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THE NOMINEE DIRECTOR – ALL RISK AND NO REWARD?

It is common practice for shareholders to appoint a non-executive director to the board of a company in which they hold shares. They normally do so in the hope that that director will look after their interests in that company. Such a non-executive director is often referred to as a "nominee director" but she/he is not an employee of that company – she/he is simply a director of that company. A nominee director may be appointed or elected to the board of a particular company to "protect" that nominee director's "appointing shareholder's" interests.

Whether executive or non-executive, all directors have a duty to act in the best interests of the company of which they are directors. In discharging this duty, each director must exercise an independent judgment and must cast her/his vote as a director of that company keeping in mind at all times the best interests of that company. A shareholder may provide funding to another company and in return would like one of its employees to sit on the latter company's board of directors to ensure that the funding is being used for the purpose for which it was provided in the first place. Such a nominee director may have been elected to represent the interests of that shareholder (who elected her/him in the first place) but in carrying out her/his duties and functions as a director of the company of which she/he is a director, she/he must serve the interests of that company to the exclusion of the interests of her/his appointing shareholder as her/his employer. This well-established principle was set out clearly in the case of *Fisheries Development Corporation v AWJ Investments* 1980 (4) SA 156 (WLD).

A director of a company must also not use her/his position as director of that company to gain an advantage for anyone other than that company. Potential difficulties arise for nominee directors as they can easily become conflicted between the competing interests of the company and their appointing shareholder (which may, but does not have to be, her/his employer).

A director of a company, whether executive or non-executive, is potentially personally liable for breaching the fiduciary duties which she/he owes to her/his company or for any loss, damages or costs sustained by the company as a consequence of that director breaching the duties which she/he otherwise owes to the company.

Sections 66(8) and 66(9) of the Companies Act, No. 71 of 2008 now clearly allows a company to remunerate its directors for their service as directors, provided that the payment of that remuneration has been approved by the company's shareholders by way of a special resolution within the previous two years.

On the one hand, nominee directors run the risk of potentially incurring personal liability if they breach the duties which they owe as directors. However, on the other hand, does any remuneration paid by the company to the nominee directors for their services as directors correspondingly accrue to them personally?

The dispute in the case of *Public Investment Corporation v Bodigelo* (128/2013) [2013] ZASCA 156 (22 November 2013) was whether Mr Bodigelo, as a nominee non-executive director to the boards of various companies in which the Public Investment Corporation (the "**PIC**") held an interest, was entitled to retain the various directors' fees and bonuses which those companies had declared to their directors.

The facts of the case were briefly that at the relevant time, Mr Bodigelo was an employee of the PIC. In the ordinary course of its business, the PIC invested moneys on behalf of public sector entities and appointed certain employees (including Mr Bodigelo) as non-executive directors to the boards of companies in which it had invested. The PIC did so to ensure that the funds it had invested in those companies were utilised for that purpose.

Mr Bodigelo was appointed by the PIC as its nominee director to various companies. These companies paid directors' fees and bonuses to their directors for the services rendered by those directors. However, on the instruction of the PIC, the fees and bonuses which were payable for the services rendered by Mr Bodigelo were paid by these companies directly to the PIC, and not to Mr Bodigelo personally.

Mr Bodigelo claimed payment of those fees and bonuses, amounting to approximately R2million, from the PIC. For completeness' sake, it should be noted that Mr Bodigelo's service contract with the PIC was silent as to how those fees and bonuses were to be dealt with. .

The court which first heard the matter dismissed Mr Bodigelo's claim. That court found that Mr Bodigelo had been nominated by the PIC as a non-executive director of those companies, that when Mr Bodigelo acted as a director of those companies he acted as an employee of the PIC and that he accordingly was not entitled to retain the directors' fees and bonuses over and above his agreed remuneration with the PIC.

Mr Bodigelo appealed to the full bench of the relevant division of the High Court. The full bench found in Mr Bodigelo's favour, primarily on the basis that it was not disputed that Mr Bodigelo became a non-executive director of the companies in question due to the PIC's actions and that the PIC knew that director's fees and bonuses would or might become payable by those companies to Mr Bodigelo.

The PIC appealed to the Supreme Court of Appeal (the "**SCA**"). The SCA held in favour of the PIC. The SCA concluded that in performing his duties and functions as a non-executive director, Mr Bodigelo did so as an employee of the PIC. Since there was no agreement between the PIC and Mr Bodigelo that entitled Mr Bodigelo to retain any director's fees and bonuses paid to him by those companies, the SCA concluded that the PIC, as Mr Bodigelo's employer, was entitled to those payments.

The SCA's judgment causes real complications. The judgment is difficult to reconcile with the established company law principle that nominee directors do not, and cannot, act as representatives (whether as employees or otherwise) of their nominating "appointing shareholders" when they act as directors of the companies on whose boards they sit. If nominee directors act as employees of their appointing shareholders when they also act as directors of the companies on whose boards they sit, they end up in an untenable position: As employees, they must, as a matter of labour law, act in the best interest of their employers. However, as a matter of company law, they must act in the best interest of the company on whose board they sit. Should any conflict exist or arise between those two sets of interests, those nominee directors are "damned if they do and damned if they don't".

What makes the SCA judgment even more worrying is its practical effect where the "appointing shareholder" is also the employer of the nominee director: Nominee directors (not their appointing employers) owe fiduciary duties and duties of skill, care and diligence to the companies on whose boards they sit. If they breach those duties, they (not their appointing employers) are potentially personally liable. So the "risk" of potential personal liability is the nominee director's, not her/his

appointing employer's. However, under the SCA judgment the "reward" is the appointing employer's, not the nominee director's. There is a resulting mismatch between risk and reward, which is unlikely to make competent employees queue up and volunteer for appointment as nominee directors.

The SCA judgment does not mean that nominee directors can never be entitled to director's fees and bonuses at all. The SCA judgment does not deal with the position where the nominee director is not employed by her/his "appointing shareholder". What the SCA judgment does mean though, is that if a nominee director is also an employee of her/his "appointing shareholder", she/he is only entitled to that directors' remuneration "reward" if she/he contractually so agrees with her/his appointing employer.

No doubt employers and nominee directors will (and should) review their service contracts in light of the SCA judgment: Employers are likely to make it clear in their service contracts that nominee directors' remuneration belongs to the employer, while their nominee directors may very well try to agree otherwise in their service contracts. But the one crucial aspect which has come out of the SCA judgment is that it is critically important that nominee directors who are employed by their "appointing shareholders" should insist that their appointing employers indemnify them against any personal liability incurred by them in acting as nominee directors. Such an indemnity will go a long way towards bringing the now "all risk and no reward" position for those nominee directors onto a more even and fairer keel.

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