

Key considerations for companies when removing a director from office

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Removing a director from office in an unfair or unlawful manner exposes companies to liability under the Labour Relations Act as well as the Companies Act. This article raises some key considerations for companies looking to achieve the smooth departure of a director.

Parting ways with a director, who is also an employee, is rarely uncomplicated, particularly from a legal perspective, as two distinct areas of law apply. The Labour Relations Act 66 of 1995 (LRA) will guide how the employment is terminated. On the other hand, the Companies Act 71 of 2008 (Companies Act) guides how the director is removed from the board of directors. The apparent overlap in the law leaves many with uncertainty on which laws would apply.

Directorship and employment therefore fall under separate legislative provisions, which have distinct requirements and consequences. In terms of the LRA, the termination of an employee's employment (with or without notice) by an employer, constitutes a dismissal. A dismissal of an employee, in terms of the LRA, should be substantively and procedurally fair. On the other hand, their removal as a director should be in accordance with the requirements of and for the reasons set out in the Companies Act. Section 71 of the Companies Act provides that a director may be removed by a shareholder or board resolution if, for example, the director is incapacitated, convicted of theft or fraud, has neglected their duties, or been derelict in their duties. The relevant director must be given appropriate notice of the meeting to pass this resolution as well as an opportunity to make representations before the resolution is adopted. An aggrieved director may apply to court to review the decision. The court would be required to decide whether the removal was lawful and whether it complied with the requirements and procedures of the Companies Act.

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requirements and procedures of the Companies Act.

The removal of a director from the board does not, however, mean that they have automatically been dismissed as an employee. As mentioned above, in terms of the LRA, the termination of an employee's employment (with or without notice) by an employer, constitutes a dismissal. The law prescribes that employers must satisfy the fairness (substance and procedure) requirements contemplated in the LRA to dismiss an employee.

In *SA Post Office v Mampeule*,¹ the court considered a provision in the Post Office's contract of employment that stated that the removal of a director also equates to their dismissal as an employee. The court maintained that this was not possible, as a removal from the board of directors and a dismissal as an employee were different processes, with different legislative requirements and consequences. The court distinguished between the requirements for the removal of a director in terms of the Companies Act and the requirements for a fair dismissal of an employee in terms of the LRA - and the different remedies available to a director and employee in the event of their removal and/or dismissal. The Post Office in this case attempted to contract out of the remedies afforded to a director and employee in the event of their removal and/or dismissal, which the court ruled against.

The remedies available to a director if s/he is unlawfully removed from the board of directors differ from those available if the same person, in the capacity as an employee, were unfairly dismissed. In the event of an unfair dismissal dispute, the LRA provides that a successful applicant may be reinstated (which may include the payment of back-pay) or be granted an order for compensation for up to 12 months' remuneration. In the event of an unlawful removal of a director from the board, various remedies are at their disposal such as a claim for damages equivalent to the value of the remainder of their term as a director. Therefore, an unlawful removal from the board of directors or unfair dismissal of an employee may have costly consequences for the employer, and employers need to ensure that both the LRA and Companies Act boxes are ticked before a dismissal and removal of an employee who is a director can be validly effected.

The appointment of a director almost always entails an employment contract, but the difference between the two should always be appreciated. When dismissing employees who are also board members, employers need to appreciate the difference between their removal from the board of directors (which must be done within the confines of the Companies Act) and their dismissal as employees (which must be done in accordance with the fairness standards prescribed in the LRA).

¹ (2010) 31 ILJ 2051 (LAC).

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