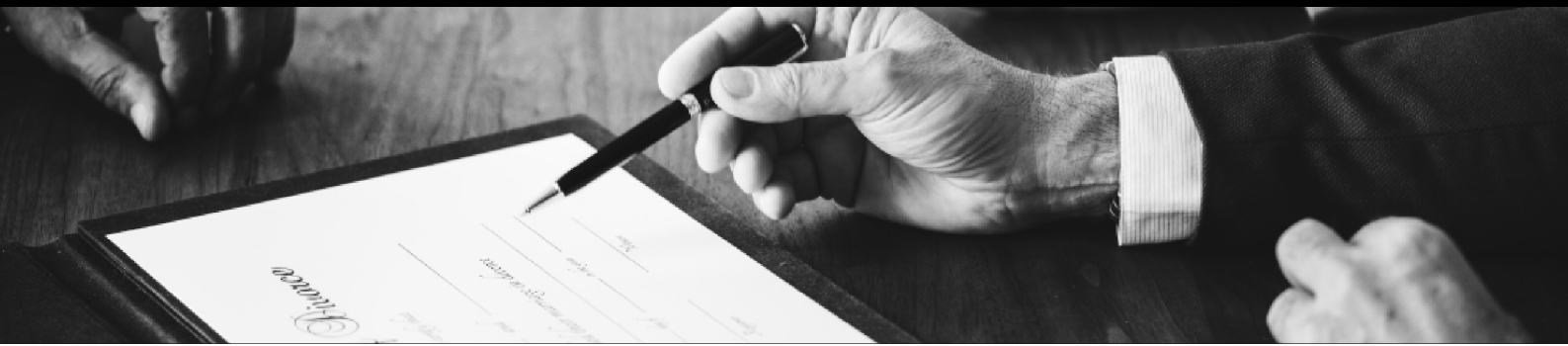




EMPLOYMENT

Are we seeing an end to the appointment of board members to act as CEOs of SOEs / Private Companies?

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1. The Labour Court has officially put a stop to the appointment of board members as CEOs of state-owned entities (“SOEs”). The Court has declared that such appointments are invalid and unlawful.
2. This is a response to a trend that has developed over the years especially in SOEs where board members are called onto act as CEOs in the event of the CEO being suspended or dismissed.
3. In our view, the **NEHAWU v National Home Builders Registration Council** (decided on 23 December 2024) judgment addresses the following four pertinent contentious issues
 - 3.1. Who is eligible to be appointed in an acting position as CEO of an SOE;
 - 3.2. Whether the board is at liberty to waive acting policies;
 - 3.3. whether the appointment of board members creates a conflict of interest; and
 - 3.4. whether the appointment of board members contravenes section 195 of the Constitution of the Republic of South Africa, 1996.

Who is eligible to be appointed in an acting position as CEO of an SOE?

4. Acting policies of SOEs envisage the appointment of a person within the ranks of the SOE to act as a CEO. Simply put, no one can be appointed to act in any position, unless such a person is employed by that SOE. On the same vein, board members are not employees and, therefore, will not be eligible to act in any position within the SOE.
5. In this regard, the court In **NEHAWU** disapproved of the appointment of board members in acting positions and held that:

"The respondent cannot be appointed as acting CEO without being employed by the NHBRC. It is common cause that she is not an employee of the NHBRC, and it is unclear how she could be appointed as acting CEO in the first place."

6. There is a rationale to this! Good corporate governance exists in order to keep the roles, responsibilities and functions of the board – a body fulfilling oversight duties- separate from management – the body that performs the day-to-day functions of the SOE. Consequently, such appointments could be in breach of the SOE's policies.

Whether the board is at liberty to waive acting policies?

7. Board members are by virtue of their positions custodians of the SOE's policies. Hence, we are in agreement with the Court that, as custodians, board members *"must ensure compliance with policies and cannot act in contravention or violation of the applicable policies, believing that [they] have the powers to waive certain provisions of policies when [they] deem necessary to do so."*
8. Fundamental to this prohibition of waiver is the absence of power to act contradistinction to policies of the SOE. In this regard, the court explained that Board members have *"no authority to waive provisions of the Acting Policy and 'the waiving of a clause of a policy as and when it suits the [Board] without any empowering provision or authority to do so is highly irregular and unlawful."*
9. Thus, any waiver of compliance with the acting policy, in the absence of an express empowering provision constitutes, maladministration, and, at worst, an abuse of power.

Whether the appointment of board members creates a conflict of interest?

10. Board members who are appointed to act as CEOs create an undesirable conflict of interest. The court confirmed that:

"the roles, responsibilities and functions of a member of the Board and CEO differ significantly and for the applicant to fulfil both, albeit not simultaneously, is far from ideal or in accordance with what the intention of the policy makers was."

Whether appointment of board members contravenes section 195 of the Constitution of the Republic of South Africa, 1996?

11. In light of the contravention of the acting policies and the ever-present risk of a conflict of interest arising, the appointment of a board member as an acting CEO will, without a doubt, be in violation of section 195 of the Constitution.
12. Section 195 demands that public administration adhere to *"a high standard of professional ethics"*, and that the *"efficient, economic and effective use of resources must be promoted."*
13. The appointment of board members to act as CEOs works against the principle of professional ethics and is inconsistent with the objective of an efficient, economic and effective use of public resources. Since board members would ordinarily be entitled to board fees, an appointment of a board member would inadvertently convert that member into an employee who is entitled to a salary.

Key takeaways

14. Indeed, **NEHAWU** will change the practice of board members being appointed in managerial positions. SOEs ought to take caution and be mindful that, on account of **NEHAWU** –
 - 14.1. Board members are not employees and are, therefore, prohibited from acting unless there is an empowering provision that enables such appointments;
 - 14.2. Board members must comply with existent acting policies. It is not permissible, without the requisite authority, to waive the acting policies of an entity;
 - 14.3. Even where there is an empowering statute that permits the appointment of board members into acting positions, good governance dictates that the conflict of interest that would arise where one holds a position in the Board and acts as a CEO (reporting to the Board) be avoided.
15. Although the facts of **NEHAWU** dealt with acting appointments in the public sector, we are of the view that this judgment will equally impact on the appointment of board members in the private sector.

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