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Creditors now empowered to make application to declare directors delinquent

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A critical look at *Vantage Mezzanine Fund II Partnership and Another v Hopeson and Others* (2022/045978) [2023] ZAGPJHC 1406 (24 November 2023)

On 2 August 2023, Dr Eric Levenstein and Director, Nastascha Harduth published an article titled "The delinquent director: No tolerance for errant directors?". This article dealt with the consequences faced by directors who failed to comply with their duties and obligations as set out in the Companies Act, 2008 (Companies Act) and where such directors might end up being declared to be a delinquent director in terms of section 162 of the Companies Act.

The present article provides a brief update on one aspect of that article, namely, the identified persons who may be entitled to launch an application to have a director declared delinquent in terms of section 162 of the Companies Act.

In *Vantage Mezzanine Fund II Partnership and Another v Hopeson and Others* (2022/045978) [2023] ZAGPJHC 1406 (24 November 2023), Vantage provided Somnipoint (Pty) Ltd (Somnipoint) with a loan facility approximating R 200 million with which Somnipoint purchased a building known as ABSA Towers located in Pretoria.

In its capacity as creditor of Somnipoint, Vantage instituted an application to declare directors of Somnipoint delinquent in terms of section 162 of the Companies Act.

In terms of section 162(3), a shareholder, a director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another representative of the employees of a company may apply to a court for an order declaring a person delinquent or under probation. It is noteworthy that creditors of the company are not included as persons who may make such an application.

To overcome this obstacle, Vantage relied on section 157(1)(d) of the Companies Act. Section 157(1)(d) provides that a party, acting in the public interest, may make application to enforce any remedy that is prescribed in terms of the Companies Act.

Vantage argued that in light of the fact that the Unemployment Insurance Fund (UIF), a government entity, was a tenant of the ABSA Towers at the time when Somnipoint was the owner of the building, and the UIF being a recipient and dispenser of public funds, that accordingly, the public has an interest in the management of Somnipoint, a company that did business with an organ of state.

The court upheld Vantage's averments and concluded that in the circumstances, it was appropriate for Vantage, in its capacity as a creditor of Somnipoint, to bring an application in terms of section 157(1)(d) of the Companies Act to declare directors of Somnipoint delinquent. The court acknowledged that this is a "novel remedy" and one which should be available to creditors.

The consequence of the judgment is that creditors of a company, acting in the public interest, can now approach the High Court to have directors of such a company declared delinquent.

The ruling is a welcome one, as creditors are crucial stakeholders of any given company and where creditors are enabled to enforce their rights and interests in the company.



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