders, but could also enhance their decision making in companies they have invested in. Accordingly, the researcher submits that the identified gaps in the *Companies Act* limit the participation of some shareholders in Lesotho companies.

Ultimately, shareholders' resolutions are affected by meetings that hinder some shareholders from attending meetings or effectively participate in such meetings due to the stringent requirements for physical attendance.³⁰ This is due to the misconception that

Quorum or No Quorum" 1962 *Communication Quarterly* 22; Byrne "What is a Quorum" 2024 *Corporate Governance Institute* 1, 2.

²⁷ *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143; see a related discussion in *Baptista N.O. and Others v Quickstep 684 (Pty) Ltd and Others* Case No: 38204/2022 paras 13 and 14; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 44; *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 21.

²⁹ *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 paras 7 and 20; See a related discussion in *Baptista N.O. and Others v Quickstep 684 (Pty) Ltd and Others* Case No: 38204/2022 paras 13 and 14; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 44; *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 21.

³⁰ Bottomley 2016 *Melbourne University Law Review* 97; Corporations and Markets Advisory Committee "The AGM and Shareholder Engagement" 2012 *Discussion Paper* 104; Yermack D and Li Y *Evasive*

minority shareholders' votes do not matter, and cannot make a positive change in important company decisions.³¹ However, the right to argue and influence the course of discussion may in some circumstances have a decisive effect on the decision reached by shareholders at company meetings because majority shareholders and directors of the company sometimes mislead themselves on certain issues. The voice of a minority shareholder may bring a new perspective to discussions and eventually neutralise the output of a meeting.³² Minority shareholders' input in corporate decision making should also be recognised and respected.

Additionally, directors' resolutions are not exempt from challenges under the *Companies Act*. The *Companies Act*, does not provide for removal of a director by other directors. Removal of a director is a duty only restricted to shareholders, without exceptions that are meant to empower directors to remove a director who is a majority shareholder and is likely to outvote resolutions proposed for his removal by shareholders.³³ It is, therefore common for directors to hold on to their offices even in circumstances that justify disqualification, just because they have loaded voting rights and can block proposed resolutions for their removal.³⁴

Shareholder Meetings (National Bureau of Economic Research 2021) 4; related discussion in *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd* 2013 JDR 0452 para 23.

³¹ Esser and Havenga 2008 *Speculum Juris* 78, 80; Gillian S and Starks L "A Survey of Shareholder Activism: Motivation and Empirical Evidence" 1998 *Contemporary Financial Digest* 10; 20; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Others* (483/2018) [2019] ZASCA 53 para 24; *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 paras 7 and 20; see related discussion in *Baptista N.O. and Others v Quickstep 684 (Pty) Ltd and Others* Case No: 38204/2022 paras 13 and 14; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 44.

³² *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Others* (483/2018) [2019] ZASCA 53 para 24; *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 paras 7 and 20; see related discussion in *Baptista N.O. and Others v Quickstep 684 (Pty) Ltd and Others* Case No: 38204/2022 paras 13 and 14; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 44.

³³ Thamae K "Changes Brought by the Companies Act 2011 to Liquidation of Companies in Lesotho" 2016 *Lesotho Law Journal* 47, 48; Nwafor AO "A Commentary on the Derivative Action under the Lesotho Companies Bill of 2006" 2007 *Botswana Law Journal* 81, 88; *Re Compaction Systems Pty Ltd* para 84.

³⁴ *Lesotho Public Motor Transport Co. (Pty) Ltd and Another v Mohaleroe and Others* (CIV/APN/264 of 2009; CIV/APN/504/09) [2010] LSHC 11 (7 July 2010) para 22 and 23, see *Netcare Hospital Group (Pty) Ltd v Afri 'Nai Health (Pty) Ltd and Others* (2530/2014) [2015] ZAFSHC 40 (26 February 2015)

1.3 Background

In this research, the background of the regulation of director and shareholders' resolutions in Lesotho is traced from 1967 when the first *Companies Act* of Lesotho was enacted, to date.³⁵ The purpose of the *1967 Act* was to regulate the establishment of company constitutions, incorporation, registration, management, administration and winding-up of companies and other associations in Lesotho.³⁶ The *1967 Act* pioneered the notion of director and shareholders' resolutions in Lesotho.³⁷ It authorised shareholders of a company to be at liberty to discuss business associated with the formation and operations of a company.³⁸ The term "member" was defined under the *1967 Act* as any person who subscribed to the memorandum of association of the company and whose name was entered into the register of members.³⁹ Notably, the term members under the *1967 Act* also included persons who bought and held shares in a company having a share capital, now referred to as shareholders under the current *Companies Act*.

para 25; see related discussion in *Wait v Marais and Others* (1707/2021) [2022] ZAEQBHC 41 (1 November 2022) para 29; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 1.

³⁵ Companies Act 25 of 1967 (the 1967 Act); Thamae 2016 Lesotho Law Journal 48, 50; Nwafor AO "Clearing the doubts on the concept of derivative action- Lesotho Court of Appeal decision in Concrete Roots (Pty) Ltd v. Lebakeng Tigali- An Opportunity Lost" 2011 *Lesotho Law Journal* 117, 124; Nwafor 2007 *Botswana Law Journal* 82.

³⁶ See Preamble of the *1967 Act*; Nwafor AO "Clearing the doubts on the concept of derivative action- Lesotho Court of Appeal decision in Concrete Roots (Pty) Ltd v. Lebakeng Tigali- An Opportunity Lost" 2011 *Lesotho Law Journal* 117, 124; Nwafor 2007 *Botswana Law Journal* 82.

³⁷ Sections 97, 98, 99, 100, 101 and 102 of the *1967 Act*; Related discussions in Cassim *et al* *Contemporary Company Law* 512-513; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 1. Bottomley 2019 MULR 95, 96.

³⁸ Section 97(7) of the *1967 Act*; Saez MI and Riano D "Corporate Governance and the Shareholders' Meeting: Voting and Litigation" 2013 *European Business Organization Law Review* 343, 346; Lindgren G "Shareholder and Shareholder Participation in the Larger Companies Meetings in Sweden" 1953 *Springer Nature* 281; Baums T and von Randow P "Shareholder Voting and Corporate Governance: the German Experience and a New Approach" 1995 *Corporate Governance in Transitional Economies* 435, 436.

³⁹ Section 27 of the *1967 Act*; Cassim *et al* *Contemporary Company Law* 470; see related discussion in *Jeffery v Pollak and Fremantle* 1938 AD 1 at 18; *Davis v Buffelsfontein Gold Mining Co Ltd* 1967 (4) SA 631 (W) 633.

Once their name was registered, they became a member of that particular company limited by shares. In companies limited by guarantee, normally known as non-profit making or charitable, the word "member" only refers to a company's owner whose name is entered on the register of members by their commitment to pay company debts up to the amount of their guarantee. In this research, the term "shareholder" is used to connote members of companies limited by shares, who have inherent rights to vote in decision making of their company.⁴⁰

The *1967 Act* provided for the requisition of a company's meetings by at least one-twentieth of the total voting rights of all the members having a right to vote at the general meetings of the company.⁴¹ This shows that the *1967 Act* did not encourage the participation of a majority in the passing of company resolutions and this remains a challenge under the current *Companies Act*. The *1967 Act* did not only introduce directors' and shareholders' resolutions, but it also emphasised that no resolution, ordinary nor special, of which notice had not been given in accordance with the articles of incorporation may be passed.⁴² In addition, the *1967 Act* underscored the importance of making company information accessible to shareholders prior to meetings of the company, by issuing certified company reports to every shareholder of the company at least fourteen days prior to convening of the meeting.⁴³ The *1967 Act* appeared to have appreciated the fact that shareholders might only be in a better position to exercise their decision making powers or to pass resolutions in company meetings when they were informed about the

⁴⁰ Cassim *et al Contemporary Company Law* 469; see related in *Valencia Holdings 13 (Pty) Limited and Others v Armitage N.O.* (A5043/2020) [2022] ZAGPJHC 92 (23 February 2022) para 1; Aquila FJ "Shareholder Rights and Activism Review" 2017 *The Legal Reviews* 1, 5; Section 62 Part I of the *1967 Act*.

⁴¹ Section 99(1) of the *1967 Act*; see related discussion by Cassim *et al Contemporary Company Law* 494; *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd* 2013 JDR 0453 GSJ para 27; *Butler v Van Zyl (554/13) [2014] ZASCA 81 (30 May 2014)* para 21.

⁴² Section 97(7) of the *1967 Act*; *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd* 2013 JDR 0453 GSJ para 28; *Yao v Meriti Holdings (Pty) Ltd (CCA/0018/2019)* [2022] LSHC 143; see a related discussion in *Baptista N.O. and Others v Quickstep 684 (Pty) Ltd and Others* Case No: 38204/2022 paras 13 and 14.

⁴³ Section 97(2) of the *1967 Act*; *Davis v Clutchco (PTY) Ltd* (1289/03) [2003] ZAWCHC 23 para 1; *Cape Metropolitan Council v Metro Inspection Services CC* 2001 (3) SA 1013 para 28; Cassim *et al Contemporary Company Law* 530.

performance of the company well in advance. In this regard, the researcher submits that the *1967 Act* ensured that directors' and shareholders' resolutions were well informed and all relevant parties were given an opportunity to participate.

The *1967 Act* provided for an expeditious recourse to shareholders when company directors failed to convene the requested meeting within twenty-one days.⁴⁴ The recourse in terms of the *1967 Act* was that shareholders were authorised to convene the meeting on their own, and to have expenses that might have been incurred in convening the meeting reimbursed by the company.⁴⁵ As a result, the *1967 Act* relatively safeguarded shareholders against arbitrary use of directors' powers by providing for a statutory remedy. Hence, shareholders were provided with a speedy and practical alternative relief to enforce their participation rights in courts of law every time such participation rights were violated. By adopting this approach, the *1967 Act* alleviated unnecessary floodgates of corporate litigation that could have been avoided by a simple provision of law. In addition, the *Act* criminalised failure by any company officer who was knowingly a party to a default in convening the requested meeting.⁴⁶ Thus far, the researcher submits that, the provisions of the *1967 Act* comparatively promoted and protected shareholders' rights of decision making in companies they invested in. However, the same cannot be said about the *Companies Act*, as it does not provide speedy remedies to shareholders nor does it provide for criminal sanctions against arbitrary use of powers by directors. This is not to imply that the *1967 Act* was perfect. The *1967 Act* did not provide for the removal of a director by other directors. Shareholders were generally given excessive bargaining

⁴⁴ Section 99(3) of the *1967 Act*; see a related discussion by McNally J "UK Shareholder Activism" 2014 *SchulteRoth&Zabel* 1; *Koh v Ellipsiz Communications Ltd* 2017 ONSC 3083 paras 40 and 41. Todica C "Controversial Aspects of the Administrators's Duty of Convening a General Meeting of Shareholders and the Consequences of Breach in it. Solutions of Judicial Practice" 2015 *Conferinta Internationala de Drept, Studii Europene si Relatii Internationale* 141, 142.

⁴⁵ Section 99(5) of the *1967 Act*; McNally 2014 *SchulteRot and Zabel* 1; see related discussion in Saez and Riano 2013 *European Business Organization Law Review* 346, 347; Lindgren 1953 *Springer Nature* 281.

⁴⁶ Section 99(6) of the *1967 Act*; Cohen MA "Theories of Punishment and Empirical Trends in Corporate Criminal Sanctions" 1996 *Managerial and Decision Economics* 399, 402; see related discussion in Alexander CR "Corporate Crime, Markets and Enforcement: A Review" *New Perspectives on Economic Crime* 20, 23; Mattarella BG "The Conflicts of Interests of Public Officers: Rules, Checks and Penalties" 2014 *Corruption and Conflicts of Interest* 30, 32.

powers at the expense of company directors who got punished for corporate offences they could have avoided where they were given discretionary powers to exercise in the best interests of companies they owe fiduciary duties. For example, failure by directors and other officers of the company to hold a meeting requested by shareholders was automatically a punishable offence.⁴⁷ The *1967 Act* created no room for directors to justify their refusal to convene a requested meeting. It follows that, compromised powers of directors in the making of resolutions that could have been in the best interests of the company were likely to impede the directors' general performance in their management duties. More than 40 years later, the *Companies Act* repealed the *1967 Act*. A development prompted by the current *Companies Act* among others, is the provision for directors' attendance of meetings in person or virtually.⁴⁸ However, assuming by audio and audio-visual connections the legislature implied electronic participation, the wording of the section is not up to date. It is noted that electronic participation of shareholders in contact meetings is impliedly provided for in the *Companies Regulations*.⁴⁹ The *Regulations* indicate that in determining attendance, shareholders who are not in the same place as others are considered to have attended.⁵⁰

⁴⁷ Section 99(6) of the *1967 Act*; Cohen "Theories of Punishment" 1996 *Managerial and Decision Economics* 399, 402; see related discussion in Alexander "Corporate Crime" *New Perspectives on Economic Crime* 20, 23; Mattarella "The Conflicts of Interests of Public Officers: Rules, Checks and Penalties" 2014 *Corruption and Conflicts of Interest* 30, 32.

⁴⁸ Section 64(2)(d) of the *Companies Act*; Boros "Virtual Shareholder Meetings" 2004 *Melbourne University Law Review* 265, 266; Koh "Irregularities in Procedure" 2012 *Singapore Journal of Legal Studies* 467, 468; see related discussion in *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 15.

⁴⁹ Companies Regulations Articles 33(5) of Private Companies and 35(5) of Public Companies; Boros "Virtual Shareholder Meetings" 2004 *Melbourne University Law Review* 265, 266; Koh "Irregularities in Procedure" 2012 *Singapore Journal of Legal Studies* 467, 468; see related discussion in *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 15.

⁵⁰ Companies Regulations Articles 33(4) of Private Companies and 35(4) of Public Companies; Boros "Virtual Shareholder Meetings" 2004 *Melbourne University Law Review* 265, 266; Koh "Irregularities in Procedure" 2012 *Singapore Journal of Legal Studies* 467, 468; see related discussion in *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 15.

1.3.1 Motivation

1.3.1.1 Rationale of the study

This research investigates whether the directors and shareholders' resolutions are adequately regulated under the *Companies Act*. This is important in understanding regulatory challenges of directors' and shareholders' company resolution processes in Lesotho. This research seeks to provide insights into the challenges affecting the enjoyment of participation rights of directors, shareholders and other relevant stakeholders in Lesotho. Possible measures on how these challenges may be addressed are also provided in Chapter Five. Therefore, this research will hopefully contribute to the adoption of adequate and fair company resolutions by directors and shareholders for the benefit of all relevant stakeholders in Lesotho under the *Companies Act*.

1.3.1.2 Limitations of the study

The research is limited to the relevant case law, other scholarly sources such as articles and journals and provisions of the *Companies Act* dealing with directors and shareholders' and resolutions. This follows that this research is centred on addressing challenges affecting directors and shareholders' resolution in Lesotho companies only. However, the research also makes reference to other statutes that are historically relevant to the study in order to understand the evolvement of directors and shareholders' resolutions in Lesotho.

1.3.3 Research Question

This research seeks to address the following question:

Does the *Companies Act* adequately provide for the fair and adequate promotion and protection of all relevant persons during the making and adoption of directors and shareholders' company resolutions in Lesotho?

1.4 Aims and Objectives

1.4.1 Aims

For the purpose of this research, aims include the overall goals and/or targets that are generally expected to be achieved by the researcher at the end of this research. Therefore, this research seeks to:

- a. provide an overview of the relevant provisions of the *Companies Act* to determine their adequacy in promoting directors and shareholders' company resolutions in Lesotho;
- b. examine the importance of directors and shareholders' resolutions under the *Companies Act*; and
- c. identify the challenges and flaws affecting the directors and shareholders' resolutions under the *Companies Act*.

1.4.2 Objectives

For the purposes of this research, objectives include any measures or specific stages that are undertaken by the researcher to achieve the overall goals and aims of the research. To achieve the aforesaid aims, the researcher:

- a. evaluates the regulation and enforcement of directors and shareholders' resolutions under the *Companies Act*;
- b. discusses possible measures that could be utilised for the purposes of monitoring, protecting and promoting the adequate regulation of the directors and shareholder's company resolution processes under the *Companies Act*; and
- c. recommends possible measures that could be used by policymakers and other relevant stakeholders to promote the effective participation of non-executive directors and minority shareholders in the making of company resolutions

1.5 Research Methodology

This research uses a qualitative research methodology based on a literature review. Qualitative research methodology refers to the collection and analysis of primary and secondary sources of law to understand opinions, concepts or experiences. The researcher utilises this methodology as it best serves the purpose of unpacking the regulatory flaws

and challenges affecting the adoption and enforcement of directors and shareholders' resolutions under the *Companies Act*. The following research methods are used:

a. Primary and Secondary Sources

This research analyses primary and secondary sources. The primary sources will include legislation and relevant case law. The secondary sources consist of journal articles, books and other internet sources relating to directors and shareholders' company resolutions in Lesotho. For the purpose of this research, the North West University *Potchefstroom Electronic Law Journal* Referencing style is utilised.

b. Relevant Legislation

The relevant provisions of the *Companies Act* are discussed to determine their adequacy in relation to the promotion of fairness and protection of minority shareholders and non-executive directors' decision making rights. The researcher also discusses other relevant legislation dealing with the regulation of directors and shareholders' company resolutions in Lesotho.

c. Relevant Case Law

Relevant case law dealing with directors and shareholders' company resolutions under the Companies Act is discussed. Due to limited case law on the topic in Lesotho, only a few relevant cases are discussed in Lesotho and South Africa. This is because both South Africa and Lesotho share their legal origin in Roman-Dutch Law and, therefore, South African precedents are persuasive to courts in Lesotho.

d. Historical Background

This method is used in Chapter Two of this research where the development of directors and shareholders' resolutions is traced from 1967 to date. This follows that the first legislation regulating directors and shareholder' resolution in Lesotho was enacted in 1967. The *1967 Act* is discussed in this chapter to provide a historical context of the topic.

1.6 Framework of Chapters

This research has five chapters as outlined below:

Chapter One provides the research outline and context. It contains the background on which the study is based. It also includes the problem statement, research question, aims and objectives, rationale of the study, limitation of the study and research methodology.

Chapter Two is the historical overview of the regulation directors and shareholders' resolutions under the *Companies Act* in Lesotho. This historical overview is traced from 1967 to date. The regulation of directors and shareholders' resolutions in Lesotho is traced from 1967 to date because directors and shareholders' resolutions were first regulated in 1967 when the *1976 Act* was enacted. This is done to unpack the historical development of directors' and shareholders' decision making rights in Lesotho.

Chapter Three discusses the current regulatory framework of the directors and shareholders' resolutions under the *Companies Act* in Lesotho. This chapter explores the relevant provisions of the *Companies Act* that regulate directors' and shareholders' resolutions in Lesotho. This is done in order to determine their relevance, competence and robustness in addressing the challenges affecting the participation of directors and shareholders in making company resolutions. The chapter also discusses whether the regulation of directors and shareholders' resolutions promotes adequate participation of all company stakeholders under the *Companies Act*.

Chapter Four identifies flaws in the current regulatory framework for directors and shareholders' resolutions. It also explores the challenges affecting directors and shareholders' company resolutions under the *Companies Act* to determine how they affect the growth and longevity of public companies in Lesotho.

Chapter Five provides recommendations and a conclusion. It proposes some measures that could be implemented to address the challenges and flaws identified in Chapter Four of the research. This is done to improve the current regulation of directors and shareholders' resolutions and protect minority shareholders against possible abuse by majority shareholders. These resolutions should promote appropriate and adequate participation of directors and shareholders in all matters affecting the companies in terms of the *Companies Act*.

1.7 Relevance for Research Unit

This research focuses on the overview of regulatory challenges of directors and shareholders' resolutions in Lesotho. Accordingly, the research falls under Finance, Trade and Innovation of the Research Unit of the Faculty of Law. The research examines the relevant provisions of the *Companies Act* that deal with directors and shareholders' resolutions. This is done to identify challenges facing directors and shareholders in making resolutions with the aim of recommending measures that will promote the active participation of all directors and shareholders under the *Companies Act*. It is hoped that some parts of this research will be published as journal articles and/or book chapters.

1.8 Statement Regarding Ethics

This research uses a qualitative research method. All primary and secondary sources that are used are properly referenced and acknowledged fully. No individuals or group interviews or questionnaires were used to hold discussions concerning any topics or issues that might be sensitive, embarrassing or upsetting. No interviews or questionnaires were held with individuals or a group of people to collect information for this research. No criminal disclosures or other disclosures which require legal action and/or those that can cause adverse effects, risk or danger to research participants were done during this research. Therefore, there is no need to plan for insurance and/or indemnity to provide for the potential legal liability of the university caused by harm to participants due to this research.

CHAPTER TWO

HISTORICAL OVERVIEW OF THE REGULATION OF DIRECTORS AND SHAREHOLDERS' RESOLUTIONS IN LESOTHO

2.1 Introduction

The history of entrepreneurship in Lesotho is primitive. Running a business has always been a survival venture that is not intended to grow beyond a sole proprietorship into a big endeavour like a company. Due to lack of capital or finance for small businesses, and lack of business education, doing business in Lesotho has been a challenging venture for local entrepreneurs.⁵¹ As a result, natives have not been enticed or encouraged to consider entrepreneurship as a lucrative career. Nonetheless, running a small business in which one man is the sole decision maker had mostly been the only way Basotho traders knew how. Upon independence in 1966, small-scale commerce was one of the prevalent economic activities practised in Lesotho.⁵² Small businesses were long licenced as General Dealers by a Proclamation⁵³ that consolidated most colonial laws relating to trade. This chapter discusses the historical overview of the regulation of directors and shareholders' resolutions in Lesotho from 1967 to 2011. Prior to 1967, the formation of companies was a foreign concept in Lesotho. It was only then that company laws were promulgated to fill the gap in the economy.

⁵¹ International Labour Office "The Enabling Environment for Sustainable Enterprises in Lesotho" 2014 *International Labour Organisation* 62; see related discussion in Keegan T "Trade, Accumulation and Impoverishment: Mercantile Capital and the Economic Transformation of Lesotho and the Conquered Territory, 1870–1920" 1986 *Journal of Southern African Studies* 196, 198; Maliehe S "An Obscured Narrative in the Political Economy of Colonial Commerce in Lesotho, 1870-1966" 2014 *Historia* 28, 31; Ashton H *The Basuto: A Social Study of Traditional and Modern Lesotho* (Oxford University Press, London, London 1967) 167; Machobane LBBJ *Government and Change in Lesotho, 1800-1966: A study of Political Institutions* (Macmillan 1990) 146.

⁵² Keegan "Trade, Accumulation and Impoverishment" 1986 *Journal of Southern African Studies* 196, 198; Maliehe 2014 *Historia* 31; Ashton *The Basuto: Traditional and Modern Lesotho* 167; Machobane *Government and Change in Lesotho* (Macmillan 1990) 146.

⁵³ Proclamation 30 of 1918; see related discussion in Ashton *The Basuto: Traditional and Modern Lesotho* 167; Maliehe 2014 *Historia* 31; Machobane *Government and Change in Lesotho* (Macmillan 1990) 146.

The first *Companies Act* in Lesotho was promulgated in 1967 and came into force the same year.⁵⁴ The word 'member' which referred to a subscriber to the memorandum of association, was used as opposed to 'shareholder'.⁵⁵ Under the *1967 Act*, companies were categorised into companies limited by shares or guarantee and unlimited companies.⁵⁶ It is, therefore, inferred from these divisions that the word member was used in place of shareholder. In addition, the *1967 Act* had umbrella provisions for three types of companies, and specific provisions that were specific to different types of companies. In the *1967 Act*, companies limited by shares were specifically covered by Part I of the First Schedule of the *Act*. Therefore, the historical overview of the regulation of directors and shareholders' resolutions in Lesotho is therefore traced from 1967.

The company law regime under the *1967 Act* was administratively enforced.⁵⁷ This follows the fact that under the *1967 Act*, the Minister responsible for commerce and industry was also tasked with overseeing the general direction and supervision over the administration

⁵⁴ Companies Act 25 of 1967 (*1967 Act*); see related discussion in Khoabane K Protection of the Interests of the Company through Derivative Action under the Lesotho Companies Act 18 of 2011 (LLM Dissertation University of Witwatersrand); Thamae K "Changes Brought by the Companies Act 2011 to Liquidation of Companies in Lesotho" 2016 *Lesotho Law Journal* 47, 47; see application in *Lesotho Public Motor Transport Co. (Pty) Ltd and Another v Mohaleroe and Others* (CIV/APN/264 OF 2009; CIV/APN/504/09) [2010] LSHC 11 (7 July 2010) paras 22 and 23.

⁵⁵ Sections 9 and 62 Part I of the *1967 Act*; Cassim *et al Contemporary Company Law* 469; see related in *Valencia Holdings 13 (Pty) Limited and Others v Armitage N.O.* (A5043/2020) [2022] ZAGPJHC 92 (23 February 2022) para 1; Aquila FJ "Shareholder Rights and Activism Review" 2023 *The Legal Reviews* 130, 131.

⁵⁶ Sections 2, 9 and 10 of the *1967 Act*; Armour J "Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law" 2000 *The Modern Law Review* 355, 356; Jain S "Capital of a Company-Shares and Debentures" 2021 *Social Science Research Network* 1, 2; Lupulescu A "Some Specific Aspects Concerning the Company by Shares" 2019 *Tribuna Juridică* 79, 80.

⁵⁷ Sections 3, 7, 96 and 98(2) 96(8), 97(9), 98(5), 99(6), 110(4), 111(4) of the *1967 Act*; see related discussions in De Lange S "Compliance Notices in Terms of the Companies Act 71 of 2008: Some Observations Regarding the Issuing of and Objection to Compliance Notices" 2018 *SA Mercantile Law Journal* 434, 435; Olivier EA "Regulating against False Corporate Accounting: Does the Companies Act 71 of 2008 Have Sufficient Teeth?" 2021 *SA Mercantile Law Journal* 1, 2. Hedges J, Bird H, Gilligan G, Godwin A and Ramsay I "The Policy and Practice of Enforcement of Directors' Duties by Statutory Agencies in Australia: An Empirical Analysis" 2017 *Melbourne University Law Review* 905, 908-910.

of the *1967 Act*, assisted by the Registrar of Companies.⁵⁸ On the one hand, this administrative landscape guaranteed a certain degree of cost-free and expeditious enforcement of directors and shareholders' rights and resolutions on one hand. On the other hand, its punitive provisions portrayed the legislature's determination to protect shareholders against abuse of the board's or managerial powers,⁵⁹ while empowering directors to execute their powers effortlessly. For example, directors were authorised to make and execute their resolutions relating to call on shares, and further than that their remunerations, meeting and travelling expenses were secured by the company and some of their actions were indemnified out of the company's assets.⁶⁰ Under the *1967 Act*, for resolutions passed at company meetings to be effective, directors had to follow established procedural requirements before, during and after meetings.⁶¹ To date, ineffective company resolutions are not only a waste of time and resources, but are also core bases of corporate disputes and failures.

This chapter discusses the historical overview of the regulation of directors and shareholders' resolutions under the *1967 Act*. The history of directors and shareholders' resolutions in Lesotho is traced from 1967, when the first legislation regulating to company resolutions was enacted, to date. The researcher also highlights how company resolutions have evolved in Lesotho from 1967 to date.

⁵⁸ Sections 3 read with Section 7 of the *1967 Act*; Hedges, Bird, Gilligan, Godwin and Ramsay "The Policy and Practice of Enforcement of Directors' Duties by Statutory Agencies in Australia: An Empirical Analysis" 2017 *Melbourne University Law Review* 905, 906; see related discussions in De Lange 2018 *SA Mercantile Law Journal* 434, 435; Olivier 2021 *SA Mercantile Law Journal* 1, 2.

⁵⁹ Sections 3, 7, 96 and 98(2) 96(8), 97(9), 98(5), 99(6), 110(4), 111(4) of the 1967 Act; see related discussions in De Lange 2018 *SA Mercantile Law Journal* 434, 435; Olivier 2021 *SA Mercantile Law Journal* 1, 2; Hedges et al "The Policy and Practice of Enforcement of Directors' Duties by Statutory Agencies in Australia: An Empirical Analysis" 2017 *Melbourne University Law Review* 905, 908-910.

⁶⁰ Sections 16, 75 and 134 of the First Schedule Part I of the *1967 Act*; Kaen *Blueprint for Corporate Governance: Strategy, Accountability and the Preservation of Shareholder Value* (New-York: AMACOM 2003) 120; Stuart and Crouch *Director's Signpost* (Australian Institute of Company Directors 2013) 6; Schulz DB "Indemnification of Directors and Officers Against Liabilities under Federal Securities Laws" 1995 *Marquette Law Review* 1043, 1044-1047.

⁶¹ Sections 100-105 of the *1967 Act*; see related discussions in De Lange 2018 *SA Mercantile Law Journal* 434, 435; Olivier 2021 *SA Mercantile Law Journal* 1, 2; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* (22312/2015) [2017] ZAGPJHC 334 paras 70-74.

2.2 *The Passing of Directors and Shareholders' Resolutions under the 1967 Act*

The *1967 Act* provided for the passing of company resolutions by directors and shareholders of the company.⁶² Prior to taking a decision, directors were required to determine whether the issue was within their sole purview or that of the company's shareholders. The *1967 Act*⁶³ set out specific matters that required passing by a special resolution, one of them being increasing the company's share capital. A resolution was special when it had been passed by at least three-fourths or seventy-five percent majority vote at a general meeting of which not less than twenty eight days' notice had been given in writing.⁶⁴ All other resolutions at a general meeting were called ordinary resolutions and they required fifty-one percent majority vote and not less than fourteen days' notice in writing.⁶⁵ In the case of a private company, the required notice in writing was seven days.⁶⁶ The researcher submits that considering the foreign nature of companies and shareholding in Lesotho⁶⁷ at the time, the high threshold required for the passing of resolutions was highly unlikely and a theoretical concept. In practice, only the elite and active minority participated in the passing of shareholders' resolutions. Consequently,

⁶² Section 108 of the *1967 Act*; See related discussion in *Wait v Marais and Others* (1707/2021) [2022] ZAEQBHC 41 (1 November 2022) para 10; Cassim *et el Contemporary Company Law* 514-517; *Gouws v Chapman Fund Managers (Pty) Ltd* [2020] 1 All SA 428 GP para 14.

⁶³ Sections 44, 45 and 46 of the First Schedule Part I of the *1967 Act*; Cassim *et el Contemporary Company Law* 514-517; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* (22312/ 2015) [2017] ZAGPJHC 334 para 41; *Gouws v Chapman Fund Managers (Pty) Ltd* [2020] 1 All SA 428 GP para 3.

⁶⁴ Section 107(1) of the *1967 Act*; Cassim *et el Contemporary Company Law* 514; *Netcare Hospital Group (Pty) Ltd v Afri Nnai Health (Pty) Ltd and Others* [2015] ZAFSHC 40; *DH Brothers Industries v Gribnitz NO and Others* [2013] ZAKZPHC 56,

⁶⁵ Sections 106(5) and 100(1) of the *1967 Act*; Cassim *et el Contemporary Company Law* 514; *Netcare Hospital Group (Pty) Ltd v Afri Nnai Health (Pty) Ltd and Others* [2015] ZAFSHC 40; *DH Brothers Industries v Gribnitz NO and Others* [2013] ZAKZPHC 56,

⁶⁶ Section 52 First Schedule Part I of the *1967 Act*; Cassim *et el Contemporary Company Law* 514; *Netcare Hospital Group (Pty) Ltd v Afri Nnai Health (Pty) Ltd and Others* [2015] ZAFSHC 40; *DH Brothers Industries v Gribnitz NO and Others* [2013] ZAKZPHC 56.

⁶⁷ Proclamations and Notices 1918; Ashton *The Basuto* (London 1967) 167; Maliehe "Colonial Commerce in Lesotho, 1870-1966" 2014 *Historia* 28, 31; Machobane *Government and Change in Lesotho* (Macmillan 1990) 146.

provisions that purported to achieve majority representation in decision making were both fallacious and futile.

According to the *1967 Act*, shares could be forfeited by a resolution of directors, subject to prior notice being given to an indebted shareholder to settle payment in not less than fourteen days.⁶⁸ This time-frame disregarded postage being the primary, but sluggish mode of communication in Lesotho at the time. The mountainous terrain of the country contributed to this challenge as it took long for postage to deliver mail in the highlands and remote areas of the country. As a result, in most instances, shareholders were likely to receive notice of meetings after the fourteen days' notice period had lapsed. The participation of shareholders in company resolutions was affected by the geographical conditions that the legislature ought to have not taken into consideration under the *1967 Act*. The case of *Yao v Meriti Holdings (Pty) Ltd*⁶⁹ is a relevant example. In this case, a shareholder was ousted by a director's resolution, following the issue of notices of meetings that were found to have been posted and registered only after the meeting was held. Although in this particular case this was a strategy meant to defeat the purpose of giving notice of meetings and to sabotage the shareholder, the facts of the case revealed the complexities of being a shareholder in a technologically less advanced regime. The lack of good technological infrastructure affected communication amongst directors and shareholders and as a result compromised the fair passing of company resolutions.

Furthermore, directors were empowered to fill casual vacancies or add a director to the board, by appointing other directors.⁷⁰ Nonetheless, the *1967 Act* was silent on whether

⁶⁸ Sections 33, 34 and 35 First Schedule Part I of the *1967 Act*; *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 paras 7 and 20; De Lange 2018 *SA Mercantile Law Journal* 434, 435; Olivier 2021 *SA Mercantile Law Journal* 1, 2.

⁶⁹ *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 paras 7 and 20; Section 129 of First Schedule Part I of the *1967 Act*; See related discussion in De Lange 2018 *SA Mercantile Law Journal* 434, 435; related discussion in Olivier 2021 *SA Mercantile Law Journal* 1, 2.

⁷⁰ Section 94 of the First Schedule Part I of the *1967 Act*; related discussion in Cassim *et al* *Contemporary Company Law* 540-551; see related discussion in *Octavia Matshidiso Matloa v Multichoice South Africa* (Gauteng Division) (unreported) case number 40731/2019 of 6 February 2020; Stuart and Crouch *Director's Signpost* 4.

directors had powers, on statutory grounds,⁷¹ to remove another director from office prior to the Annual General Meeting (AGM). It was unclear as to whether the power to appoint directors automatically included the power to remove them by a company resolution. Therefore, *the 1967 Act* failed to expressly provide for the removal of a director from office by a resolution of fellow directors. Consequent to the omission is a possibility that an insolvent or dishonest director, or a director of an unsound mind, would continue exercising their duties despite being statutorily disqualified,⁷² at least until a shareholders' meeting is convened and a resolution for their removal is successfully passed. One may argue that the power to appoint impliedly included the power to remove. However, it can also be argued that, if that was the intention, the legislature would have unequivocally empowered directors to remove a fellow director on grounds of disqualification. The controversy surrounding removal of a statutorily disqualified director by other directors was one other challenge that affected the passing of company resolutions by directors and shareholders under the *1967 Act*, especially when the disqualified director was a majority shareholder who could outvote a resolution for his removal.

2.3 Procedural Requirements for Directors and Shareholders' Resolutions under the 1967 Act

2.3.1 Notice of Directors and Shareholders' Meetings under the 1967 Act

Company meetings could not be held and convened without issuing sufficient notices according to the provisions of the *1967 Act*.⁷³ This legal position was evident by a ruling in

⁷¹ Section 87 of the First Schedule Part I of the *1967 Act*; *Octavia Matshidiso Matloa v Multichoice South Africa* (Gauteng Division) (unreported) case number 40731/2019 of 6 February 2020; related discussion in *Lesotho Public Motor Transport Co. (Pty) Ltd and Another v Mohaleroe and Others* (CIV/APN/264 OF 2009; CIV/APN/504/09) [2010] LSHC 11 (7 July 2010) para 34; see related in *Nusca v Da Ponte* 1994 (3) SA 251 (BG) 258-259.

⁷² Section 87 First Schedule Part I of the *1967 Act*; *Lesotho Public Motor Transport Co. (Pty) Ltd and Another v Mohaleroe and Others* (CIV/APN/264 OF 2009 para 34; CIV/APN/504/09) [2010] LSHC 11 (7 July 2010) para 22 and 23, see related discussion in *Netcare Hospital Group (Pty) Ltd v Afri 'Nai Health (Pty) Ltd and Others* (2530/2014) [2015] ZAFSHC 40 (26 February 2015) para 25; *Wait v Marais and Others* (1707/2021) [2022] ZAECQBHC 41 (1 November 2022) para 29.

⁷³ Sections 107 read with 108 of the *1967 Act*; Sections 50 and 129 of First Schedule Part I of the *1967 Act*; *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 paras 7 and 20; *Lesotho Public Motor Transport Co. (Pty) Ltd and Another v Mohaleroe and Others* (CIV/APN/264 OF 2009;

Lesotho Public Motor Transport Co. (Pty) Ltd and Another v Mohaleroe and Others.⁷⁴ Acting Justice J.D. Lyons applied the provisions of the *1967 Act* pertaining to validity of shareholders' meetings in which special resolutions passed in shareholders' meetings required special notice of twenty eight days. He emphasized that consequent to a one day's notice of a shareholders' meeting purporting to appoint one Mr. Mohaleroe a director through a special resolution, such appointment was ineffective for not complying with the statutory twenty eight days' notice. In terms of the *1967 Act*, an annual general meeting (AGM) required twenty one days' notice in writing, while all other ordinary company meetings required fourteen days' notice in writing in a public company and seven days' notice in writing in a private company.⁷⁵ The notice had to specify the agenda, the place, the day and time of the meeting.⁷⁶ Notice of a general meeting could include a prescription of the items of business such as financial statements.⁷⁷ If a special resolution was to be passed at a general meeting, the notice had to specify the intention to propose the resolution as a special resolution and its terms.⁷⁸ Unless sufficient notice was given, a special resolution could not be passed at the general meeting. The required notice of meetings depended on the type of meeting being convened and the nature of the

CIV/APN/504/09) [2010] LSHC 11 (7 July 2010) para 21; see related discussion in De Lange 2018 *SA Mercantile Law Journal* 434, 435.

⁷⁴ *Lesotho Public Motor Transport Co. (Pty) Ltd and Another v Mohaleroe and Others* (CIV/APN/264 OF 2009; CIV/APN/504/09) [2010] LSHC 11 (7 July 2010) para 21; Sections 107 read with 108 of the *1967 Act*; Sections 50 and 129 of First Schedule Part I of the *1967 Act*; see related discussion in see related discussion in *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd* 2013 JDR 0452 paras 26 and 28; see De Lange 2018 *SA Mercantile Law Journal* 434, 435.

⁷⁵ Section 100(1) of the *1967 Act*; see related discussion in Cassim *et al Contemporary Company Law* 499-502; see De Lange 2018 *SA Mercantile Law Journal* 434, 435; see related discussion in Olivier 2021 *SA Mercantile Law Journal* 1, 2.

⁷⁶ Section 103 of the *1967 Act*; see related discussions in Olivier 2021 *SA Mercantile Law Journal* 1, 2; De Lange 2018 *SA Mercantile Law Journal* 434, 435; Cassim *et al Contemporary Company Law* 501.

⁷⁷ Sections 97 and 100 of the *1967 Act* read with 50 of First Schedule Part I of the *1967 Act*; see related in Cassim *et al Contemporary Company Law* 499-502; see a related discussion by McNally 2014 *SchulteRoth&Zabel* 1,3; see *Koh v Ellipsiz Communications Ltd* 2017 ONSC 3083 paras 40 and 41.

⁷⁸ Sections 104 and 106 of the *1967 Act*; see related in Cassim *et al Contemporary Company Law* 499-502; see a related discussion in *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* (22312/ 2015) [2017] ZAGPJHC 334 paras 70-74; see *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd* 2013 JDR 0452 para 28.

company. For example, a private company required a seven days' notice in writing.⁷⁹ The required notice of meetings was shorter in private companies probably because the number of shareholders was relatively few, making the distribution of notices proximate and faster. If it was not possible to give notice to every shareholder at a time, notice of meetings could be given to shareholders simultaneously through an advertisement in a newspaper circulating in Lesotho.⁸⁰ This is because, at the time of the enactment of the *1967 Act*, the common mode of communication in Lesotho was post,⁸¹ which was sluggish and difficult to reach all mountainous areas of the country. The newspaper advertisement for distributing notices of meetings was a faster alternative mode of communication that concurrently reached as many shareholders as possible.

The *1967 Act* provided for meetings to be duly called notwithstanding the short notice. However, subsequent ratification was sought by the company from all or majority shareholders that had a right to attend and vote at AGMs or any other meetings respectively.⁸² Matters that could be addressed at an AGM included any resolution of which notice was given. Nevertheless, a notice of meeting would be deemed to have been so given, notwithstanding the accidental omission in giving it to one or more shareholders.⁸³ Thus, if a company gave a short notice of an ordinary meeting to a

⁷⁹ Section 100(1) of the *1967 Act*; see related in Shamsuddeen M, Yaacob N and Mohamed Yusoff Z "The Application Towards Improving Notice of Meeting Under the Nigerian Company Law" 2018 *The European Proceedings of Social & Behavioural Sciences* 92, 93; related discussion in Cassim *et al* *Contemporary Company Law* 499-502; see *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd* 2013 JDR 0452 para 28.

⁸⁰ Section 107(1) of the *1967 Act*; see related discussion in Shamsuddeen *et al* 2018 *The European Proceedings of Social & Behavioural Sciences* 92, 93; see Cassim *et al* *Contemporary Company Law* 499-502; see related in *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd* 2013 JDR 0452 para 28.

⁸¹ Section 129 of First Schedule Part I of the *1967 Act*; see Shamsuddeen *et al* 2018 *The European Proceedings of Social & Behavioural Sciences* 92, 93; see related in Cassim *et al* *Contemporary Company Law* 499-502; see *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd* 2013 JDR 0452 para 28.

⁸² Section 100 of the *1967 Act*; section 50 of First Schedule Part I of the *1967 Act*; Cassim *et al* *Contemporary Company Law* 499-502; *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd* 2013 JDR 0452 para 28; Shamsuddeen *et al* 2018 *The European Proceedings* 92, 93.

⁸³ Sections 100 and 105(6) of the *1967 Act*; Section 50 of First Schedule Part I of the *1967 Act*; see a related discussion *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd* 2013 JDR 0452 para 28; *Trinity Asset Management (Pty) Ltd v Investec Bank Ltd* 2009 (4) SA 89 (SCA) para 22.

shareholder who was entitled to receive it, or accidentally omitted to give them a notice of such ordinary meeting altogether, there was a minimal risk that resolutions passed at that meeting would be invalid. This was due to the fact that the *1967 Act* expressly provided that an accidental failure to give notice of a meeting to one or more shareholders or non-receipt of a notice of the meeting would not invalidate proceedings of the ordinary meeting.⁸⁴

The *1967 Act* did not provide examples or a list of scenarios that qualified as accidental failure to give notice of meetings. Accordingly, the researcher argues that this provision was vague and ambiguous and affected the participation of shareholders in company resolutions. The effective serving of notice of meetings improves shareholder participation in decision making and the passing of resolutions.⁸⁵ Sufficient notice of meetings secures the shareholders' physical attendance and also underscores the importance of making company information accessible to members prior to meetings for their informed deliberations on the agenda.⁸⁶ In this regard, the researcher submits that notice of meetings is crucial for the passing of representative and sound directors and shareholders' resolutions in a company. Therefore, the *1967 Act* failed to adequately regulate the issuing of notice of meetings for shareholder participation.

2.3.2 Requirements of Directors and Shareholders' Meetings under the 1967 Act

A company is a juristic person and it makes decisions through its directors and shareholders by way of passing resolutions at validly held meetings.⁸⁷ Determining what

⁸⁴ Sections 50 and 51 of First Schedule Part I of the *1967 Act*; see a related discussion *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd* 2013 JDR 0452 para 28; *Trinity Asset Management (Pty) Ltd v Investec Bank Ltd* 2009 (4) SA 89 (SCA) para 22; *Juspoint Nominees (Pty) Ltd v Sovereign Food Investments Limited* (878/16) [2016] ZACPEHC 15 (26 April 2016) para 84.

⁸⁵ Section 50 of First Schedule Part I of the *1967 Act* see a related discussion *Van Zyl v NucoChrome Bophuthatswana (Pty) Ltd* 2013JDR 0452 para 28; *Trinity Asset Management (Pty) Ltd v Investec Bank Ltd* 2009 (4) SA 89 (SCA) para 22; Cassim *et al Contemporary Company Law* 502-503.

⁸⁶ Section 97 (2) of the *1967 Act*; *Wait v Marais and Others* (1707/2021) [2022] ZAEQBHC 41 (1 November 2022) para 10; *Trinity Asset Management (Pty) Ltd v Investec Bank Ltd* 2009 (4) SA 89 (SCA) para 22; Cassim *et al Contemporary Company Law* 502.

⁸⁷ Cassim *et al Contemporary Company Law* 2nd ed (Juta and Co Ltd Claremont 2012) 41; Nwafor AO *Comparative Company Law* (Malthouse Press Ltd, Nigeria 2020) 179; Pickering 1968 *The Modern Law Review* 481-511.

constitutes valid meetings under the *1967 Act* is of utmost importance.⁸⁸ The board of directors were generally assigned to call meetings.⁸⁹ However, the *Act* provided that any individual director or two shareholders could call a meeting when some directors were out of the country, unless those present within the country did not form a quorum.⁹⁰ If the default was made in calling an AGM, the Minister could, on application by any shareholder, call or direct the convening of the general meeting by one shareholder.⁹¹ The *1967 Act* also provided for extraordinary meetings held on the requisition of not less than one-twentieth of company shareholders.⁹²

Provisions on meetings were clear and authorised both directors and shareholders to call meetings whenever they needed to voice their concerns, deliberate on them and ultimately pass relevant resolutions.⁹³ The *1967 Act* also provided time frames within which directors had to act on shareholders' demands for meetings.⁹⁴ The shareholders

⁸⁸ Sections 97, 98 and 99 read with Section 47 First Schedule Part I of the *1967 Act*; Boros 2004 Melbourne University Law Review 265, 266; Koh P "Irregularities in Procedure" 2012 *Singapore Journal of Legal Studies* 467; *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 15.

⁸⁹ Section 97(2) read with Section 49 First Schedule Part I of the *1967 Act*; Stuart D and Crouch E *Director's Signpost: Your Guide to Directorship* 4; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 paras 4 and 44.

⁹⁰ Section 47 of the First Schedule Part I of the *1967 Act*; Gopal M "Impracticability and the Court's Power to Convene a Company Meeting" 1982 *National University of Singapore Faculty of Law* 248, Koh P 2012 *Singapore Journal of Legal Studies* 467; *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 15.

⁹¹ Section 98(2) of the *1967 Act*; Gopal 1982 *National University of Singapore* 248; Koh 2012 *Singapore Journal of Legal Studies* 467; *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 15.

⁹² Section 99(1) of the *1967 Act*; Alam MK "Company Members' Meetings in Bangladesh and the United Kingdom: Convergence and Diversity" 2013 *Dhaka University Studies Company Members'* 1; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 paras 4 and 44; Stuart and Crouch *Director's Signpost*.

⁹³ Section 99 of the *1967 Act*; Section 49 of the First Schedule Part I of the *1967 Act*; see related discussion in *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 44; Alam 2013 *Dhaka University Studies Company Members'* 1, 2; Stuart and Crouch *Director's Signpost* 4.

⁹⁴ Section 99 of the *1967 Act*; Gopal "Impracticability and the Court's Power to Convene a Company Meeting" 1982 *National University of Singapore Faculty of Law* 248; *Linake & Another v Chairman*

were authorised to conduct meetings without the authorisation of directors should directors fail to respond and act timeously to their call. Consequently, directors could not maliciously ignore the call for a meeting by shareholders without any consequences. This enabled shareholders to participate in company resolutions regardless of the lack of support from directors. The researcher submits that this provision could have been a measure by the legislature to avoid litigation instituted by disgruntled shareholders. The recent Lesotho High court decision in the case of *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd*⁹⁵ shows how courts are loath to intervene in the running of a company. The court held that approaching the courts of law to compel a board to call a meeting, was company law contra-intuitive.⁹⁶

Under the *1967 Act*, requisitionists were at liberty to go ahead and convene a meeting on their own, provided that they clearly stated the object of the meeting and made up half of the total voting rights.⁹⁷ *Prima facie*, section 99 of the *1967 Act* promoted shareholder activism. However, the researcher argues that this provision undermined the directors' fiduciary duty to act in the best interests of the company. As a result, the provision could likely be abused by vexatious shareholders who would lobby for meetings only to pass resolutions that destabilise even healthy companies. This follows that the provision precluded directors from evaluating the purpose of the meeting and if need be, refuse such request on reasonable grounds. For example, on the basis that the meeting was frivolous or there was a likelihood of passing a resolution that oppressed the minority

of the Board: Naledi Funeral Planners (Pty) Ltd [2022] LSHC 230 Comm. (27TH OCTOBER 2022) para 12; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 44.

⁹⁵ *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd* [2022] LSHC 230 Comm. (27TH OCTOBER 2022) para 16; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 84; Gopal 1982 National University of Singapore Faculty of Law 248, 248; Alam 2013 *Dhaka University Studies Company Members'* 1, 2; Stuart and Crouch *Director's Signpost* 4.

⁹⁶ Section 61(3) of the *Companies Act*; *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd* [2022] LSHC 230 Comm. (27TH OCTOBER 2022) para 16; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 84; Alam 2013 *Dhaka University Studies Company Members'* 1; Stuart D and Crouch E *Director's Signpost* 4.

⁹⁷ Section 99 of the *1967 Act*; Alam 2013 *Dhaka University Studies Company Members'* 1; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 paras 4 and 44; Stuart and Crouch *Director's Signpost* 4.

shareholders. On the contrary, it can be submitted that the provision limited the powers of directors and prevented arbitrary use of powers by majority shareholders at the expense of minority shareholders.

The *1967 Act* authorised one shareholder to call a company meeting in the absence of sufficient directors in Lesotho.⁹⁸ The purpose of this provision was to promote and prioritise the interests of the company. Furthermore, in default to hold an AGM of the company, one shareholder or their proxy could successfully apply for a meeting from the Minister and convene such meeting alone upon failure of other company stakeholders to show up.⁹⁹ However, the provision remained ambiguous to the extent that it did not expressly indicate whether a shareholder/proxy could pass resolutions in their solo meeting and the type of resolutions that could be passed in such meeting. The provision itself tended to undermine the importance of an AGM. It is at the AGM that distributions are declared and financial statements are approved. It is impractical to imagine a shareholder or proxy successfully holding an AGM in the absence of all stakeholders, particularly the board of directors in whose hands the company management is. The other challenge was whether the Minister could use his administrative powers to enforce resolutions that could be passed by a single shareholder or proxy. For example, the removal of directors from office.

2.3.3 Directors and Shareholders' Quorums in Passing Company Resolutions under the 1967 Act

A quorum prominently contributes in the decision making process of both directors and shareholders. A quorum is a number of qualified persons, required to officially hold a meeting and validly carry out business.¹⁰⁰ Under the *1967 Act*, whereas the quorum for

⁹⁸ Section 49 of the First Schedule Part I of the *1967 Act*; see related discussion in *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2019] ZASCA 53 (SCA) para 44; Alam 2013 *Dhaka University Studies Company Members' 1*; Stuart and Crouch *Director's Signpost 4*.

⁹⁹ Section 99 of the *1967 Act*; see related discussion in *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2019] ZASCA 53 (SCA) para 14; Alam 2013 *Dhaka University Studies Company Members' 1*; Stuart and Crouch *Director's Signpost 4*.

¹⁰⁰ Cassim *et al Contemporary Company Law 508*; *Henderson v James Louttit & Co Ltd* (1894) 21 Rettie 674, 676; *Ensemble Hotel Holdings (Pty) Limited and Another v Swamvest 328 (Pty) Limited and Others* (2022/058058) [2024] ZAGPJHC 81 (6 February 2024) para 23; Charlety P, Fagart MC and

shareholders' meetings was pre-determined to a number of two shareholders in the case of a private company and three shareholders in the case of a public company, present in person, directors were at liberty to fix the quorum necessary for carrying out business of the board, and unless so fixed remained two.¹⁰¹ In meetings, where proposals of resolutions were voted on, quorums were a necessary check against small minorities making significant decisions without a mandate.¹⁰² It was provided no resolution would be passed, at any general meeting, unless a quorum of shareholders was present at the time when the meeting commenced and proceeded through the entire business.¹⁰³ The *1967 Act* further provided that if within half an hour from the time appointed for the meeting a quorum was not present, if convened upon the requisition of shareholders, the meeting would be dissolved. In any other case, the meeting would stand adjourned to the same day in the next week, at the same time and place or to such other day, time and place as directors might determine.¹⁰⁴

In the absence of a quorum, no valid decisions could be made, therefore, decisions were postponed to a later meeting. If at the adjourned meeting a quorum was still not present within half an hour from the time appointed for the meeting, shareholders that were

Souam S "Quorum Rules and Shareholder Voting" 2019 *International Review on Law and Economics* 1, 2.

¹⁰¹ Sections 53 read with 101(1)(c) and 98 of the First Schedule Part I of the *1967 Act*; See related discussion in Cassim *et al Contemporary Company Law* 508; *Henderson v James Louttit & Co Ltd* (1894) 21 Rettie 674, 676; *Ensemble Hotel Holdings (Pty) Limited and Another v Swamvest 328 (Pty) Limited and Others* (2022/058058) [2024] ZAGPJHC 81 (6 February 20244) para 23; Charlety *et al* 2019 *International Review on Law and Economics* 1,2.

¹⁰² Charlety *et al* 2019 *International Review on Law and Economics* 1,2; Flamand S and Troumpounis O "Participation Quorums in Costly Meetings" 2014 *Public Choice* 53, 54; *Ensemble Hotel Holdings (Pty) Limited and Another v Swamvest 328 (Pty) Limited and Others* (2022/058058) [2024] ZAGPJHC 81 (6 February 20244) para 23; Charlety *et al* 2019 *International Review on Law and Economics* 1, 2.

¹⁰³ Section 53 First Schedule Part I of the *1967 Act*; Flamand and Troumpounis 2014 *Public Choice* 53, 54; Cassim *et al Contemporary Company Law* 508; *Henderson v James Louttit & Co Ltd* (1894) 21 Rettie 674, 676.

¹⁰⁴ Section 54 First Schedule Part I of the *1967 Act*; Flamand and Troumpounis 2014 *Public Choice* 53, 54; Cassim *et al Contemporary Company Law* 508; *Henderson v James Louttit & Co Ltd* (1894) 21 Rettie 674, 676; Charlety *et al* 2019 *International Review on Law and Economics* 1,2.

present would form a quorum.¹⁰⁵ The provision was reasonable for fixing shareholders' quorum to the bare minimum of two shareholders in private companies and three in public companies. It is common cause that when the quorum requirement is high and causes a decision to be postponed, the number of participants in the second meeting is likely to decrease. More so, when shareholders were bound by physical attendance of meetings, and some of them had to take long trips to make it to the meeting venue. As such, the quorum requirements under the *1967 Act* were fair. However, the requirement for physical attendance at company meetings posed challenges to the participation of shareholders in passing company resolutions.¹⁰⁶

As shown above, with regard to directors, the quorum necessary for carrying out business such as the passing of resolutions would be determined by directors themselves, and unless so determined, would be two.¹⁰⁷ The flexibility of the provision on directors' quorum underscored directors' empowerment in the administration of the company and passing necessary decisions at the earliest opportunity and convenience. From the provisions, the researcher draws the impression that the purpose of a quorum under the *1967 Act* was to ensure that decisions were made by a sufficiently representative group, thereby safeguarding the interests of all stakeholders. Nonetheless, when majority stakeholders were passive or showed less interest in the decision making process of a corporation, the minority had to take over to ensure company resolutions pass smoothly in the course of business. So the logic accounted for why the Minister could direct that only one shareholder constitute a quorum at the meeting. Nevertheless, the provision erred by not indicating the extent of powers that the solo shareholder could exercise at the individual meeting.

¹⁰⁵ Section 54 First Schedule Part I of the *1967 Act*; see a related discussion in *Foxvest Group (Pty) Ltd and Another v Rocky Park Holdings (Pty) Ltd* Unreported Case No: 20222807 paras 9, 13 and 14; Cassim *et al Contemporary Company Law* 509; *Henderson v James Louttit & Co Ltd* (1894) 21 Rettie 674, 676; Charlety *et al* 2019 *International Review on Law and Economics* 1, 2.

¹⁰⁶ Section 54 First Schedule Part I of the *1967 Act*; Charlety *et al* 2019 *International Review on Law and Economics* 1,2; Cassim *et al Contemporary Company Law* 509; *Henderson v James Louttit & Co Ltd* (1894) 21 Rettie 674, 676.

¹⁰⁷ Section 98 First Schedule Part I of the *1967 Act*; Koh 2012 *Singapore Journal of Legal Studies* 468; Mancuso A *The Corporate Records Handbook: Meetings, Minutes & Resolutions* (Nolo 2022) 13; Cassim *et al Contemporary Company Law* 635.

Furthermore, under the *1967 Act*, directors did not always need to convene and hold physical meetings for the passing of resolutions. A company resolution could be passed in writing and be signed by all directors who were entitled to receive notice of the meeting of the directors.¹⁰⁸ Such a resolution would be as sound and efficacious as if it had been passed at a meeting duly held and convened. Resolutions that are passed in this way are informally known as “round robin” resolutions. They are the quickest and least formal way of passing resolutions without pressure for a quorum that required convening a formal meeting. However, the *1967 Act* did not provide the same for shareholders in order to secure majority participation in decision making. This could have been due to the fact that acquiring the signatures of a scattered number of shareholders could have been impractical.

2.3.4 Directors and Shareholders’ Voting Rights in Passing Company Resolutions under the 1967 Act

Under the *1967 Act*, voting was done by a show of hands, and every shareholder present in person had one vote on a resolution, irrespective of the number of shares held by such shareholder.¹⁰⁹ A proxy appointed to attend a meeting of a company on behalf of the shareholder could give his vote on a poll but not on a show of hands.¹¹⁰ The researcher submits that restricting a proxy’s voting rights to a poll obstructed the decision making rights of absent shareholders. This follows that restricting voting rights of proxies to a poll curtailed absent shareholders’ rights in the passing of company resolutions, considering that proxy representation was at the time the only alternative to securing shareholders’ decision making input in person. As for directors’ meetings, resolutions were passed by a majority of votes of the present directors, and in the case of equality of votes, the

¹⁰⁸ Section 105 First Schedule Part I of the *1967 Act*; see related in Mancuso *The Corporate Records Handbook* (Nolo 2022) 13; see Cassim *et al Contemporary Company Law* 638; *CDH Invest NV v Petrobank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 32; see *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 15.

¹⁰⁹ Section 101(1)(e) of the *1967 Act*; Cassim *et al Contemporary Company Law* 505; *Re HR Harmer Ltd* [1959] 1 WLR 62 at 82; *Samuel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 680.

¹¹⁰ Sections 102(3) of the *1967 Act* and 62 and 67 of the First Schedule Part I of the *1967 Act*; see a related discussion in Cassim *et al Contemporary Company Law* 484; OECD G20/OECD Principles of Corporate Governance 22; see related discussion in *Van Zyl v Nuco Chrome Boputatswana (Pty) Ltd* 2013 JDR 0452 para 24.

chairman had a second vote otherwise known as a casting vote.¹¹¹ The provision was fair and clearly articulated.

2.4 Conclusion

From the above discussion, the researcher draws a conclusion that except being an old piece of legislation with devalued penalties, the *1967 Act* was almost balanced in the promotion of directors and shareholders' participation in the passing of company resolutions. For example, firstly, a provision on time frames within which directors had to act on shareholders' demands for meetings.¹¹² Secondly, a provision authorising directors to forfeit indebted shares from shareholders following unsettled calls for payment.¹¹³ Furthermore, some provisions sought to strike a balance between shareholder activism and directors' supremacy in the running of the affairs of the company. For example, a provision that empowered shareholders to request a meeting and propose resolutions, and a section that provided for additional directors to be appointed by a resolution by other directors, as a means of ensuring diversity in the composition of the board.¹¹⁴

The passing of resolutions at company meetings was generally clearly provided for and could seldom pose serious challenges to the passing of directors' and shareholders' resolutions. Ministerial intervention on default of a company to hold an AGM was one of

¹¹¹ Section 103 First Schedule Part I of the *1967 Act*; Banks MA "The Chair's Casting Vote: Some Inconsistencies and Problems" 1977 *UW Ontario L Rev* 195, 199; Cassim *et al Contemporary Company Law* 508; see related discussion in *Blair v Consolidated Enfield Corp* (1995) 128 DLR (4th) 73 para 47.

¹¹² Section 99 of the *1967 Act*; Gopal 1982 *National University of Singapore Faculty of Law* 248, 248; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 44.

¹¹³ Sections 33, 34 and 35 First Schedule Part I of the *1967 Act*; *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 paras 7 and 20; De Lange 2018 *SA Mercantile Law Journal* 434, 435; Olivier 2021 *SA Mercantile Law Journal* 1, 2.

¹¹⁴ Section 99 of the *1967 Act*; Alam 2013 *Dhaka University Studies Company Members'* 1,1; Stuart and Crouch *Director's Signpost* 4; Section 94 of the First Schedule Part I of the *1967 Act*; Cassim *et al Contemporary Company Law* 540-551; see related discussion in *Octavia Matshidiso Matloa v Multichoice South Africa* (Gauteng Division) (unreported) case number 40731/2019 of 6 February 2020.

the remarkable provisions of the *1967 Act*.¹¹⁵ The legislature, in drafting the *1967 Act* was cognisant of providing solutions in foreseeable situations, and ensuring that administrative intervention was made available where needed. Moreover, the *1967 Act* mostly upheld shareholder activism in the passing of company resolutions, and thus, safeguarded transparency and accountability in the running of the company affairs by the company's officers and board members.¹¹⁶ In addition, the requirements for the maintenance of company records,¹¹⁷ and making them accessible to shareholders, upheld shareholders' duties of making informative deliberations in the passing of resolutions in company meetings.¹¹⁸

The harshness of some of the punitive provisions was out of balance and discouraging to directorship.¹¹⁹ The restrictive nature of proxy voting under the *1967 Act* posed a challenge to shareholders' resolutions in that as a general company law principle, shareholders should be able to vote boundless in *absentia*. Equal effect should be given to all kinds of votes whether cast in person or *absentia*.¹²⁰ Denying proxy's power to vote on a show of hands was equal to denying a shareholder's vote.¹²¹ Nonetheless, when

¹¹⁵ Section 98(2) of the *1967 Act*; Gopal 1982 *National University of Singapore* 248, 248; Koh 2012 *Singapore Journal of Legal Studies* (2012) 467, 467; *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 15.

¹¹⁶ Section 99 of the *1967 Act*; Alam 2013 *Dhaka University Studies Company Members'* 1, 2; Stuart and Crouch *Director's Signpost* 4; *CDH Invest NV v Petrobank South Africa (Pty) Ltd and Another* [2019] ZASCA 53 (SCA) para 14.

¹¹⁷ Section 105 of the *1967 Act*; see related discussion in *Wait v Marais and Others* (1707/2021) [2022] ZAEQBHC 41 (1 November 2022) para 10; Cassim *et al Contemporary Company Law* 523; *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) para 6.

¹¹⁸ Section 105 of the *1967 Act*; see related discussion in *Wait v Marais and Others* (1707/2021) [2022] ZAEQBHC 41 (1 November 2022) para 10; Cassim *et al Contemporary Company Law* 523; *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) para 6.

¹¹⁹ Section 99 (6) of the *1967 Act*; Alam 2013 *Dhaka University Studies Company Members'* 1,2; Stuart and Crouch *Director's Signpost* 4; Gopal 1982 *National University of Singapore* 248, 248; Koh 2012 *Singapore Journal of Legal Studies* (2012) 467, 467.

¹²⁰ OECD G20/OECD *Principles of Corporate Governance* 22; see a related discussion in Cassim *et al Contemporary Company Law* 484; *Van Zyl v Nuco Chrome Boputatswana (Pty) Ltd* 2013 JDR 0452 para 10.

¹²¹ Bottomley 2016 *Melbourne University Law Review* 97; Corporations And Markets Advisory Committee "The AGM and Shareholder Engagement" 2012 *Discussion Paper* 104; Yermack D and Li Y *Evasive*

comparing the pros and cons of the *1967 Act*, the researcher submits that the *1967 Act* was mostly balanced in application. It managed to empower shareholders without stripping off much of the crucial powers of directors.¹²² However, the decision to repeal the *1967 Act* was not a bad one. Despite being old and outdated, the *1967 Act* was bulky and less comprehensible. First, for covering different types of companies in one document and second for covering clarifications that could have been covered through regulations. Third, for giving shareholders too much power to convene unilateral meetings that could pass resolutions that were not in the best interests of the company.

The following chapter discusses the current regulatory framework of directors and shareholders' resolutions in Lesotho provided under the *Companies Act*.¹²³ The chapter explores the relevant provisions of the *Companies Act* that regulate directors and shareholders' resolutions in Lesotho. This is done in order to determine their relevance, competence and robustness in addressing the challenges affecting the participation of shareholders and directors in making company resolutions. The chapter also determines whether the regulation of directors and shareholders' resolutions in Lesotho promotes adequate participation of all company stakeholders in public companies.

Shareholder Meetings (National Bureau of Economic Research 2021) 4; *Van Zyl v Nuco Chrome Boputatswana (Pty) Ltd* 2013 JDR 0452.

¹²² Section 99(6) of the *1967 Act*; Alam 2013 *Dhaka University Studies Company Members'* 1, 2; Stuart and Crouch *Director's Signpost*4; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2019] ZASCA 53 (SCA) para 14.

¹²³ The Lesotho *Companies Act* 18 of 2011.

CHAPTER THREE

OVERVIEW OF THE CURRENT REGULATION OF THE DIRECTORS AND SHAREHOLDERS' RESOLUTIONS UNDER THE COMPANIES ACT 18 OF 2011

3.1 Introduction

Companies in Lesotho have only been regulated by two statutes from 1967 to date. The *Companies Act* of 1967¹²⁴ was repealed and succeeded by *Companies Act* of 2011.¹²⁵ Under the *1967 Act*, types of companies included companies limited by guarantee, companies limited by shares and unlimited companies.¹²⁶ The *Companies Act* only applies to companies limited by shares, unlimited companies and single shareholding companies, to the exclusion of companies limited by guarantee.¹²⁷ This is technically a positive move considering that the *Companies Act's* application is now restricted to shareholding companies and does not extend to guarantee companies. The previous *1967 Act* was lengthy which rendered some provisions confusing and ambiguous. The *Companies Act* is short and not detailed on many provisions. It is supplemented by the *Companies*

¹²⁴ The *1967 Act*; see related discussion Khoabane K Protection of the Interests of the Company through Derivative Action under the Lesotho Companies Act 18 of 2011 (LLM Dissertation University of Witwatersrand); Thamae K "Changes Brought by the Companies Act 2011 to Liquidation of Companies in Lesotho" 2016 *Lesotho Law Journal* 47, 47; see application in *Lesotho Public Motor Transport Co. (Pty) Ltd and Another v Mohaleroe and Others* (CIV/APN/264 OF 2009; CIV/APN/504/09) [2010] LSHC 11 (7 July 2010) para 22 and 23.

¹²⁵ The Lesotho *Companies Act* 18 of 2011 (the *Companies Act*); See related discussion in Thamae "Changes Brought by the Companies Act 2011 to Liquidation" 2016 *Lesotho Law Journal* 48; Khoabane K Protection of the Interests of the Company through Derivative Action under the Lesotho Companies Act 18 of 2011 (LLM dissertation University of Witwatersrand); *Mokobane Maliehe v Eurotyres (Pty) Ltd & 6 Others* [2023] LSHC 133 Comm. (3RD AUGUST 2023) para 6.

¹²⁶ Section 2, 9 and 10 of the *1967 Act*; Armour 2000 *The Modern Law Review* 355, 356; Jain 2021 *Social Science Research Network* 1, 2; Lupulescu 2019 *Tribuna Juridică* 79, 80.

¹²⁷ Section 2 of the *Companies Act*; Armour 2000 *The Modern Law Review* 355, 356; Jain 2021 *Social Science Research Network* 1, 2; Lupulescu 2019 *Tribuna Juridică* 79, 80.

Regulations of 2012 to deliberate in most of its brief provisions.¹²⁸ The *Companies Regulations* provide for due administration and give effect to the *Companies Act*. For instance, the *Companies Regulations* are necessary for, *inter alia*, prescribing fees payable to the Minister, penalty fees, for amending fees and schedules under the *Companies Act* and for prescribing requirements or dimensions of notices made in newspapers.¹²⁹ Under the *Companies Act*, the term "shareholder" refers to holders of shares in a company.¹³⁰

This chapter explores relevant provisions of the *Companies Act* that regulate directors and shareholders' company resolutions. This is done to determine its robustness and to identify challenges that affect the participation of directors and shareholders in passing company resolutions. This chapter also discusses whether the *Companies Act* adequately promotes and protects directors and shareholders' resolutions.

3.2 The Passing of Directors and Shareholders' Resolutions under the Companies Act

Company resolutions refer to the formal decisions that are made, usually by way of voting, by the board of directors or shareholders of a company.¹³¹ Under the *Companies Act*, the voting process in the passing of shareholders' resolutions is not adequately regulated.

¹²⁸ The *Companies Regulations* 2012 (*Companies Regulations*); Enriques L "EC Company Law Directives and Regulations: How Trivial Are They?" 2006 *U.Pa.J.Int'l Econ.L.* 1, 2; Armour J "Who Should Make Corporate Law? EC Legislation Versus Regulatory Competition" *Current Legal Problems* 1, 3; see related discussion in *Afrisam (South Africa) (Pty) Ltd v Afrisam T Constructions (Pty) Ltd and Another* (CT01209/ADJ/2022) [2023] COMPTRI 29 (5 March 2023) para 15.

¹²⁹ Section 185 of the *Companies Act*; Enriques "EC Company Law Directives and Regulations" 2006 *U.Pa.J.Int'l Econ.L.* 1, 2; Armour J "Who Should Make Corporate Law? EC Legislation Versus Regulatory Competition" 2005 *Faculty of Law and Centre for Business Research, Cambridge University* 1, 3; see related discussion in *Afrisam (South Africa) (Pty) Ltd v Afrisam T Constructions (Pty) Ltd and Another* (CT01209/ADJ/2022) [2023] COMPTRI 29 (5 March 2023) para 15.

¹³⁰ Section 2 of the *Companies Act*; Cassim *et al Contemporary Company Law* 2nd ed (Juta and Co Ltd Claremont 2012) 469; see related discussion in *Howell v Freese* (11341/2022) [2023] ZAGPJHC 458 (11 May 2023) para 2; *Mokobane Maliehe v Eurotyres (Pty) Ltd & 6 Others* [2023] LSHC 133 Comm. (3RD AUGUST 2023) para 6.

¹³¹ Cassim *et al Contemporary Company Law* 512; Mancuso *The Corporate Records Handbook* (Nolo 2022) 13; Koh 2012 *Singapore Journal of Legal Studies* 467, 468. Saez and Riano 2013 *European Business Organization Law Review* 343, 346.

According to the *Company Regulations*, unless a poll is demanded by shareholders, a mere declaration by a chairperson of the meeting, that a resolution has on a show of hands been carried unanimously, or by a particular majority is conclusive without any requirement to record the number of such votes.¹³² The researcher argues that this poses a serious challenge to the passing of shareholders' resolutions since the provision opens chicanery and abuse of powers by the chairperson. The provision does not seem to appreciate that the only way shareholders exercise control rights in companies they invest in is through voting in the passing of resolutions. It is therefore, of utmost importance that the voting process be carried out with all integrity and transparency, eliminating reasonable suspicions of dishonesty and deceitfulness.¹³³ Furthermore, the *Companies Act* is silent on the procedure for lodging grievances on unfair decisions by a chairperson of meetings or his or her removal if and when need be. It is essential for good corporate governance that the passing of shareholders' resolutions at company meetings be effected objectively to safeguard shareholder activism and shareholding proprietary rights.¹³⁴

Directors' resolutions are not immune from the challenges affecting the regulation of company resolutions under the *Companies Act*. For example, the *Companies Act* does not provide for the appointment and removal of a director by other directors. The *Companies Act* provides for no appointment nor removal of a director by other directors.¹³⁵ The lack of authority for directors to fill vacancies on the board can pose serious challenges. For example, with the lack of authority to fill vacancies in the board, the board of directors'

¹³² *Companies Regulations* Articles 39 (1) of Private Companies and 41 (1) of Public Companies; Mancuso *The Corporate Records Handbook* (Nolo 2022) 13; Koh 2012 *Singapore Journal of Legal Studies* (2012) 467; Saez and Riano 2013 *European Business Organization Law Review* 343, 346.

¹³³ Cassim *et al Contemporary Company Law* 505; PL Davies and S Worthington Gower *Principles of Modern Company Law* 10 ed (Sweet & Maxwell 2016) 449; De Jong A, Mertens G and Roosenboom P "Shareholders' Voting at General Meetings; Evidence from the Netherlands" 2006 *Journal of Management and Governance* 353, 356; see related discussion in *Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others* 2001 (4) SA 511 (SCA) para 14.

¹³⁴ Cassim *et al Contemporary Company Law* 505; PL Davies and S Worthington Gower *Principles of Modern Company Law* 10 ed (Sweet & Maxwell 2016) 449; De Jong A, Mertens and Roosenboom 2006 *Journal of Management and Governance* 353, 356; see related discussion in *Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others* 2001 (4) SA 511 (SCA) para 14.

¹³⁵ Section 62(1)(c) of the *Companies Act*; Cassim *et el Contemporary Company Law* 540-551; see related discussion in *Octavia Matshidiso Matloa v Multichoice South Africa* (Gauteng Division) (unreported) case number 40731/2019 of 6 February 2020; Stuart and Crouch *Director's Signpost* 4.

judgment in passing resolutions in the vacant area of expertise could negatively be affected, pending shareholders' meeting for re-election and appointment.¹³⁶ In addition, the failure of the *Companies Act* to provide for the removal of a director by the board of directors through a resolution also poses challenges. This follows that the inability of directors to initiate the removal of another director entails that a director can only be removed by shareholders through passing a special resolution. An area of difficulty arises if a director in their capacity as a shareholder of a company has more voting rights attached to their class of shares, or is a majority shareholder of the company. This entails that the director may easily contest their removal by demanding that a resolution proposed for his removal be voted on by a poll. Ultimately, this could cause significant divisions amongst shareholders and may affect the passing of shareholders' resolutions. The researcher argues that, although the company may ultimately seek a court order for the removal of the director, the same end could be freely and expeditiously achieved in a directors' meeting where each director has one vote to a company resolution.¹³⁷

Nonetheless, the case of *Netcare Hospital Group (Pty) Ltd v Afri 'Nai Health (Pty) Ltd and Others*,¹³⁸ demonstrated a challenge in removing a director through a court order. Although this was a South African case, the Lesotho company law regime was acknowledged in refuting Netcare's case in the South African court to remove one Mr Mosotho as a director of Afri 'Nai company. Netcare Hospital Group and Afri 'Nai were both South African companies with shareholding in a Lesotho company of Ts'epong. There was animosity between Net care representatives and Mr Mosotho in carrying out their duties in

¹³⁶ *Tsikoane v Tsikoane* (CCA/0017/2019) [2023] LSHC 23 (4 May 2023) paras 4 and 5; Koh 2012 *Singapore Journal of Legal Studies* 467, 468; *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 para 2; *Wait v Marais and Others* (1707/2021) [2022] ZAECQBHC 41 (1 November 2022) para 5.

¹³⁷ *Lesotho Public Motor Transport Co. (Pty) Ltd and Another v Mohaleroe and Others* (CIV/APN/264 OF 2009; CIV/APN/504/09) [2010] LSHC 11 (7 July 2010) para 22 and 23, *Netcare Hospital Group (Pty) Ltd v Afri 'Nai Health (Pty) Ltd and Others* (2530/2014) [2015] ZAFSHC 40 (26 February 2015) para 25; *Wait v Marais and Others* (1707/2021) [2022] ZAECQBHC 41 (1 November 2022) para 29; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 1.

¹³⁸ *Netcare Hospital Group (Pty) Ltd v Afri 'Nai Health (Pty) Ltd and Others* (2530/2014) [2015] ZAFSHC 40 (26 February 2015) para 32; *Wait v Marais and Others* (1707/2021) [2022] ZAECQBHC 41 (1 November 2022) para 29; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 1; *Lesotho Public Motor Transport Co. (Pty) Ltd and Another v Mohaleroe and Others* (CIV/APN/264 OF 2009; CIV/APN/504/09) [2010] LSHC 11 (7 July 2010) para 12.

Tsepong. Removing Mr Mosotho as a director would interrupt his directorship duties in the Lesotho registered company of Tsepong, in which Mr Mosotho was a director by virtue of his company being a shareholder. Therefore, an interim removal of Mr Mosotho as a director was sought by Netcare to speed-up the decision-making process of directors in Tsepong. Jurisdiction was a decisive issue that proved even courts of law are in some cases restrained from providing a necessary relief to remove a director from office even if sufficient and valid grounds are advanced to validate the removal. In his judgment, Daffue J, in providing possible solutions to the case, alluded to the common law principle of ousting a director through a special board meeting. Even so, it would be helpful for the *Companies Act* to incorporate removal in its provisions so requirements are clear for proper application.

3.3 Procedural Regulations of Directors and Shareholders' Resolutions under the Companies Act

3.3.1 Notice of Directors and Shareholders' Meetings

The issuing of sufficient notices is a prerequisite to convening valid proceedings of company meetings under the provisions of the *Companies Act* and the *Companies Regulations*.¹³⁹ This follows that notice of meetings informs directors and shareholders of the details of the meeting which are essential for the preparation and passing of company resolutions.¹⁴⁰ Under the *Companies Act*, shareholders are entitled to a minimum of ten days' notice for all meetings.¹⁴¹ The ten days' notice requirement under the *Company's Act* is seemingly not enough, especially for public companies wherein shareholders are in different places. Virtual attendance of meetings for directors' meetings is provided for by

¹³⁹ Sections 64 (2) (b) and 51 (1) of the *Companies Act*; Cassim *et al Contemporary Company Law* 499; *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd* 2013 JDR 0452 para 28, *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 19; see related discussion in *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 14.

¹⁴⁰ Section 51(1) of the *Companies Act*; Bottomley 2019 *Melbourne University Law Review* 95, 96; Saez and Riano *Business Organization Law Review* 343, 346; Lindgren 1953 *Springer Nature* 281.

¹⁴¹ *Companies Regulations* Article 27(1); Cassim *et al Contemporary Company Law* 499; 2013 JDR 0452 para 28, *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 19; see related discussion in (2022/058058) [2024] para 14.

the *Companies Act*.¹⁴² This is a positive development in the right direction, although virtual meetings are still a foreign concept in Lesotho, and only a small section of the population is acquainted with them. Furthermore, the provision for virtual attendance excludes shareholders who are still bound to vote in person or by proxy representation at shareholders' meetings.¹⁴³ The discrimination of shareholders on virtual attendance of company meetings over directors is unreasonable and unrealistic considering shareholders are most likely to be many in numbers and more geographically scattered than the board of directors. Thus, bringing shareholders together through physical attendance or proxy representation is a challenging exercise that could be alleviated by providing for their virtual attendance of meetings.

Furthermore, unless the articles of incorporation states otherwise, a notice of an annual general meeting (AGM) may not disclose the purpose for which the meeting is called, unless there is a special resolution that needs to be passed.¹⁴⁴ As much as this provision may not inconvenience experienced shareholders, inexperienced shareholders who are new to the proceedings at company AGMs may feel left-out throughout the meeting proceedings. Ideally, shareholders attend meetings prepared, informed and in a better position to make valuable contributions to the passing of company resolutions.¹⁴⁵ It is trite that staying informed or reminded of the agenda of an AGM works even in the best interests of old or experienced shareholders. The provision is, therefore, prejudicial for having not considered the needs of all shareholders equally. It is not only important that shareholders attend and participate in the passing of company resolutions, but also that their contributions be valuable for the betterment of the company. Accordingly, it is

¹⁴² Section 64(2)(d) of the *Companies Act*; Boros 2004 *Melbourne University Law Review* 265, 266; Koh 2012 *Singapore Journal of Legal Studies* 467, 468; (2022/058058) [2024] para 15.

¹⁴³ Section 52(3) of the *Companies Act*; Cassim *et al Contemporary Company Law* 505; see related discussions in Bottomley 2019 *Melbourne University Law Review* 95, 96; (9381/2022) [2023] ZAWCHC 130 para 12; (CCA/0018/2019) [2022] LSHC 143 para 18.

¹⁴⁴ *Company Regulations* Articles 28(2) of Private Companies and 30(2) of Public Companies; SSB "Secretarial Standards on General Meetings" 2015 ISCI 14; Koh 2012 *Singapore Journal of Legal Studies* 2012 468; Mancuso *The Corporate Records Handbook* (Nolo 2022) 13.

¹⁴⁵ Shamsuddeen *et al* 2018 *The European Proceedings* 92, 94; Bateman 1998 *Australian Company Secretary* 142 144; Cassim *et al Contemporary Company Law* 501; *Trinity Asset Management (Pty) Ltd v Investec Bank Ltd* 2009 (4) SA 89 (SCA) para 22.

important that shareholders be informed of the agenda of all meetings to ensure informed contributions, especially when passing resolutions.

In case of an ordinary meeting, notice of the time and place of the meeting of the board of directors shall be given to each director not less than five days, and at least one day's notice in case of a special meeting.¹⁴⁶ The short notice for directors' meetings is unfair despite the provision of virtual attendance.¹⁴⁷ Physical presence remains the most reliable form of participation in meetings, especially for directors who are not proficient in the use of technology. This follows that virtual platforms may not be ideal for resolving contentious issues or conducting complex negotiations, as it is harder to gauge reactions and maintain productive communication in high-stakes situations. Consequently, a short notice of directors' meetings provided for by the *Companies Act* may render physical attendance almost impossible. However, virtual meetings present a good alternative in case of failure to attend physically or other unforeseeable circumstances. Be that as it may, short notice of meetings inhibits chances for proper deliberations, clarity and understanding in the passing of company resolutions. Furthermore, under the *Companies Act*,¹⁴⁸ subsequent ratification is sought from all or majority shareholders that feel they are maliciously excluded from being given notices or sufficient notices thereof, and are at liberty to approach a court of law for relief.¹⁴⁹

When a company gives a short notice to a shareholder who is entitled to receive it, or accidentally omits to give him/her notice altogether, or the shareholder for some reason fails to receive notice prior to the meeting, resolutions passed at that meeting will not be

¹⁴⁶ Section 64(2)(b) of the *Companies Act*; Shamsuddeen *et al* 2018 *The European Proceedings* 92, 94; Bateman 1998 *Australian Company Secretary* 142, 144; Cassim *et al* *Contemporary Company Law* 501; *Trinity Asset Management (Pty) Ltd v Investec Bank Ltd* 2009 (4) SA 89 (SCA) para 22.

¹⁴⁷ Section 64(4)(d) of the *Companies Act*; Boros 2004 *Melbourne University Law Review* 265, 266; Koh 2012 *Singapore Journal of Legal Studies* 467; *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 15.

¹⁴⁸ *Companies Regulations* Article 27(2) of the; *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd* 2013 JDR 0452 para 28, *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 19; see related discussion in *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 14.

¹⁴⁹ *Companies Regulations* Article 27 (2); Shamsuddeen *et al* 2018 *The European Proceedings* 92; Secretarial Standards Board (SSB) "Secretarial Standards on General Meetings" 2015 *Company Secretaries of India (ISCI)* 16-36.

invalidated.¹⁵⁰ The *Companies Act* and *Regulations* do not give a criterion used to determine grounds that amount to accidental omission, nor do they provide examples or a list of scenarios that qualify as accidental failure to give notice of meetings.¹⁵¹ Although accidental or erroneous failure to give enough notice of meetings almost defeats the end of inclusive passing of directors and shareholders' resolutions, accidental or erroneous omissions to give notice of meetings may genuinely be inevitable in public companies with vast numbers of scattered shareholders.

It is inferred from the merits of the most recent case of *Yao v Meriti Holdings*, that accidental omission to give notice should not be a result of deliberate sabotage to a shareholder who was eligible to receive proper notice.¹⁵² In *Yao v Meriti Holdings*, the applicant, a Chinese investor, incorporated a company in Lesotho with the respondent shareholder who was also the company's director. The applicant lodged an application to challenge a resolution that was taken by the respondent relating to the forfeiture of the applicant's shares. The applicant was accused by respondent of failure to comply with the call notice, and ousted from the company. However, these meetings were convened without proper notices being issued in terms of the company's articles of incorporation.¹⁵³

The respondent claimed to have given the applicant several notices of the meetings, including call notices, although the call notices were found to have been delivered only after the meetings were convened. The court held that meetings convened without proper notices being issued were irregular and resolutions passed consequent thereto were null

¹⁵⁰ *Company Regulations* Article 27(3); see a related discussion *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd* 2013 JDR 0452 para 28; Bateman 1998 *Australian Company Secretary* 142.

¹⁵¹ Shamsuddeen et al 2018 *The European Proceedings* 92; SSB "Secretarial Standards on General Meetings" 2015 ISCI 14; Koh 2012 *Singapore Journal of Legal Studies* 467; *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 14.

¹⁵² *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 paras 7 and 20; see a related discussion in *Baptista N.O. and Others v Quickstep 684 (Pty) Ltd and Others* Case No: 38204/2022 paras 13 and 14; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 44; *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 21.

¹⁵³ *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 paras 7 and 20; see a related discussion in *Baptista N.O. and Others v Quickstep 684 (Pty) Ltd and Others* Case No: 38204/2022 paras 13 and 14; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 44; *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 21.

and void and of no force and effect.¹⁵⁴ Nonetheless, not all merits may constitute a clear malicious intent to not give notice of company meetings. A relevant question becomes, where do shareholders draw a line between a malicious and accidental omission? In the absence of clear guidelines, the provision on accidental omission to give notice of meetings may be subjected to abuse by directors to deliberately obstruct some shareholders' participation in the passing of the company's resolutions. The accidental omission to give notice of a meeting may be cited as an excuse in cases of deliberate sabotage.¹⁵⁵

3.3.2 *The Regulation of Directors and Shareholders' Meeting Proceedings under the Companies Act*

Company meetings are fundamental platforms in which directors and/or shareholders of a company come together to engage and make decisions that are crucial for the company.¹⁵⁶ For these meetings to be validly convened, some requirements should be met and upheld in order for the resolutions passed in such meetings to be valid.¹⁵⁷ Calling for meetings is generally a duty assigned to the board of directors under the *Companies Act*.¹⁵⁸ A special meeting may be convened on the written request of shareholders holding

¹⁵⁴ *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 44; *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 paras 7 and 20; see a related discussion in *Baptista N.O. and Others v Quickstep 684 (Pty) Ltd and Others* Case No: 38204/2022 paras 13 and 14; *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 21.

¹⁵⁵ *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 paras 7 and 20; see a related discussion in *Baptista N.O. and Others v Quickstep 684 (Pty) Ltd and Others* Case No: 38204/2022 paras 13 and 14; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 44; *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 21.

¹⁵⁶ Sections 53 and 64 of the *Companies Act*; Cassim *et al Contemporary Company Law* 504; Boros 2004 *Melbourne University Law Review* 265, 266; Koh 2012 *Singapore Journal of Legal Studies* 467, 468; see related discussion in *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 15.

¹⁵⁷ Sections 49, 50; 52, 54, 55 and 64 of the *Companies Act*; Boros 2004 *Melbourne University Law Review* 265, 266; Koh 2012 *Singapore Journal of Legal Studies* 467; *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 15.

¹⁵⁸ Section 50(2) of the *Companies Act*; Cassim *et al Contemporary Company Law* 504; Stuart and Crouch *Director's Signpost* 4; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 paras 4 and 44.

shares totalling not less than five percent of the voting rights.¹⁵⁹ Additionally, if there are no sufficient shareholders to form a quorum in a company meeting, any two shareholders in a private company¹⁶⁰ and any director or four shareholders in a public company¹⁶¹ may convene that special meeting. The provision for shareholders' requested meetings empowers minority shareholders to initiate the passing of resolutions that may serve their neglected interests in the company.

3.3.3 Requirements for Quorums for Directors and Shareholders' Meetings under the Companies Act

A quorum is the minimum number of qualified persons whose presence at a meeting is necessary to convene a meeting.¹⁶² Quorums constitute a necessary check against small minorities making significant decisions without a mandate.¹⁶³ The *Companies Act* provides that a quorum at a shareholders' meeting should be a majority of shareholders represented in person or by proxy.¹⁶⁴ The *Companies' Regulations* further provide that if within half an hour from the time set for the meeting, a quorum is not present, the meeting should be adjourned to the same day in the next week, at the same time and

¹⁵⁹ Sections 49, 50 of the *Companies Act*; Stuart and Crouch *Director's Signpost* 4; *DH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 paras 4 and 44; *Foxvest Group (Pty) Ltd and Another v Rocky Park Holdings (Pty) Ltd* Unreported Case No: 20222807 para 5.

¹⁶⁰ Section 50(1) of the *Companies Act*; Article 26(5); Alam 2013 *Dhaka University Studies Company Members' 1*; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 paras 4 and 44; Stuart and Crouch *Director's Signpost* 4.

¹⁶¹ Section 50(2) of the *Companies Act* read with Article 28(5) of the *Companies Regulations*; Alam 2013 *Dhaka University Studies Company Members' 1*; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 paras 4 and 44; Stuart and Crouch *Director's Signpost* 4.

¹⁶² Cassim *et al Contemporary Company Law* 508; Byrne 2024 *Corporate Governance Institute* 1; Charlety *et al* 2019 *International Review on Law and Economics* 1; Flamand and Troumpounis 2014 *Public Choice* 53; English RW 1962 *Communication Quarterly* 22.

¹⁶³ Charlety *et al* 2019 *International Review on Law and Economics* 1; Flamand and Troumpounis 2014 *Public Choice* 53; English 1962 *Communication Quarterly* 22, 23; Byrne 2024 *Corporate Governance Institute* 1, 3.

¹⁶⁴ Section 52(3) of the *Companies Act*; Cassim *et al Contemporary Company Law* 509; Flamand and Troumpounis 2014 *Public Choice* 53; English 1962 *Communication Quarterly* 22; Byrne 2024 *Corporate Governance Institute* 1, 2.

place or to such other day, time and place as the shareholders may determine.¹⁶⁵ If at the adjourned meeting a quorum is still not present within half an hour from the time appointed for the meeting, the shareholders present will form a quorum.¹⁶⁶ Taking into account that a company's affairs cannot be put at bay forever, for quorums that may never be achieved, the *Companies Act* empowers represented minority stakeholders to engage and even pass resolutions at meetings initially adjourned for poor attendance.

In addition, another development introduced by the *Companies Act*, is authorising shareholders to determine a date, time and place of an adjourned shareholders' meeting, if not until the same day in the next week, at the time and place that may suit the shareholders.¹⁶⁷ This is an indication that, under the *Companies Act*, directors do not always have the upper hand to determine issues that affect shareholders, especially in cases where shareholders are determined to make decisions that foster their interests in the company.¹⁶⁸ Under the *Companies Act*, both directors and shareholders' resolutions may be passed in writing in lieu of meetings.¹⁶⁹ This is the quickest and least formal way of passing unanimous resolutions without a need to comply with the requirement to form a quorum at company meetings. Accordingly, it can be said that through this provision the *Companies Act* promotes shareholder participation in the passing of company resolutions.

¹⁶⁵ *Companies Regulations* Articles 28(3) of Private Companies and 30(3) of Public Companies; Cassim *et al Contemporary Company Law* 511; Byrne 2024 *Corporate Governance Institute* 1, 2; see a related discussion in *Foxvest Group (Pty) Ltd and Another v Rocky Park Holdings (Pty) Ltd* Unreported Case No: 20222807 para 5.

¹⁶⁶ *Companies Regulations* Articles 28(3) of Private Companies and 30(3) of Public Companies; Cassim *et al Contemporary Company Law* 511; Byrne 2024 *Corporate Governance Institute* 1,2; see a related discussion in *Foxvest Group (Pty) Ltd and Another v Rocky Park Holdings (Pty) Ltd* Unreported Case No: 20222807 para 5.

¹⁶⁷ *Companies Regulations* Articles 28(3) of Private Companies and 30(3) of Public Companies; Cassim *et al Contemporary Company Law* 511-12; *McLaren v Thompson* [1917] 2 Ch 261 (CA) 264-5; see related discussion in English RW 1962 *Communication Quarterly* 22, 23.

¹⁶⁸ *Companies Regulations* Article 28(3) of Private Companies and Article 30(3) of Public Companies against Section 54 First Schedule Part I of the 1967 Act; Byrne 2024 *Corporate Governance Institute* 1; see a related discussion in *Foxvest Group (Pty) Ltd and Another v Rocky Park Holdings (Pty) Ltd* Unreported Case No: 20222807 para 5.

¹⁶⁹ Sections 54(1) and 64 of the *Companies Act*; Mancuso *The Corporate Records Handbook* (Nolo 2022) 13; Alam 2013 *Dhaka University Studies Company Members'* 1, 3; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 paras 4 and 44.

3.3.4 The Regulation of Directors and Shareholders' Voting Rights under the Companies Act

In terms of the *Companies Act*, and subject to any rights and restrictions attached to any class or classes of shares, on a show of hands, every shareholder present in person has one vote, and on a poll every shareholder has one vote for each share they hold.¹⁷⁰ The *Companies Act* expressly provides for the voting rights of shareholders but makes a vague provision for voting through representation by proxies.¹⁷¹ The researcher submits that under the *Companies Act*, it is not clear whether voting by proxy is only restricted to a poll, or for a change, extends to the show of hands. The ambiguity surrounding proxy's voting rights is a challenge to the passing of shareholders' resolutions. Shareholders may be discouraged from sending proxies for representation in meetings when they already anticipate voting for resolutions on a show of hands. Consequently, this status *quo* contributes to shareholders passiveness in participating in the passing of company resolutions.

The *Companies Act* provides that each director participating in a directors' meeting has one vote.¹⁷² The emphasis is put on the word 'participating' as opposed to 'present in person' used for shareholders' voting.¹⁷³ The word 'participating' is interpreted to include input made by virtual attendance, whereas 'present in person' excludes virtual participation in the voting and passing of resolutions by shareholders. It is clear from the emphasis that shareholders are excluded from provisions of virtual attendance of meetings

¹⁷⁰ *Companies Regulations* Articles 34 (1) of Private Companies and 36 (1) of the Public Companies; De Jong A, Mertens G and Roosenboom P "Shareholders' Voting at General Meetings; Evidence from the Netherlands" 2006 *Journal of Management and Governance* 353, 356; *Re New Cedos Engineering Co Ltd* [1994] 1 BCLC 797, 813-15; Cassim *et al Contemporary Company Law* 519.

¹⁷¹ Section 38 of the *Companies Act*; Cassim *et al Contemporary Company Law* 482-489; *Louw v SA Mohair Brokers Ltd* [2011] 1 All SA 328 (ECP) para 17; see related discussion in *Venter NO v Silver Lakes Homeowners Association NPC* (444994/2016) [2017] ZAGPPHC 11 (20 January 2017) para 13.2.

¹⁷² *Companies Regulations* Articles 58 (2) of Private Companies and 60 (2) of Public Companies; Banks 1977 *UW Ontario L Rev* 1; SSB "Secretarial Standards on General Meetings" 2015 *ISCI* 96; Stuart and Crouch *Director's Signpost* 4.

¹⁷³ *Companies Regulations* Articles 34(1) of Private Companies and 36(1) of Public Companies; Banks 1977 *UW Ontario L Rev* 1; SSB "Secretarial Standards on General Meetings" 2015 *ISCI* 96; Stuart and Crouch *Director's Signpost* 4.

under the *Companies Act*. As a result, shareholders' meetings are strictly restricted to in-person and proxy representations whereas directors' meetings may virtually be attended.

3.4 Conclusion

Although the *Companies Act* is supplemented by the *Companies Regulations* for precision and clarity, most of its provisions are still not well pronounced and lack clarity. Therefore, the researcher submits that the *Companies Act* is a generally ambiguous piece of legislation that impedes the smooth passing of directors and shareholders' resolutions. For example, a provision on proxy representation does not describe the nature and extent of voting rights transferable by the shareholder to the proxy.¹⁷⁴ The provision mentions voting rights in general, without being specific as to whether a proxy is allowed to vote both on a poll and by a show of hands, a distinction that was expressly provided for under the *1967 Act*.

The status quo remains one procedural challenge in the passing of company resolutions. This is because of the general rule discussed in *Lesotho Public Motor Transport Co. (Pty) Ltd and Another v Mohaleroe and Others*,¹⁷⁵ that procedural irregularities at a general meeting renders resolutions passed at that meeting invalid. Unfortunately, without a court precedent on proxy representation, it remains controversial whether a maxim of statutory interpretation "*generalalia specialibus non derogant*" will apply to the general voting powers inferred from the provisions. The lack of clarity and precision on several provisions makes the *Companies Act* a controversial piece of legislation, unreliable and discouraging to potential investors whose main objective is not only to make a profit on their shareholding but to safeguard their rights in companies they invest in. With the rise of advocacy in shareholder activism, weaknesses in the *Companies Act* are even more exposed and

¹⁷⁴ Section 38 of the *Companies Act*; see a related discussion in Cassim *et al Contemporary Company Law* 484; *Van Zyl v Nuco Chrome Boputatswana (Pty) Ltd* 2013 JDR 0452 para 28; *SA Mohair Brokers Ltd v Louw and Others* (602/10) [2011] ZASCA 87 (27 May 2011) paras 4 and 8; see related discussion in *Barry v Clearwater Estates NPC and Others* 2017 (3) SA 364 (SCA) paras 13, 16 and 23.

¹⁷⁵ *Lesotho Public Motor Transport Co. (Pty) Ltd and Another v Mohaleroe and Others* (CIV/APN/264 OF 2009; CIV/APN/504/09) [2010] LSHC 11 (7 July 2010) para 21; see related discussions in *Van Zyl v Nuco Chrome Boputatswana (Pty) Ltd* 2013 JDR 0452 para 28; *SA Mohair Brokers Ltd v Louw and Others* (602/10) [2011] ZASCA 87 (27 May 2011) paras 4 and 8; Cassim *et al Contemporary Company Law* 499; *Barry v Clearwater Estates NPC and Others* 2017 (3) SA 364 (SCA) paras 13 and 16; see De Lange 2018 *SA Mercantile Law Journal* 434, 435.

calling for amendments. However, there are positive developments in some provisions of the *Companies Act*. For example, the exclusion of companies limited by guarantee from the *Companies Act*, so its entire focus is on shareholding companies.¹⁷⁶ Another example of positive development is a section that provides for shareholders' written resolutions in lieu of meetings.¹⁷⁷ Shareholders no longer have to convene in person or by proxy for the passing of company resolutions. Under the *Companies Act* and for a change, they can contribute to the passing of company resolutions in the comfort of their homes.

The following chapter identifies the flaws and challenges affecting the passing of company resolutions under the *Companies Act*. This is done to propose recommendations and measures that can be implemented to protect the rights of directors and shareholders in passing company resolutions.

¹⁷⁶ Section 2 of the *Companies Act*; Armour 2000 *The Modern Law Review* 355, 356; Jain 2021 *Social Science Research Network* 1, 2; Lupulescu 2019 *Tribuna Juridică* 79, 80.

¹⁷⁷ Sections 54(1) of the *Companies Act*; Mancuso *The Corporate Records Handbook* (Nolo 2022) 13; Alam 2013 *Dhaka University Studies Company Members'* 1; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 paras 4 and 44.

CHAPTER FOUR

THE REGULATORY FLAWS AND CHALLENGES ASSOCIATED WITH THE DIRECTORS AND SHAREHOLDERS' RESOLUTIONS UNDER *THE COMPANIES ACT 18 OF 2011*

4.1 Introduction

It is important to note that in a project survey that provided objective measures of business laws and their enforcement across 190 economies and selected cities at the subnational and regional level, overall, Lesotho was ranked 122 out of the 190 economies.¹⁷⁸ Protection of minority investors in Lesotho was one of the score indexes conducted in relation to shareholder rights,¹⁷⁹ director liability,¹⁸⁰ ownership and control,¹⁸¹ and corporate transparency.¹⁸² Lesotho scored 32% on the protection of

¹⁷⁸ Doing Business (DB) Economic Profile Lesotho (World Bank Group 2020) 4; see related discussions in Gillson I and Strychacz N "Addressing the Trade Challenges Facing Land-locked LDCs: The Experience of Lesotho" 2010 *Africa Trade Policy* Notes Note 8 1, 2-3; Ramonyatsi T Factors Affecting the Start-Up and Growth of Basotho-Owned MSMEs in Selected Districts of Lesotho (MBA-Dissertation University of Free State 2010); African Economic Outlook Lesotho (AfDB, OECD, UNDP, UNECA 2012) 9.

¹⁷⁹ The *Companies Act* sections 32-45; *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 para 23; See related discussion in *Wait v Marais and Others* (1707/2021) [2022] ZAECQBHC 41 (1 November 2022) para 29; *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd* [2022] LSHC 230 Comm. (27TH OCTOBER 2022) paras 13-16; *Louw v SA Mohair Brokers Ltd* [2011] 1 All SA 328 (ECP) para 17.

¹⁸⁰ Sections 79, 108 and 122; see related discussions in Cassim *et al Contemporary Company Law* 783-788; *Venator Africa (Pty) Ltd v Watts and Another* (053/2023) [2024] ZASCA 60; 2024 (4) SA 539 (SCA) (24 April 2024) paras 4 and 33; *Rabinowitz v Van Graan and Others* [2013] ZAGPJHC 151; 2013 (5) SA 315 (GSJ) paras 16 and 23; *De Bruyn v Steinhoff International Holdings N.V. and Others* [2020] ZAGPJHC 145; 2022 (1) SA 442 (GJ) paras 122-127, 136 and 155-156.

¹⁸¹ Sections 25 and 59 of the *Companies Act*, *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019)[2022] LSHC 143 para 23; *Tsikoane v Tsikoane* (CCA/0017/2019) [2023] LSHC 23 (4 May 2023) paras 4 and 5; see related discussion in *Wait v Marais and Others* (1707/2021) [2022] ZAECQBHC 41 (1 November 2022) para 29.

¹⁸² Section 85 of the *Companies Act*; see related discussions *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 para 7; see related discussions in *Wait v Marais and Others*

minority investors' *index*. These poor rankings of business laws in Lesotho are evidence that the provisions of *Companies Act* are inadequate to promote and protect the rights of directors and shareholders in the passing of company resolutions. For the purpose of this chapter, findings of the project survey on poor protection of minority investors are narrowly interpreted in light of regulatory flaws and challenges associated with directors and shareholders' resolutions under the *Companies Act*.¹⁸³ For example, shareholder rights are restricted to the right to receive notice of meetings, purposeful proxy representation, virtual attendance of meetings and removal of directors from office. Over the years, several challenges and flaws have affected the regulation of directors and shareholders' resolutions under the *Companies Act*. Some of the challenges and flaws include the flawed distribution of company resolution notices, the requirement of non-disclosure for annual general meetings (AGMs) and failure to provide for virtual attendance during shareholders' meetings.

This chapter discusses the regulatory challenges associated with directors and shareholders' resolutions under the *Companies Act*. This is done to determine the adequacy of the *Companies Act* in protecting and promoting the directors and shareholders' decision making rights.

4.2 Flaws and Challenges Affecting the Regulation of Directors and Shareholders' Resolutions under the Companies Act

4.2.1 The Flawed Distribution of Company Resolution Notices

It was evident in *Yao v Meriti Holdings*,¹⁸⁴ that the traditional distribution of notices of company resolutions by post is ineffective and has become outdated over time. The

(1707/2021) [2022] ZAECQBHC 41 (1 November 2022) para 10; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 4.

¹⁸³ The *Companies Act*; see related discussion in Thamae "Changes Brought by the Companies Act 2011 to Liquidation" 2016 Lesotho Law Journal 48; Khoabane K Protection of the Interests of the Company through Derivative Action under the Lesotho Companies Act 18 of 2011 (LLM Dissertation University of Witwatersrand); *Mokobane Maliehe v Eurotyres (Pty) Ltd & 6 Others* [2023] LSHC 133 Comm. (3RD AUGUST 2023) para 6.

¹⁸⁴ *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 para 7; see a related discussion in *Baptista N.O. and Others v Quickstep 684 (Pty) Ltd and Others* Case No: 38204/2022 paras 13 and

challenges relating to the distribution of notices by post is a long-standing one that traces back as early as the *1967 Act*. The geographical circumstances and terrain of Lesotho have posed considerable challenges to the effective distribution of meetings' notices to shareholders around Lesotho. The enactment of the *Companies Act* in 2011 also failed to address this challenge by expressly annulling the distribution of notices by post and restricting the delivery of notices of meetings to electronic forms that safeguard the effective distribution of notices. The *Yao v Meriti Holdings* case provides a good example of how relying on post to deliver notice of meetings can lead to delays in communication on company meetings and negatively affect the participation of shareholders and other relevant stakeholders. Consequently, shareholders may fail to attend meetings in which important company decisions are made. In this regard, the researcher submits that the failure to annul post in the distribution of notices has affected the participation of shareholders in passing company resolutions. Despite its proven challenges, postal delivery is among the delivery methods recognised under the *Companies Act* since the requirement is only for the notice of meetings to be in writing.¹⁸⁵

Most companies, aware of the challenges of post delivery, currently resort to newspaper advertisements, message and email notifications for simultaneous passing of notice of meetings to shareholders. This multiple message distribution saves time and resources, while ensuring easy compliance to the required period of notice for all types of meetings. Nevertheless, under the provisions of the *Companies Act*, it is still possible to receive notice of a meeting by post after the meeting was convened, a detrimental decision taken, and an unfavourable resolution passed against a stakeholder who happened to have been deprived of their right to make their case at the meeting. One may argue that this setback can easily be avoided by specifying in shareholders' agreement, the acceptable mode of delivery that suits all shareholders. Additionally, that clarity in the company's rules and procedures is provided by a company's articles of incorporation. Same is hardly true since

14; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 44; *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 21.

¹⁸⁵ The *Companies Regulations* 2012 Article 1 read with Article 27(1)(a); *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 para 7; Koh 2012 *Singapore Journal of Legal Studies* 468; Mancuso *The Corporate Records Handbook* (Nolo 2022) 13.

the *Companies Act* introduced model articles¹⁸⁶ that are general in application and no longer peculiar to the needs of individual companies. Only a few companies in Lesotho still draft articles of incorporation that are germane to their needs. Some provisions of the *Companies Act*, are arbitrarily drafted and not water-tight in application, opening doors for unnecessary company disputes and collapses.

4.2.2 The Non-Disclosure of Meetings' Agenda for AGMs and Denial of Company Information under the Companies Act

The *Companies Act* provides for the non-disclosure of the purpose of an AGM in the given notices.¹⁸⁷ This provision does not promote optimal participation by all shareholders or their proxies during company meetings and the passing of company resolutions.¹⁸⁸ Directors and shareholders of the company may not always have the same exposure and understanding of what to expect from company AGMs. As such, it is fair and reasonable to inform all relevant stakeholders or their proxies of the purpose and matters that will be discussed in the meeting. The passing of significant financial and strategic resolutions therefore requires that all stakeholders understand their potential outcomes. This can be achieved if the shareholders and other stakeholders are given time to review the agenda in advance and seek expert opinion and input prior to committing to decisions.¹⁸⁹ It needs to be emphasised that the purpose of a meeting is not only that stakeholders be in attendance and form required quorums, but that they also have the capacity to make meaningful contributions and pass sound company resolutions. Mokhesi J in *Nkhoula v*

¹⁸⁶ Section 6(2) read with section 87(4) of the *Companies Act*; Thamae "Changes Brought by the Companies Act 2011 to Liquidation" 2016 *Lesotho Law Journal* 48; see *Mokobane Maliehe v Eurotyres (Pty) Ltd & 6 Others* [2023] LSHC 133 Comm. (3RD AUGUST 2023) para 6; Khoabane K Protection of the Interests of the Company through Derivative Action under the Lesotho Companies Act 18 of 2011 (LLM dissertation University of Witwatersrand).

¹⁸⁷ *Company Regulations* Articles 28(2) of Private Companies and 30(2) of Public Companies; SSB "Secretarial Standards on General Meetings" 2015 *ISCI* 14; Koh 2012 *Singapore Journal of Legal Studies* 468; Mancuso *The Corporate Records Handbook* (Nolo 2022) 13.

¹⁸⁸ Section 64 of the *Companies Act*; Kaen FA *Blueprint for Corporate Governance: Strategy, Accountability and the Preservation of Shareholder Value* (New-York: AMACOM 2003) 120; Domini and Crouch *Director's Signpost* 1; *Wait v Marais and Others* (1707/2021) [2022] ZAECQBHC 41 para 10.

¹⁸⁹ See comments by Kaen *Blueprint* 120; Domini and Crouch *Director's Signpost* 5; *Wait v Marais and Others* (1707/2021) [2022] ZAECQBHC 41 para 10.

Ahead Technologies (Pty) Ltd,¹⁹⁰ dismissed shareholders' application for judicial management on account of mismanagement of the company by its directors, including denied access to company information. However, he highlighted that shareholders have a right of access to company information. He further emphasised that denial of this right is justiciable at the instance of a dissatisfied shareholder approaching the courts in terms of section 34 of the *Companies Act*, for an order directing the provision of information. This is a regulatory setback considering the right of access to company information could easily be enforced administratively under the *1967 Act*.¹⁹¹ The administrative intervention cut unnecessary litigation costs and maintained good relations among company's stakeholders, while ensuring the smooth passing of company resolutions for companies' growth and sustainability.

4.2.3 Inadequate Provisions Relating to Virtual Attendance to Shareholders' Meetings and Uncertainty of Proxies' Participation Rights

The provisions relating to virtual attendance and proxy representation under the *Companies Act* lack substance and clarity. It is clear that a director may attend a meeting in person or virtually, and their virtual attendance can be counted towards a quorum.¹⁹² With regard to shareholders' meetings, the *Companies Act* provides for the majority of

¹⁹⁰ *Nkhoul v Ahead Technologies (Pty) Ltd* (CCA/0080/2021) [2022] LSHC 62 (18 August 2022) para 22; *Waitv Marais and Others* (1707/2021) [2022] ZAEQBHC 41 para 36; Kaen FA *Blueprint for Corporate Governance: Strategy, Accountability and the Preservation of Shareholder Value* (New-York: AMACOM 2003) 120; Domini and Crouch *Director's Signpost* 1.

¹⁹¹ Section 96 of the *1967 Act*; see related discussions in De Lange S "Compliance Notices in Terms of the Companies Act 71 of 2008: Some Observations Regarding the Issuing of and Objection to Compliance Notices" 2018 *SA Mercantile Law Journal* 434, 435; Olivier EA "Regulating against False Corporate Accounting: Does the Companies Act 71 of 2008 Have Sufficient Teeth?" 2021 *SA Mercantile Law Journal* 1, 2; Hedges J, Bird H, Gilligan G, Godwin A and Ramsay I "The Policy and Practice of Enforcement of Directors' Duties by Statutory Agencies in Australia: An Empirical Analysis" 2017 *Melbourne University Law Review* 905, 908-910.

¹⁹² Section 64(2)(d) of the *Companies Act*; Cassim *et al Contemporary Company Law* 635; Flamand and Troumpounis 2014 *Public Choice* 53, 55; English 1962 *Communication Quarterly* 22; Byrne 2024 *Corporate Governance Institute* 1, 2.

issued shares represented in person or by proxy.¹⁹³ It is noted that virtual attendance is counted towards directors' quorum but not shareholders'. What is not clear is why directors are privileged over shareholders in relation to virtual attendance of meetings. It follows that the *Companies Act* inhibits shareholding by foreign nationals who may not always be available in the country for physical or proxy attendance of meetings. The barring of virtual attendance of meetings by shareholders is an economic setback considering how convenient and cost-effective electronic meetings have become today.

Furthermore, on the one hand, the *1967 Act* was clear to the extent that proxy votes are limited to a poll but not the show of hands.¹⁹⁴ On the other hand, the *Companies Act* only alludes to a shareholder voting their share in person or by proxy. The extent of rights transferable from a shareholder to their proxy is a mystery left to be clarified by a judicial pronouncement on the matter. This is a challenge because until then, stakeholders may not know how to correctly exercise their rights in the passing of company resolutions. The confusion and uncertainty are indeed a regulatory challenge to the passing of company resolutions by shareholders.

4.2.4 Inadequate Provisions and Guidelines for Requested Shareholders' Meetings under the Companies Act

There are no adequate provisions and/or guidelines for meetings requested by shareholders under the *Companies Act*. Although there is a section that provides for the same, the time frame within which the board should call the requested meeting is not stated. Save for the provision that the threshold of at least five percent of the total shareholding entitled to be exercised on the issue must sign the written request, there are no further provisions on this matter.¹⁹⁵ The confusion caused by this inadequacy was

¹⁹³ Section 52 (3) of the *Companies Act*; Cassim *et al Contemporary Company Law* 509; Flamand and Troumpounis 2014 *Public Choice* 53, 55; English 1962 *Communication Quarterly* 22; Byrne 2024 *Corporate Governance Institute* 1, 2.

¹⁹⁴ Sections 102(3) of the *1967 Act* and 62 and 67 of the First Schedule Part I of the *1967 Act*; see a related discussion in Cassim *et al Contemporary Company Law* 484; OECD G20/OECD *Principles of Corporate Governance* 22; see related discussion in *Van Zyl v Nuco Chrome Boputatswana (Pty) Ltd* 2013 JDR 0452 para 24.

¹⁹⁵ Section 50 (2) of the *Companies Act*; Alam 2013 *Dhaka University Studies Company Members'1*; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 paras 4 and 44; Stuart and Crouch *Director's Signpost* 4.

illustrated in the case of *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd*.¹⁹⁶ Applicants were shareholders in the second respondent's company. They requested a special meeting to resolve, among other things, the removal of directors of the company. It is common cause that the request for a special meeting of the shareholders was made by the first applicant and that barely ten days later, he went on to issue a reminder to the board that his demand had not been responded to. Even after the reminder, the board did not respond.¹⁹⁷ The applicant decided to lodge an application requesting the court to order the board to call for the demanded special meeting. He alleged that the board ignored his demand for the meeting. The issue before the court was whether or not the board ignored the applicant's statutory right to request for the special meeting.

In addressing the issue, the judge noted two important points. Firstly, under the common law, the calling of a meeting by the board of directors fell under their fiduciary duties. Thus, calling for a meeting as a fiduciary duty, must be exercised in good faith, and in the best interests of the company.¹⁹⁸ Secondly, when the board was faced with a demand in proper form, from a shareholder or shareholders holding shares totalling not less than five percent of the voting rights on the issue, the board was bound to accede to the demand. Unlike in the repealed *1967 Act*,¹⁹⁹ the *Companies Act* does not make provision for the

¹⁹⁶ *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd* [2022] LSHC 230 Comm. (27TH OCTOBER 2022) paras 12-16; Alam 2013 *Dhaka University Studies Company Members' 1*; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 paras 4 and 44; Stuart and Crouch *Director's Signpost* 4.

¹⁹⁷ *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd* [2022] LSHC 230 Comm. (27TH OCTOBER 2022) paras 13; Alam MK 2013 *Dhaka University Studies Company Members' 1*; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 paras 4 and 44; Stuart and Crouch *Director's Signpost* 4.

¹⁹⁸ *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd* [2022] LSHC 230 Comm. (27TH OCTOBER 2022) para 12; Alam 2013 *Dhaka University Studies Company Members' 1*; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 84; Stuart and Crouch *Director's Signpost* 4.

¹⁹⁹ Companies Act 25 of 1967 (1967 Act); See related discussion in Khoabane K Protection of the Interests of the Company through Derivative Action under the Lesotho Companies Act 18 of 2011 (LLM Dissertation University of Witwatersrand); Thamae K "Changes Brought by the Companies Act 2011 to Liquidation of Companies in Lesotho" 2016 *Lesotho Law Journal* 47; see application in

time within which the meeting should be called after the request had been sent.²⁰⁰ The second respondent's Articles of Incorporation also did not make provision for the scenario. In the *1967 Act*, the meeting had to be called within twenty-one days of the deposit of the requisition. In the *1967 Act*, the requisitionists were given powers to convene the meeting themselves if the requisition was not acceded to within the time stipulated, but that aspect was left out in the *Companies Act*.²⁰¹

The question to be determined was whether or not it was unreasonable to require the board to have called the meeting within fourteen days after the request was submitted. In his *obiter*, the Judge indicated that the twenty-one-days obtained under the *1967 Act* were standard and reasonable.²⁰² It provided that the meeting be called within twenty-one days of the deposit of the request. Therefore, it was held that the applicants' request could not be said to have been ignored by the board.²⁰³ It is worrying that the Judge had to refer to the old and repealed *1967 Act* for presiding over a recent case, when the legal framework of the *Companies Act* is still in force.

In this regard, the researcher submits that, if the *1967 Act* is still that very useful, the legislature ought to have imported some of its provisions to the *Companies Act* which seems vague and fails to adequately regulate the passing of directors and shareholders' resolutions. On whether the court should order the calling of the requested special

Lesotho Public Motor Transport Co. (Pty) Ltd and Another v Mohaleroe and Others (CIV/APN/264 OF 2009; CIV/APN/504/09) [2010] LSHC 11 (7 July 2010) paras 22 and 23.

²⁰⁰ Section 99(1) of the *1967 Act*; Gopal 1982 *National University of Singapore Faculty of Law* 248; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 44.

²⁰¹ Section 99(3) of the *1967 Act*; Gopal 1982 *National University of Singapore Faculty of Law* 248, 248; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 44.

²⁰² *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd* [2022] LSHC 230 Comm. (27TH OCTOBER 2022) paras 14; Alam MK 2013 *Dhaka University Studies Company Members' 1*; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 84; Stuart and Crouch *Director's Signpost* 4.

²⁰³ *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd* [2022] LSHC 230 Comm. (27TH OCTOBER 2022) paras 14; Alam 2013 *Dhaka University Studies Company Members' 1*; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 paras 4 and 44; Stuart and Crouch *Director's Signpost* 4.

meeting as empowered by the *Companies Act*,²⁰⁴ it was held that the power of the court to order the calling of the special meeting was not always guaranteed and that it was exercisable in exceptional circumstances. Additionally, the fact that there was a dispute amongst shareholders could not serve as a warrant for the court to exercise the power, unless there were exceptional circumstances.²⁰⁵ The case of *Tsikoane v Tsikoane*,²⁰⁶ illustrated one of the exceptional circumstances that warrant the court's intervention in shareholders' initiated litigation being where there is a deadlock in the management of the company. So long the company is being run without any hitches and the internal controls are still functional to deal with issues that arise from time to time, the court does not find it desirable to intervene. It is the saving of the company that the courts is mostly interested in. In the case of *Tsikoane v Tsikoane*, shareholders of the company sought judicial dissolution of their company because the management was at logger heads. The court intervened and the ruling was in favour of the shareholders. Unlike in *Nkhoulula v Ahead Technologies (Pty) Ltd*,²⁰⁷ whereby shareholders' application was dismissed for judicial management on account of mismanagement of the company by its directors, one submission of the judge being that the management of the company was not corrupt but just slow, because the company proved to be smoothly running. The decisions in these case illustrate shareholders' dilemma in Lesotho. The constant remedy provided to

²⁰⁴ Section 55 of the *Companies Act*; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 84; Stuart and Crouch *Director's Signpost 4; Otto v Klipvlei Diamond Areas (Pty) Ltd and Others* 1958 (2) SA 437 (T.P.D) at 441H.

²⁰⁵ *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd* [2022] LSHC 230 Comm. (27TH OCTOBER 2022) para 16; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 84; Stuart and Crouch *Director's Signpost 4; Otto v Klipvlei Diamond Areas (Pty) Ltd and Others* 1958 (2) SA 437 (T.P.D) at 441H.

²⁰⁶ *Tsikoane v Tsikoane* (CCA/00172019) [2023] LSHC 23 (4 May 2023); *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd* [2022] LSHC 230 Comm. (27TH OCTOBER 2022) para 16; *Nkhoulula v Ahead Technologies (Pty) Ltd* (CCA/0080/2021) [2022] LSHC 62 (18 August 2022) para 21; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 84; *Otto v Klipvlei Diamond Areas (Pty) Ltd and Others* 1958 (2) SA 437 (T.P.D) at 441H.

²⁰⁷ *Nkhoulula v Ahead Technologies (Pty) Ltd* (CCA/0080/2021) [2022] LSHC 62 (18 August 2022) para 21; *Tsikoane v Tsikoane* (CCA/00172019) [2023] LSHC 23 (4 May 2023); *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd* [2022] LSHC 230 Comm. (27TH OCTOBER 2022) para 16; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 84

shareholders by the *Companies Act* is litigation, despite the regularly pronounced reluctance of the courts of law to interfere in the management of companies' affairs.²⁰⁸ As a result, the *Companies Act* does not adequately promote shareholder activism, and most of its provisions are not adequate for promoting the passing of shareholders' resolutions.

4.2.5 The Lack of Provisions for the Appointment and Removal of a Director by other Directors through a Resolution

The *Companies Act* does not provide for the appointment of a director by other directors. The lack of authority for directors to fill vacancies in the board can pose a serious challenge under the *Companies Act*. For example, when a knowledgeable director exits the office, their position can only be filled by a shareholders' meeting. The lack of clear authority would therefore negatively affect the board of directors' judgment in passing resolutions in a vacant area of expertise, pending shareholders' meeting for filling the vacancy. With regard to the removal of a director by other directors, the *Companies Act*, does not provide for the removal of a director by fellow directors. Removal of a director is a duty only restricted to shareholders, without exceptions that are meant to empower directors to remove a director who is a majority shareholder and is likely to outvote resolutions proposed to remove them.²⁰⁹ Therefore it is common for directors to hold on to their offices even in circumstances that justify disqualification, just because they have more voting rights and are able to block resolutions proposed for their removal.²¹⁰ This affects the passing of company resolutions as an ineffective director may be kept on the

²⁰⁸ *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd* [2022] LSHC 230 Comm. (27TH OCTOBER 2022) paras 16; *CDH Invest NV v Petrobank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 84; *Nkhoula v Ahead Technologies (Pty) Ltd* (CCA/0080/2021) [2022] LSHC 62 (18 August 2022) para 21; *Otto v Klipvei Diamond Areas (Pty) Ltd and Others* 1958 (2) SA 437 (T.P.D) at 441H.

²⁰⁹ Cassim *et al Contemporary Company Law* 607; Thamae K "Changes Brought by the Companies Act 2011 to Liquidation of Companies in Lesotho" 2016 *Lesotho Law Journal* 47, 48; Nwafor AO "A Commentary on the Derivative Action under the Lesotho Companies Bill of 2006" 2007 *Botswana Law Journal* 81, 88; *Re Compaction Systems Pty Ltd* [1976] 2 NSWLR 135 para 84.

²¹⁰ *Lesotho Public Motor Transport Co. (Pty) Ltd and Another v Mohaleroe and Others* (CIV/APN/264 of 2009; CIV/APN/504/09) [2010] LSHC 11 (7 July 2010) para 22 and 23, see *Netcare Hospital Group (Pty) Ltd v Afri 'Nai Health (Pty) Ltd and Others* (2530/2014) [2015] ZAFSHC 40 (26 February 2015) para 25; see related discussion in *Wait v Marais and Others* (1707/2021) [2022] ZAECQBHC 41 (1 November 2022) para 29; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 1.

board and lead to poor decision making. Also, considering that the responsibility to remove directors rests on shareholders, this could overburden shareholders and cause disputes amongst shareholders, especially in cases of notable ownership divisions or poor engagement by minority shareholders.

4.2.6 The Lack of Alternative Dispute Resolution Forums under the Companies Act

The *Companies Act* provides for no alternative dispute resolution forums that are entrusted with playing an active role in ensuring companies comply with the mandatory provisions of the *Companies Act*, such as convening AGMs.²¹¹ Although the wording of the *Companies Act* makes the calling of AGMs mandatory, it does not go on to provide for a body that will receive complaints in cases of default or a body that will entertain alleged infringements of rights such as ignoring or denying shareholders' their rights to demanded meetings.²¹² The lack of provisions on alternative dispute resolutions under the *Companies Act* creates a reliance on litigation, which is generally costly, and lengthy and causes strained relationships within companies. The researcher submits that alternative dispute resolutions such as arbitration and mediation encourage peaceful, confidential and tailored resolution of conflicts.

4.3 Conclusion

In conclusion, under the *Companies Act*, shareholders are sometimes deterred and frustrated from convening shareholder or other relevant company meetings for the adoption and passing of effective company resolutions. Shareholder activism under the *Companies Act* is promoted in bizarre circumstances that are likely to jeopardise the effective running of a company and threaten its subsistence. For example, restricting powers of appointment, election and removal of a director to shareholders' meetings.²¹³

²¹¹ Section 49 of the *Companies Act*; Gopal 1982 *National University of Singapore* 248; Koh 2012 *Singapore Journal of Legal Studies* (2012) 467; Cassim *et al Contemporary Company Law* 490-491.

²¹² *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd* [2022] LSHC 230 Comm. (27TH OCTOBER 2022) paras 12-16; Alam 2013 *Dhaka University Studies Company Members'* 1,2; *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd* 2013 JDR 0452 para 27; *Butler v Van Zyl* (554/13) [2014] ZASCA 81 (30 May 2014) para 21.

²¹³ Sections 58 read with 73 of the *Companies Act*; see related discussions Cassim *et al Contemporary Company Law* 540-551; See related discussion in *Octavia Matshidiso Matloa v Multichoice South Africa*

The legislature overlooked the possibility of a director who is also a majority shareholder abusing their voting powers to hold on to power by blocking the passing of resolutions that are proposed to remove him from office. Another challenge under the *Companies Act* is the absence of provision on time frames within which boards are to act on mandatory provisions. The absence of alternative dispute resolution forums that are meant to entertain complainants on boards' default and infringements of rights is one other challenge that calls for immediate legislature's attention.

The next chapter is the last chapter of this research, and it proposes possible measures that can be implemented to address the challenges and flaws affecting the adequate regulation of directors and shareholders' resolutions identified in this chapter.

(Gauteng Division) (unreported) case number 40731/2019 of 6 February 2020; Stuart and Crouch *Director's Signpost* 4.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

This chapter proposes measures that can be implemented to address the challenges and flaws affecting the adequate regulation of directors and shareholders' resolutions identified in the previous chapter. It is important to note that attaining registration of external companies in Lesotho is one of the objectives of the *Companies Act*.²¹⁴ However, among the factors that potential investors take into consideration are business and company laws of their destined countries. At the centre of the subsistence of companies is a legal framework that balances notions of shareholder activism with that of directors' supremacy. Recent concerns about the need for improved corporate accountability raise questions about the role of shareholders in the decision making processes of their companies.²¹⁵ For shareholders to execute their decision making powers as intended, company laws need to be adequately enabling or capacitating. It is important that law-makers do not only include provisions on directors and shareholders' participation, but that those provisions enable the stakeholders to achieve the required result. For example, avoiding ambiguous provisions relating to the distribution of notices of company resolutions secures the passing of valid company resolutions, which is a desired result.²¹⁶ Secondly, ensuring that the provisions of the *Companies Act* are contemporary and in touch with the current needs

²¹⁴ *The Companies Act* Preamble; see related discussion in Thamae "Changes Brought by the Companies Act 2011 to Liquidation" 2016 *Lesotho Law Journal* 48; Khoabane K Protection of the Interests of the Company through Derivative Action under the Lesotho Companies Act 18 of 2011 (LLM dissertation University of Witwatersrand); *Mokobane Maliehe v Eurotyres (Pty) Ltd & 6 Others* [2023] LSHC 133 Comm. (3RD AUGUST 2023) para 6.

²¹⁵ King IV Project Lead (1 November 2016) 44; Kaen *Blueprint* 120; Domini and Crouch *Director's Signpost* 1, 3; *Wait v Marais and Others* (1707/2021) [2022] ZAEQBHC 41 para 10; Kaen *Blueprint* 120.

²¹⁶ *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 para 7; see a related discussion in *Baptista N.O. and Others v Quickstep 684 (Pty) Ltd and Others* Case No: 38204/2022 paras 13 and 14; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 44; *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 21.

of stakeholders such as virtual attendance of shareholders' meetings.²¹⁷ Limiting shareholders' quorum to in-person and proxy representation may serve the interests of shareholders based in Lesotho, but may infringe the interests of stakeholders beyond the borders of Lesotho. It is wise that while capacitating and empowering shareholders, directors are also empowered in their decision making and management powers to avoid unnecessary interference of powers that may culminate in deadlocks.²¹⁸ Separation of roles and responsibilities between directors and shareholders is viable with well-pronounced provisions that set clear boundaries between the two organs of the company.²¹⁹

In this regard, this chapter proposes recommendations that can be implemented to enhance the regulation of directors and shareholders' resolutions under the *Companies Act*. The researcher hopes that these recommendations will be taken into consideration by policymakers to ensure the adequate regulation of company resolutions in Lesotho.

5.2 Recommendations

The researcher submits that policymakers in Lesotho should enhance the provisions on directors and shareholders' resolutions. Below are the researcher's recommendations:

a. The Companies Act should be amended to provide for the electronic distribution of company meeting notices

Unlike traditional ways of conveying messages through the posts, it is recommended that the *Companies Act* be amended to provide for electronic dissemination of company meetings' notices. Electronic dissemination of information is considerably more effective

²¹⁷ Section 64(2)(d) of the *Companies Act*; Cassim *et al Contemporary Company Law* 635; Flamand and Troumpounis 2014 *Public Choice* 53, 55; English 1962 *Communication Quarterly* 22; Byrne 024 *Corporate Governance Institute* 1, 2.

²¹⁸ Section 62(1)(c) of the *Companies Act*; Cassim *et el Contemporary Company Law* 540-551; see related discussion in *Octavia Matshidiso Matloa v Multichoice South Africa* (Gauteng Division) (unreported) case number 40731/2019 of 6 February 2020; Stuart and Crouch *Director's Signpost* 4.

²¹⁹ *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd* [2022] LSHC 230 Comm. (27TH OCTOBER 2022) paras 12-16; Alam MK 2013 *Dhaka University Studies Company Members' 1*; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 paras 4 and 44; Stuart and Crouch *Director's Signpost* 4.

compared to the post.²²⁰ Electronic dissemination is also less costly, saves time, and is efficient in ensuring the concurrent distribution of information to all shareholders of the company.²²¹ The researcher proposes the use of electronic mails and short message service (SMS) to communicate notices of meetings with all relevant stakeholders. However, it should be noted that the proposed electronic communication need not be sophisticated to exclude primitive shareholders. The primary objective is to avoid complexities while enhancing the distribution of company information that is essential to the passing of valid directors and shareholders' resolutions. When costs of dissemination of company information are generally low and speedy, companies would be encouraged to effortlessly distribute notices of meetings and enhance participation in company resolutions' processes.

b. The Companies Act should be amended to provide express regulations and/or guidelines for shareholders' meetings

The *Companies Act* provides for written requests of shareholders' meetings with a requirement of at least five percent of the total shareholding entitled to be exercised on the matter.²²² The provision is unequivocally intended to promote activism of minority shareholders in the proposing and passing of company resolutions that may protect their interests in the company. However, the *Companies Act* does not make provision for the time within which the meeting should be called after the request had been sent despite

²²⁰ *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 para 7; see related discussions in Naude F and du Toit A "Dissemination of Annual Report Information on the Internet by South African Companies" 2003 SAJEMS 765, 766; *Giftwrap Trading (PTY) LTD v Vodacom (Pty) Ltd and Others* (1009/2020) [2023] ZASCA 47 (4 April 2023) para 5; *Nampak Glass (Pty) Limited v Vodacom (Pty) Limited and Others* (2814/2018) [2018] ZAGPJHC 481; 2019 (1) SA 257 (GJ) (31 January 2018) para 6.

²²¹ Naude and du Toit "Dissemination of Annual Report Information on the Internet" 2003 SAJEMS 765, 766; see related discussions in *Giftwrap Trading (PTY) LTD v Vodacom (Pty) Ltd and Others* (1009/2020) [2023] ZASCA 47 (4 April 2023) para 5; *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 para 7; *Nampak Glass (Pty) Limited v Vodacom (Pty) Limited and Others* (2814/2018) [2018] ZAGPJHC 481; 2019 (1) SA 257 (GJ) (31 January 2018) para 6.

²²² Section 50(2) of the *Companies Act*; Alam 2013 *Dhaka University Studies Company Members' 1*, 3; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 paras 4 and 44; Stuart and Crouch *Director's Signpost* 4.

this having been provided for in the previous *1967 Act*.²²³ Accordingly, the researcher recommends that the *Companies Act* be amended to provide for the time frames within which directors are expected to accede to the shareholders' demand. The proposed amendments may also curb the abuse of powers by directors who may act against their fundamental duty of good faith by ignoring the demand. It is submitted that the primary objective of company directors should be the success of the company and the collective best interests of the shareholders.²²⁴ Therefore, amending the *Companies Act* to provide for the time frame within which directors may accede to the demand of shareholders would not only protect the rights of minority shareholders but will also protect directors of the company from inadvertently acting *ultra vires*.

c. The Companies Act should be amended to provide adequate provisions relating to virtual attendance to shareholders' meetings and proxies' participation rights

During shareholders' meetings, a quorum for the passing of resolutions is the majority of issued shares represented in person or by proxy.²²⁵ It is noted that virtual attendance is not provided for making shareholders' quorum. What is not clear is why virtual attendance of meetings covers directors to the exclusion of shareholders. The researcher submits that the *Companies Act* inhibits the participation rights of shareholders who are abroad at the time of convening shareholders' meetings.²²⁶ Proxy representation cannot always be an ideal alternative to in-person representation at shareholders' meetings since the extent of rights transferable from a shareholder to their proxy is uncertain under the *Companies*

²²³ Section 99(1) of the *1967 Act*; see related discussions in Gopal 1982 *National University of Singapore Faculty of Law* 248, 248; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 4; Alam 2013 *Dhaka University Studies Company Members'* 1, 3.

²²⁴ Section 63(1) of the *Companies Act*; Cassim *et al Contemporary Company Law* 692-693; *Cohen v Segal* 1970 (3) SA 702 (W) at 706; *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd* [2022] LSHC 230 Comm. (27TH OCTOBER 2022) para 12.

²²⁵ Section 52(3) of the *Companies Act*; Cassim *et al Contemporary Company Law* 509; Flamand and Troumpounis 2014 *Public Choice* 53, 55; English 1962 *Communication Quarterly* 22; Byrne 2024 *Corporate Governance Institute* 1, 2.

²²⁶ *Yao v Meriti Holdings (Pty) Ltd* (CCA/0018/2019) [2022] LSHC 143 para 11; Boros 2004 *Melbourne University Law Review* 265, 266; Fairfax LM "Virtual Shareholder Meetings Reconsidered" 2010 *Seton Hall L. Rev.* 1367, 1367-1368; Van der Krans A "The Virtual Shareholders Meeting: How to Make it Work" 2007 *J. Int'l Com. L. & Tech.* 32, 32-33.

Act.²²⁷ The inadequacy and uncertainty in the provisions of the *Companies Act* in regulating the passing of shareholders' resolutions is a challenge, particularly to shareholders who may not attend shareholders' meetings in person for various reasons, one being geographical constraints. Shareholders outside the borders of Lesotho may end up being completely passive and losing interest in acquiring or growing their shareholding in Lesotho companies. Therefore, the researcher recommends that the *Companies Act* should be amended to bridge the regulatory gaps that hinder the active participation of shareholders who may not be able to attend meetings in person. The provision for virtual attendance will ensure that shareholders outside Lesotho can participate in the passing of company resolutions virtually. This will also alleviate the uncertainties relating to the rights of proxies as shareholders will be able to attend company meetings.

d. Directors should be authorised to appoint and remove other directors through a resolution

The lack of authority for directors to fill vacancies on the board poses a challenge in the passing of directors' resolutions under the *Companies Act*. For example, when a knowledgeable director leaves office, their position can only be filled by a shareholders' meeting. This entails that the position remains vacant until the shareholders meet and appoint a person to fill the position. Meanwhile, the directors are expected to continue with their duties and pass resolutions despite the vacant position and expertise, pending shareholders' meeting for filling the vacancy. Furthermore, the *Companies Act* does not provide for the removal of a director by other directors. Removal of a director is a duty only restricted to shareholders' initiation, without exceptions that are meant to empower directors to remove a director who is a majority shareholder and is likely to outvote resolutions proposed for his removal by shareholders.²²⁸ To protect minority shareholders against abuse of powers by the majority, it is recommended that the *Companies Act* be

²²⁷ Section 52 (3) of the *Companies Act*; Cassim *et al Contemporary Company Law* 509; Flamand and Troumpounis 2014 *Public Choice* 53, 55; English 1962 *Communication Quarterly* 22; Byrne *Corporate Governance Institute* 1, 2.

²²⁸ Cassim *et el Contemporary Company Law* 607; Thamae K "Changes Brought by the Companies Act 2011 to Liquidation of Companies in Lesotho" 2016 *Lesotho Law Journal* 47, 48; Nwafor AO "A Commentary on the Derivative Action under the Lesotho Companies Bill of 2006" 2007 *Botswana Law Journal* 81, 88; *Re Compaction Systems Pty Ltd* para 84.

amended to provide for the appointment and removal of a director by other directors through a resolution. This will ensure that directors are immediately replaced in the event of one leaving their office and also that shareholders are not overburdened by the responsibilities to appoint and remove directors. The researcher submits that authorising directors to remove and appoint directors improves governance efficiencies, company stability and operations as the directors are responsible for the day-to-day running of the company.

e. The Companies Act should be amended to provide for alternative dispute resolution mechanisms

Alternative dispute resolution (ADR) refers to a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts.²²⁹ ADR encompasses mediation, arbitration, and a variety of other hybrid processes by which an impartial person facilitates the resolution of legal disputes without formal adjudication or litigation. These alternatives to adjudication are advocated for a variety of reasons. Benefits firstly include the reduction of the transaction costs of dispute resolution because ADR processes are cheaper and faster than ordinary judicial proceedings. Secondly, ADR creates resolutions that are tailored to the parties' underlying interests and needs and improve *ex-post* compliance with the terms of the resolution. Thirdly, ADR offers a workable solution to the difficulties sometimes posed by litigation in the process of settling disputes.²³⁰ One of the difficulties is long-term strained relationships that affect the general performance of a company and the passing of its resolutions. The reason for deadlocks following litigation outcome is because in litigation there is no compromise reached between the conflicting parties. Litigation decisions are mostly extreme due to their win or lose approach that

²²⁹ Mnookin RH "Alternative dispute resolution" 1998 *Harvard Law School* 1, 1-2; Cassim *et al* *Contemporary Company Law* 33; see related discussions in *Zondi v City of Johannesburg and Others* (J 2461/12) [2015] ZALCJHB 39 (17 February 2015) para 50; *Mmethi v DNM Investments CC t/a Bloemfontein Celtics Football Club* (JS 1298/09) [2010] ZALC 143; [2011] 3 BLLR 268 (LC); (2011) 32 ILJ 659 (LC) (1 October 2010) para 8.

²³⁰ Mnookin RH "Alternative dispute resolution" 1998 *Harvard Law School* 1, 1-2; Cassim *et al* *Contemporary Company Law* 33; see related discussions in *Zondi v City of Johannesburg and Others* (J 2461/12) [2015] ZALCJHB 39 (17 February 2015) para 55; *Mmethi v DNM Investments CC t/a Bloemfontein Celtics Football Club* (JS 1298/09) [2010] ZALC 143; [2011] 3 BLLR 268 (LC); (2011) 32 ILJ 659 (LC) (1 October 2010) para 23.

sometimes shatters the hope of parties that were still keen to save their company and work together after the litigation outcome.

As indicated above, the lack of provisions on ADR to resolve company disputes under the *Companies Act* creates a reliance on litigation, which is generally costly, and lengthy and causes strained relationships within companies. The researcher submits that ADR mechanisms such as arbitration and mediation encourage peaceful, confidential and tailored resolution of conflicts. In this regard, it is recommended that the *Companies Act* should be amended to provide for ADR forums for speedy and peaceful resolution of company disputes. The researcher further submits that with ADR in place, the passing of company resolutions will seldom be hindered by strained relationships that often lead to the dissolution of companies in worst case scenarios.

5.3 Conclusion

Under the *1967 Act*, provisions were detailed with clarity. Procedural irregularities on issues like voting quorum in the passing of shareholders' resolutions could easily be avoided. For example, firstly, voting by proxy was explicitly limited to a poll but not by the show of hands.²³¹ Contrary, to the clarity provided by the *1967 Act*, the *Companies Act* remains uncertain on the rights of proxy representation. Secondly, if default was made in calling an AGM, under the *1967 Act*, the Minister could on the application of any shareholder, call or direct the calling of the general meeting by one shareholder.²³² However, under the *Companies Act*, there is no administrative intervention or remedy provided for shareholders to call an AGM on directors' default. The only relief available to a dissatisfied director or shareholder is an intervention by courts of law.

²³¹ Sections 102(3) of the *1967 Act* and 62 and 67 of the First Schedule Part I of the *1967 Act*; see a related discussion in Cassim *et al Contemporary Company Law* 484; OECD G20/OECD *Principles of Corporate Governance* 22; see related discussion in *Van Zyl v Nuco Chrome Boputatswana (Pty) Ltd* 2013 JDR 0452 para 24.

²³² Section 98(2) of the *1967 Act*; Gopal 1982 *National University of Singapore* 248; Koh 2012 *Singapore Journal of Legal Studies* (2012) 467; *Ensemble Hotel Holdings and Another v Swanvest 328 and Others* (2022/058058) [2024] para 15.

The courts' intervention in the affairs of the company is not guaranteed, considering it is only exercisable in exceptional circumstances.²³³ The Court may direct that a meeting of shareholders be held only if doing so is in the best interests of the company. It is commonplace that litigation deters shareholders from undergoing the route due to its lengthy and costly proceedings. Thirdly, under the *Companies Act*, there is no provision on the time within which directors should accede to requested shareholders' meetings. Such provision is clearly provided for under the *1967 Act*.²³⁴ The above examples indicate how confusing and frustrating the application of the provisions of the *Companies Act* is to the business fraternity. Notably, the flaws in the passing of directors and shareholders' resolutions also show the potential of scaring away investors from considering Lesotho as their business destination. The ambiguity surrounding the passing of company resolutions is a threat to the survival of already existing companies because at the centre of successful companies is the ability to take legally-sourced decisions as and when need be.

Shareholder activism and protection of minority shareholders against abuse of powers in the passing of company resolutions is significant. It is ideal that the *Companies Act* be amended to provide for alternative dispute resolution forums for speedy and affordable resolution of conflicts. Alternative dispute resolution comes in handy where shareholders are deadlocked and unable to do something about it and voting at board meetings is along partisan lines that led to an impasse. Reaching out to ADR to save the company would be a more practical option than approaching courts of law for the company's dissolution.

The directors' supremacy is an important notion in company law that should not be undermined. Drawing distinct boundaries between the powers of directors and that of shareholders eradicates interference of one organ of the company with the powers of another. For example, although shareholder activism is currently at the core of good corporate government principles, it is noted that shareholders do not owe the company

²³³ *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd* [2022] LSHC 230 Comm. (27TH OCTOBER 2022) paras 16; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 84; Stuart and Crouch *Director's Signpost* 4; *Otto v Klipvlei Diamond Areas (Pty) Ltd and Others* 1958 (2) SA 437 (T.P.D) at 441H.

²³⁴ Section 99(1) of the *1967 Act*; see related discussions in Gopal 1982 *National University of Singapore Faculty of Law* 248, 248; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324 para 4; Alam 2013 *Dhaka University Studies Company Members'* 1, 3.

any fiduciary duties,²³⁵ but directors do. It is possible for shareholders to vote their personal interests in the passing of company resolutions, interests that may sometimes even be detrimental to the general performance of the company. It is significant that a room be created for directors to intervene and exercise their business acumen in the passing of company resolutions. For example, directors can be empowered to remove another director from the board if doing so will serve the best interests of the company.²³⁶

The researcher further submits that although the *1967 Act* was not perfect, most of its provisions were clear and well pronounced. Policymakers may not have to look far, since some provisions are better off imported from the *1967 Act* straight into the *Companies Act*, considering their relevance and resilience over time. The same cannot be said about the *Companies Act's* provisions. The *Companies Act* is generally a vague piece of legislation that requires urgent refinement. Therefore, it is recommended that flawed provisions of the *Companies Act* be amended for them to serve their course in adequately promoting the passing of directors and shareholders' resolutions under the *Companies Act*.

²³⁵ Section 63(1) of the *Companies Act*; Cassim *et al Contemporary Company Law* 692-693; *Cohen v Segal* 1970 (3) SA 702 (W) at 706; *Linake & Another v Chairman of the Board: Naledi Funeral Planners (Pty) Ltd* [2022] LSHC 230 Comm. (27TH OCTOBER 2022) para 12.

²³⁶ *Lesotho Public Motor Transport Co. (Pty) Ltd and Another v Mohaleroe and Others* (CIV/APN/264 OF 2009; CIV/APN/504/09) [2010] LSHC 11 (7 July 2010) para 22 and 23, *Netcare Hospital Group (Pty) Ltd v Afri 'Nai Health (Pty) Ltd and Others* (2530/2014) [2015] ZAFSHC 40 (26 February 2015) para 25; see related discussions in *Wait v Marais and Others* (1707/2021) [2022] ZAECQBHC 41 (1 November 2022) para 29; *Theart v Theart and Others* (9381/2022) [2023] ZAWCHC 130 para 1.

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