

REMOVAL OF DIRECTORS: DOES IT CONSTITUTE DISMISSAL UNDER THE LABOUR RELATIONS ACT?

Introduction

The Companies Act No. 71 of 2008 ("the Act") regulates the removal of directors. A director of a company may be removed as a director in terms of section(s) 71 (removal of directors) and 137(5) (effect on shareholders and directors) of the Act.

Under section 71 of the Act a director may be removed from office by ordinary resolution (a resolution adopted with support of more than 50% of the voting rights exercised on the resolution) of the shareholders in a general meeting, by the board of director's resolution, and by the Companies Tribunal in certain instances.

Further, under Section 137(5) of the Act a director of a company that is in the process of business rescue may be removed, on application to a court, by the business rescue practitioner for failure to comply with the requirements of Chapter 6 of the Act or for impeding the business rescue practitioner in the performance of the powers and functions of the business rescue practitioner.

Application of the Labour Relations Act ("the LRA") to the removal of directors

Removal of directors constitute a dismissal under the LRA. In the case of *SA Post Office Ltd v Mampeule (2010) 31 ILJ 2051 (LAC)* the respondent ("Mampeule") was appointed, on contract, as the chief executive officer and as a member of the board of the applicant ("the SA Post Office Ltd"). Prior to the expiry of the contract of employment, the chief executive officer was removed as a director by the sole shareholder of the SA Post Office Ltd, the Minister of Communication. As a result of the removal, the chief

executive office instituted legal proceedings against the company for breach of contract and for unfair dismissal.

The court held that the automatic termination clause contained in the contract of employment was in conflict with Mampeule's right not to be unfairly dismissed. The court observed: *"a managing director holds two positions and acts in two different capacities in that he is a director of a company and qua director is governed by the Companies Act but he is also an employee of the company and qua employee the relationship must fall squarely within the ambit of the Act."*

In *PG Group (Pty) Ltd v Mmambo NO & Others (2004) 25 ILJ 2366 (LC)* held that *"Neither the Labour Relations Act, nor the Companies Act nor, in this case, the applicant's articles, specifically precludes a director from enjoying the protection of the Labour Relations Act. More importantly, s 220 of the Companies Act, which allows a company to make short shrift of a director's career, expressly requires a right to a hearing (s220(2)). The Constitution which requires fair administrative action, demands that such a hearing must be fair. Whether that hearing was fair or not, should not be finally determined by the shareholders or the company's board of directors. It is inconceivable that in such an enquiry the ordinary principles of employment law would not be relevant. It follows that the obvious remedy available to an unfairly dismissed director would lie in the provisions of the Labour Relations Act. However, in the light of the dual capacities in which a director holds office, it is questionable if directors are entitled to reinstatement."*

Breach of contract and damages

In terms of section 71(9) of the Act a director removed from office may apply to a court for damages or otherwise compensation for loss of office as a director or loss of any other office as a consequence of being removed as a director.

Conclusion

Whilst it is possible to remove a director of a company in terms of section 71 of the Act, careful consideration will have to be given to the director's employment law rights under the LRA, including the risks pertaining to the liabilities that may arise from breach of contract and damages. The LRA should be considered when removing a director under the Act. Where the company wishes to remove a director from his office as director and as an employee of the company reference must be given to both the Act as well as the LRA.

Automatic termination clauses

In *Mampeule supra* the court held that parties to an employment contract cannot contract out of the protection afforded by the LRA against unfair dismissal. An automatic termination clause which provides that if the director is removed from his office as director, his employment with the company will be automatically terminated or vice versa is inconsistent with the LRA and should be avoided.

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