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NEW COMPANIES ACT ALERT SERIES

Derivative Action

Introduction

A derivative action is a claim brought by an individual shareholder, acting on behalf of and for the benefit of a company, against the directors of the company. The derivative action is brought to remedy wrongs committed against the company, which the company is not willing to pursue itself.

Derivative action under current law

Presently, a derivative action may only be brought where:

- the persons complained of, control the company and their action amounts to a fraud on the minority; and
- the wrong complained of, contravenes the objects of the company and cannot be ratified by ordinary resolution.

The common law governing the derivative action is however, complex and the remedy is rarely pursued.

Who may bring a derivative action under the Companies Act 2015?

Only a member of the company may bring a derivative claim. The person need not have been a member when the action complained of occurred.

When may a derivative action be brought?

The Companies Act 2015 has codified the common law based derivative action. The matter complained of must be in relation to an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director (including a former director) of the company.

Procedure for lodging a derivative claim under the Companies Act 2015

A member who intends to bring a derivative claim must apply to the Court for permission to do so.

Neither the defendants nor the company are involved at this stage although they will have received notice that the action has been commenced.

Implications

The Companies Act 2015 has expanded the range of circumstances in which a derivative action can be maintained thus making it easier for shareholders to hold the directors of the company to account for their actions.

It is expected that the number of derivative actions lodged may increase.

If you have any queries regarding the Act, please do not hesitate to contact Sonal Sejjal at ss@africalegalnetwork.com. You can also send your queries to:

A&KCompaniesAct@africalegalnetwork.com.

If you would like to attend our Companies Act Seminar taking place at the Intercontinental Hotel in Nairobi on 9 November, from 8:00 a.m. to 1:00 p.m., please register by emailing akevents@africalegalnetwork.com.

The content of this alert is intended to be of general use only and should not be relied upon without seeking specific legal advice on any matter.