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Is a Director or Shareholder the real owner of a Private Company?



Within the contemporary corporate landscape, a question often posed is: who is the real owner of a company?

This question lacks a simple solution and necessitates a comprehensive understanding of the distinctions between the important roles of a 'Director' and a 'Shareholder', along with their corresponding responsibilities within a corporate entity.

This article aims to streamline and elucidate the distinct roles that a Director and a Shareholder fulfil within a Private Company.

Understanding the difference between a Director and Shareholder

Section 1 of the Companies Act, 71 of 2008, assigns the following meaning to the terms **‘Director’** and **‘Shareholder’**;

- **“Director”** means a member of the Board, as contemplated in section 66 of the **Companies Act** (“the Act”), or any **Individual** occupying the position of a director, irrespective of title, or an **Alternate Director**, properly appointed in terms of the **Act,** while an **Executive Director** is a **Director** involved in the day-to-day management of the company.
- **“Shareholder”,** as defined in sections 1 and 57(1) of the Act, is the holder of a **Share** and under certain circumstances as the context may indicate, the holder of a **Security** issued by the company and who is identified as such in the certificates or uncertificated Security Register of the company.

The word *‘shareholder’* also includes persons who, for instance, make a financial investment in the company, which entitles them to exercise voting rights as shareholders, e.g. those holding debentures, options, etc. in a company.

Those persons who benefit financially from a company are referred to as persons holding a **‘beneficial interest’**. This term is defined in section 1 of the Companies Act as follows:

When used in relation to a company’s securities, means the right or entitlement of a person, through *ownership*, agreement, relationship or otherwise, alone or together with another person to— **(a)** receive or participate in any distribution in respect of the company’s securities; **(b)** exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company’s securities; or **(c)** dispose or direct the disposition of the company’s securities, or any part of a distribution in respect of the securities.

What are the powers of a Shareholder or Shareholder’s Rights?

Shareholders normally do not have any right to be directly involved in the operational management of a company. In terms of legislation, this role is assigned exclusively to the director of a company.

If shareholders are not satisfied with the performance of directors, they may remove or replace the directors or refuse to re-elect them. Shareholders normally do not participate directly in corporate decision-making and directors are not always required to comply with the wishes of shareholders.

While the day-to-day management of the company is the responsibility of the company's board of directors, the shareholders may exert a meaningful indirect influence by exercising the rights and powers available to them. These include–

- passing resolutions at shareholder meetings;
- electing/appointing directors;
- electing to sell their shares;
- exercising minority buy-out rights (the minority shareholder can approach the court for an order for the company to buy back their shares);
- requesting the company, in writing, to furnish them with information held by the company (with a right to appeal to the court if the company refuses);
- requiring the company to provide the shareholder with a statement of the shares that he or she holds, and of the various rights, privileges, conditions and limitations that attach to those shares; and
- adding or changing restrictions on the issue, transfer or ownership of shares.
- adopting any amendments to the company's Memorandum of Incorporation (MOI)

Managing a company

In terms of section 66 of the Companies Act, the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Companies Act or the company's MoI provides otherwise.

The word 'manager' is derived from the Latin word '*manus*', meaning 'hand'. A manager gives the necessary 'hand' in providing guidance by leading or giving direction to others, while a director of an organisation plays a very important managing role and serves as a member of a company's board of directors.

What are the Fiduciary duties of directors?

A director has a fiduciary duty towards the company. 'Fiduciary duty' bears a meaning far beyond the corporate world.

It also pertains to life as such. The word ‘fiduciary’ is derived from the Latin word ‘*fidil*’ which means faith. The English word ‘fidelity’ means the quality of being faithful and loyal, which confirms the definition of a fiduciary duty as one of good faith, loyalty and truthfulness. A person entrusted with a fiduciary duty should act in the best interest of someone else and avoid a conflict of interest. A director’s fiduciary duty is to act in the best interests of the company as a whole.

We now know and understand that a director is acting on behalf of the company and not in the interest of its employees or shareholders.

Directors therefore have a fiduciary duty to always primarily act in good faith and in the best interests of the company. The obligations of a director with a fiduciary duty include the following:

- Directors are not allowed to use corporate property, information or opportunities for personal gain;
- Directors must have, or use, the ability to act or decide according to their own discretion or judgement;
- Directors should exercise their power for the purpose it was assigned to them (‘proper purpose’). (The **Proper Purpose** Rule states that if directors use their power for reasons other than the benefit of the company, it is deemed improper and they would have failed to fulfil their fiduciary duties to the organisation, i.e. their obligation to act in good faith and for the benefit of the company);
- Directors should avoid any conflict of interest;
- Directors have a duty not to misappropriate corporate opportunities;
- Directors may not abuse their position as director or misuse any information obtained while acting in the capacity of a director;
- Directors should not knowingly cause harm to the company or a subsidiary of the company;
- Directors should communicate to the board any information that comes to their attention unless the information is immaterial or generally available to the public or known to the other directors, or if the director is not bound to disclose such information by reason of confidentiality; and If a company does not meet the solvency and liquidity test (section 4 of the Companies Act) it may not enter into certain corporate actions (duty of director).

In conclusion

A shareholder does not owe any fiduciary duty to the company. A shareholder may hold shares in a competitor company, while, in the case of a director, such a situation would represent a conflict of interest and breach of fiduciary duty. Shareholders and directors have two completely different roles in a company. The shareholders own the company by owning its shares and have a beneficial interest in the company, while the directors manage the affairs of a company. Unless clearly required by a company's MoI, a director does not have to be a shareholder and *vice versa*.

Historically, the courts have said that directors' duties are owed to their company and not to the company's shareholders because directors have more knowledge of the company's affairs than a shareholder and their actions would potentially affect the shareholders.

The possibility of being a shareholder and serving as a director simultaneously is legal, but naturally this means that there should be a separation of responsibilities between the two functions when serving in either capacity.

The responsibilities of directors and shareholders, respectively, and the relationship between them, are often set out in the company's Memorandum of Incorporation or MoI; therefore, it is essential to be aware of this and consider all the facts before establishing a business. In doing so, one would be able to ensure that everyone involved in corporate governance of a company is acting in a way that is legally compliant and beneficial to the future success of the organisation.

The answer to the question: 'who owns a company' depends to a large extent on whether you approach the question from a beneficial point of view or a management and control perspective, as these functions are fulfilled by different role players in a company.

The question then of 'Who is the real owner of a Private Company' is therefore open and yours to decide.

SERR Synergy assists businesses to comply with the new Companies Act and amended Closed Corporations Act by bringing all relevant company documents in line with the new Companies Act.

Our Corporate Legal Advisory team assists businesses with the setting up of Shareholder Agreements and Director Agreements as well as compliance with the newly proposed amendments to the Companies Act published in 2021 in respect of shareholder detail disclosure, record keeping and access to information of the Company.

About the Author: Ursula Jordaan gained valuable experience in her previous roles as creditors clerk and HR manager. She joined SERR Synergy in 2018 and currently works in the Ownership Department as a Corporate Legal Advisory Team Lead. She is currently involved with the implementation of collective ownership structures and shareholding transactions for businesses.

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