BOARDROOM TALES BY ANN CROTTY

A legal but troubling solution

The regulator may not accept the way Mpact has managed to arrange payment for its directors

It shouldn't have been surprising, given that Caxton is involved, but Mpact's precedent-setting response to being prohibited from paying its nonexecutive directors (NEDs) has sent a few shock waves through the investment community. Or at least that shrinking portion of the community that is concerned with corporate governance issues.

It has to be stressed that what Mpact has done is entirely legal. The appointment of all the NEDs of the listed entity, Mpact Ltd, to the board of the wholly owned operating subsidiary Mpact Operations means the NEDs will be able to receive fees. The good news is that while businesses are under no obligation to disclose details of those fees, a company spokesperson assured the FM details would be made known.

Here's what prompted the unprecedented move: just over three months ago, at the group's AGM, the special resolution needed, in terms of the Companies Act, to approve the payment of NED fees was not passed. Caxton, which owns 34% of Mpact, voted against it. Because a special resolution needs at least 75% support, it was dead.

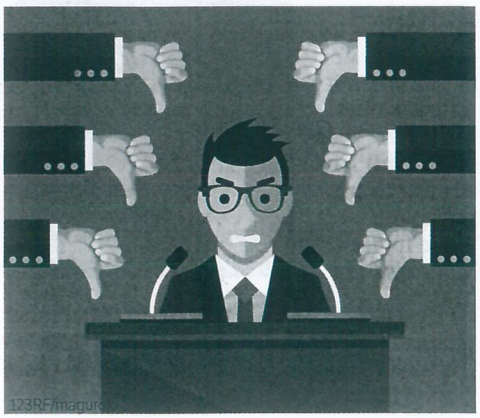
However, it's important to note that this didn't automatically mean the nonpayment of NED fees. Section 66(9) of the act says a special resolution "approved by the shareholders within the previous two years" is needed to pay the fees. As it happens, at the AGM in 2021, the NED special resolution was passed by 90% of shareholders who attended and voted. Caxton, which held 31.8% of the shares at that stage, abstained.

This should have meant Mpact was able to pay its NEDs the same fees approved by the 2021 AGM. But it wasn't, because, for whatever reason, the wording of this year's resolution specified the fees were for services rendered between July 1 2022 and June 2023.

This isn't the first time a block of agitated shareholders has threatened the payment of NED fees. In 2020 Sasol shareholders threatened to vote down the special resolution needed. A reasonable enough response, given the 300% increase the NEDs had enjoyed over the previous 10 years in the face of a huge destruction of shareholder value. And then there were the generous additional allowances also paid to Sasol's NEDs.

Sasol's chronically mean-spirited attitude to shareholder engagement had resulted in it putting only the necessary resolution to the AGM every two years. So it was in a spot. Only by promising to take a 20% cut in fees was it able to persuade shareholders not to block the resolution.

Evidently Mpact's engagement with Caxton wasn't as successful. Caxton says the move reflects its concern about the NEDs' lack of disclosure in a number of key areas.



But here's the problem: Mpact's entirely legal move sidesteps the substance of the law's intention and creates a troubling precedent.

And just because it's legal doesn't mean there will be no response from the regulator. The Companies & Intellectual Properties Commission might feel the move contravenes section 6 of the Companies Act, which deals with compliance and anti-avoidance.

If it does, the commission might be able to persuade a court that the move was "substantially intended to defeat or reduce the effect of a prohibition or requirement" of a provision of the act.

Mpact's unprecedented move reveals the sad reality that when push comes to shove, directors are inclined to abandon the best practice version of corporate governance. Mind you, the company does make a reasonable case in arguing that the move is in the best interests of the investors, who hold 66% of the shares. That is, everyone except Caxton.

Significantly, 91% of Mpact shareholders attended the AGM, and while 37.4% of that number (namely Caxton) voted against the NEDs' fees, 62.6% voted in favour – not enough to pass a special resolution. The situation raises a number of governance concerns, including that Caxton will continue to use its stake to block special resolutions. This could make Mpact ungovernable.

In the US there are regulations restricting an "offerer" from using its voting rights to pursue its interests as an offeror. There are no similar restrictions in SA. And even if there were, it might not make a difference, such is the convoluted mess of this particular battle.

Caxton wants to make an offer but, because of Mpact's outstanding issues with the competition authorities, it refuses to attach a price to it. Without a price, says the Mpact board, very reasonably, there is no offer to consider. And so far it has managed to persuade the competition authorities and the Takeover Regulation Panel that there is indeed no offer.

Until that changes, or one of the protagonists blinks, we can look forward to lots more unprecedented governance moves from this battle. x