

# EMPLOYMENT ALERT

9 September 2013

## HIDDEN ENTITLEMENTS: THE RIGHTS OF TRADE UNIONS UNDER THE COMPANIES ACT 71 OF 2008 - SOME FOOD FOR THOUGHT

The Companies Act is typically not in the forefront of one's mind when discussing the impact of labour legislation.

However, employers dismiss the importance of this statute at their peril.

The Companies Act grants significant additional rights to trade unions. For instance, section 20(4) allows any trade union to approach the High Court for an order restraining the employer from doing anything inconsistent with the Companies Act. The Act contains 225 different sections where lesser-known obligations for employers may lurk. Employers may be forgiven for feeling overwhelmed as the Companies Act adds to the regulatory framework that governs interaction between employers and trade unions/employees.

### Business Rescue Proceedings – Section 31(3) and 128

Business Rescue Proceedings aim to facilitate the rehabilitation of Employers that are in financial distress.

At the commencement of the proceedings, the Employees continue to be employed on the same terms and conditions of employment, save to the extent that changes may occur in the ordinary course of attrition. Should retrenchments become necessary, these are to be carried out under section 189 and/or 189A of the Labour Relations Act (LRA).

Any amounts that become due and payable prior to the rescue proceedings result in the Employees ranking as unsecured preferent creditors of the Employer.

Trade Unions that represent affected employees have the right to access the Employer's financial statements and, armed with this information, are able to initiate the business rescue process themselves by approaching a High Court.

### Loans and Financial Assistance to Directors - Section 45(5)

Previously when Employers provided financial assistance to their directors, this could be authorised by way of a resolution.

The Companies Act now requires that a copy of the resolution be provided to the employee's Trade Union:

1. Within 10 business days if the value of the loan or assistance exceeds 1% of the Employer's net worth; or
2. Within 30 business days after the end of the financial year end in all other circumstances.

This may have far reaching substantive consequences for Employers who have previously provided loans to directors and thereafter have to embark on retrenchments in terms of section 189 and 189A of the LRA.

### Protection for Whistle Blowers - Section 159

Any Employee that makes a disclosure under the Protected Disclosures Act 26 of 2000 ('the PDA') is afforded immunity from civil, criminal and administrative liability if that disclosure reveals genuine wrongdoing by the employer (such as corruption). Employees who make protected disclosures about corruption in good faith are also protected from disciplinary action in terms of the LRA.

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The Companies Act mirrors the requirements of the PDA in so far as the immunity applies and also requires that the disclosure be made in good faith. However, it also expands on the PDA by allowing the disclosure to be made by an Employee, registered Trade Union or Employee Representative.

The disclosure can now also be made to the Companies and Intellectual Property Commission ('CIPC'), the Companies Tribunal or the Takeover Regulation Panel. Disclosures that fall outside the ambit of the PDA and/or section 159 of the Companies Act will not enjoy civil and criminal immunity.

#### Application to declare a Director Delinquent - Section 162(2)

This section gives Trade Unions the right to approach the High Court and apply for company director to be declared delinquent if that director grossly abuses his/her position, takes personal advantage of an opportunity, inflicts harm upon the Employer's business and/or acts in breach of his/her functions, thereby breaking the relationship of trust.

It appears that a director who has been declared a delinquent will be prevented from acting as such for that particular Employer.

#### Probation - Section 162(7) and (8)

Trade Unions can now also apply to have a director placed on probation in instances where the director acts in a materially inconsistent manner with regard to his/her duties.

During any period of probation the director may be required to undergo remedial education or pay compensation to any person adversely affected by the conduct. In some instances, this may result in compensation being paid to the Trade Union or Employees.

#### Derivative Actions - Section 165(2)

This section will allow Trade Unions to serve demands on the Employer in order to commence or continue with legal proceedings so as to protect the legal interests of the Employer (even if the board no longer wishes to engage with the litigation in question). The Employer is only able to set aside the demand if it believes the demand to be frivolous, vexatious and without any merit.

In all other instances the Employer will be required to commission a report within 60 business days to either initiate or continue proceedings or refuse to comply with the demand. The Trade Union can then approach a High Court to bring or continue with the proceedings in the name of and on behalf of the Employer.

Despite the existence of this provision, it is unknown how such a process would apply in practice and who would fund the continued litigation - it is doubtful whether the Trade Union would take upon the costs of such litigation.

#### Conclusion

The Companies Act affords trade unions greater say in the business of a company. Employers should consider the impact of the Companies Act on its labour relations. In the interim, both employers and trade unions scan the law reports carefully for indications from our courts as to how our judiciary will interpret the rights and obligations of employers and trade unions emanating from the Companies Act.

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