QUESTION

Whether or not reasons must be given for the removal of directors. Against the motion.

WHO IS A DIRECTOR?

According to Section 170(1) of the Companies Act, 2019 (Act 992) 'directors' are persons who are appointed to direct and administer the business of the company. By law, every company incorporated must have a minimum of two directors, one of these directors being ordinarily resident in Ghana[1].

APPOINTMENT OF DIRECTORS

First directors of a company are usually appointed by the promoters of the said company. Subsequently the directors may be appointed by the shareholders or in accordance with the provision of the constitution of the company.[2]

REMOVAL OF DIRECTORS

Section 176(1) of the Companies Act, 2019 (Act 992) provides that all or any of the directors of companies may be removed from office by an *ordinary resolution*[3] of members of the company at a general meeting regardless of the provision in the constitution of the company or any agreement with the said director.

Also Act 992 provides that any person named in the constitution as a person who has power to appoint or to remove, that power is enforceable by that person although that person is not a member or officer of the company.

Although the mode of removal of a director may be in accordance with the constitution of the company, the default procedure spelt out in the Companies Act, 2019 (Act 992) does not require reasons to be stated in removing a director.

PROCESS FOR THR REMOVAL OF DIRECTORS

Subject to the provisions of the constitution of the company, the removal of any director by the members of the company must strictly comply with the procedure outlined in Section 176 of the Companies Act, 2019 (Act 992). The procedure is as follows;

1. Notice of intention to remove the director must be given to the company 35 clear days before the meeting at which the resolution is to be moved[4]. That notwithstanding, after such notice of the

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[1] Section 171(1) of the Companies Act, 2019 (Act 992)

[2] Section 172(4) of the Companies Act, 2019 (Act 992)

[3] *A resolution is an ordinary resolution when it is passed by a simple majority of votes cast by the members of the company, being entitled to vote in person or by proxy at a general meeting*. See Paragraph 14 (a) of the 8th Schedule to Act 992.

[4] Section 176(2) of Act 992

intention to move the resolution is given to the company and the meeting is called for a date 35 days or less, the notice is deemed to have been properly given for such purpose.[5]

2. The Company shall now go ahead to give the members of the company notice of the resolution at the same time and in the same manner as the company gives notices of meetings. However, where this mode is not practicable, the company is statutory required give the notice of the resolution to its members in the same manner as notices of meetings are given not less than 21 days before the meeting[6].

3. The company shall send a copy of the intended notice of resolution to the director concerned[7].

4. Also, in accordance with the principle of natural justice, specifically *audi alterem partem* (right to be heard), the director is entitled to be heard at the meeting, and also send have a written statement to the company.[8]

CASE LAW ON REMOVAL OF DIRECTORS

The findings of the court have generally been that, there is no burden on members to give reasons justifying their decision to remove a director from office. Thus, once the statutory requirements are complied with, no court suit can properly be instituted to set aside the removal of a director. On the other hand, it stands to also mean that members are not barred from stating reasons in the notice of intention to remove a director.

The courts in Ghana have had the opportunity to pronounce on the removal of directors, and it is to a discussion of these cases that I would like to further proceed.

In the case of **Pinamang v. Abrokwa [1991] 2 GLR 384**, Pinamang (the 'appellant') was the majority shareholder and managing director of the company. Abrokwa (the 'respondents') in their capacities as shareholders, claimed that the appellant was conducting the affairs of the company in a manner oppressive and in disregard of their interests, and so they sued him in court seeking that the appellant be made to pay all moneys found due from him to the company after proper account had been taken of the affairs of the company. Further, they sought that the appellant should be removed from the board of directors of the company. The High Court dismissed the suit. So they appealed the decision and it was also dismissed.

The Court of Appeal **held** that Companies Act, 1963 (Act 179) specifically provides for the procedure and mode for the removal of the director of a limited liability company. Accordingly, the High Court had no jurisdiction in this cause. The court further stated once a resolution has been passed by majority of members of the company the trial court must not inquire into matters of internal management or, at the instance of a shareholder, interfere with transactions of the company although it may be irregular and

[5] Section 176(2) of Act 992
[6] Section 176(3) of Act 992
[7] Section 176(5) of Act 992

[8] Section 176(5) of Act 992

detrimental to the company (somethings which are capable of being rectified by an ordinary resolution of the company in a general meeting).

It is in respect of the position of the court in this case that it has set boundaries on the power of the members to remove directors. Thus, it can only interfere with the removal of a director when the statutory requirement has not been complied with.

However, that does not mean the court cannot remove a director when his appointment was wrong.

In **Asafu-Adjaye v. Agyekum [1984-86] 1 GLR 382,** Asafu-Adjaye (the 'appellant') and Agyekum (the 'respondent') were all directors of a company. Upon incorporation of the company, they agreed all the founding shareholders will hold the same number of shares. The respondent was further appointed an executive director. An argument ensued between the appellants and the respondent regarding the management of the company's funds which the respondent accused the appellants of diverting for their personal use. The respondent also accused the appellants of reducing his shares contrary to their verbal agreement and purportedly holding a meeting to remove him as director, and acting in an oppressive manner against him. The respondent sued the appellant, seeking the court to declare the reduction of his shares invalid, order the appellants to refund the monies taken, and an injunction restraining the appellants from holding the meeting to remove him. The orders were granted to the respondent, but it was appealed.

The Court of Appeal reversed the decision of the High Court on disallowing the removal of the respondent as director of the company. The reason given by the court was that when a company complies with Companies Act, 1963 (Act179) as to the requisite notice of 35 days to remove a director, apart from the mandatory requirement to call an annual general meeting, nothing else is mandated. Therefore, the removal of the respondent as director of the company was proper.

There are remedies such as compensation and damages for a director (executive directive) to seek for his wrongful removal. Therefore, it should be for only very crucial and vital reasons that the Court must depart from the rules provided by the Companies Act, because, in any case "equity follows the law". Thus, where a statute is direct and governs the case with all its circumstances or the particular point, a court of equity is bound to follow it.

In **Heinrich Koch v. Horteng Limited (2004)** the decision of the court is that notice of an intention to remove a director must specify that a director is going to be removed, and it is necessary to state the grounds for his removal. The director concerned must be given a right to be heard in his defence to any charges that may be preferred against him. No stage during the trial did the company tender the statutory notice required. Only the removal letter was tendered, not the notices to attend the meeting or its proof of service. Consequently, the removal breached the rules of natural justice of fair hearing. So the removal of Heinrich was declared null and void for breach of the Companies Act. Our understanding is that the requirement to give notice of intention to remove a director as well as the right to be heard is mandatory. However, in the case of the requirement to state the reasons for his removal in the notice, to the court, it was held to be necessary but not mandatory.

CONCLUSION

In conclusion, all persons who are directors of a company may be removed from office by an ordinary resolution of members of the company at a general meeting regardless of what the constitution governing the company says. And although the mode of removal of a director may be in accordance with the constitution of the company, the default procedure of the Companies Act, 2019 (Act 992) does not require to state reasons for removing a director.

However, rules are founded on the general principles of justice and fairness. It is important to know that we are now in the age of modern purposive approach to interpretation. As long as the statutory requirement in the Companies Act, 2019 (Act 992) provides for a director to be given an opportunity to be heard, we should know the direction in which the law is thinking. Thus, the court is likely to presume that reasons should be given for removal of directors.

However, it is our opinion that it should be for only very crucial and vital reasons that the Court must depart from the rules provided by the Companies Act,2019 (Act 992) because in any case "equity follows the law".

Thus, where a statute is direct and governs the case with all its circumstances or the particular point, a court of equity is bound to follow it. Moreover, the understanding is that the requirement to give notice of intention to remove a director as well as his right to be heard at a general meeting is mandatory. However, it is not a statutory requirement to state the reasons justifying the intention to remove a director from office