

The changing landscape of the Companies Act, 2008: the Second Amendment Bill, 2023

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In the wake of the Zondo Commission of Enquiry into State Capture's recommendation that certain provisions in the Companies Act 71 of 2008 ("**Companies Act**") be amended to extend the time period set out in section 162(2) and 162(3) of the Companies Act, the Department of Trade, Industry and Competition ("**DTIC**") issued a notice on 14 August 2023^[1] ("**Notice**") wherein it introduced, *inter alia*, the Companies Second Amendment Bill, 2023 ("**Second Amendment Bill**").

According to the Notice, the Second Amendment Bill envisages extending the current 24 month time frame within which, *inter alia*, a company, a shareholder, director, company secretary or prescribed officer of a company may apply to a Court for an order declaring a director of a company to be delinquent, to 60 months.^[2] In addition, the DTIC envisages extending the Courts powers under section 162 of the Companies Act to allow the Courts to extend the 60 month time period in sections 162(2) and 162(3) in specific circumstances, provided that the Court considers the interests of justice and fairness when exercising that power.^[3] The purpose of section 162 of the Companies Act is to "*protect companies and corporate stakeholders against those who have proven themselves to be unable to manage the business of a company effectively*".^[4]

A Court will declare a director to be 'delinquent' in a number of circumstances, including, if a director (i) grossly abused his/her position as a director of a company,^[5] (ii) intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of a company, contrary to section 76(2)(a)^[6] of the Companies Act,^[7] or (iii) acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company.^[8]

A declaration of delinquency of a director by a Court may (a) be unconditional and subsist for the lifetime of the person who has been declared delinquent,^[9] (b) be made subject to any conditions the Court considers appropriate, including conditions limiting the application of the declaration to one or more particular categories of companies,^[10] or (c) subsist for seven years from the date of the court order, or such longer period as determined by the Court at the time of making the declaration, subject to subsections (11) and (12) of the Companies Act.^[11]

A director who is declared 'delinquent' by a Court is disqualified from being a director of a company under the Companies Act^[12] and therefore the extension of the time frame from 24 months to 60 months in section 162 of the Companies Act will have significant implications for all directors of companies in South Africa, especially those directors who have historically been unable to manage the business of a company effectively.

In addition to extending the time frame in section 162(2) and 162(3) of the Companies Act, the DTIC envisages providing the Court with the ability to extend the 36 month time frame in section 77 of the Companies Act (which section deals specifically with the liability of directors of a company) if required^[13] and in circumstances where a director of a company has breached his/her fiduciary duties to a company.^[14] The purpose of section 77(7) is to "*hold the director liable for damages or costs for which a person is or may be held liable in terms of [section 77(7)]. Actions in terms of [section 77(7)] must take place within a period of three years or longer as is determined by court on good cause shown.*"^[15]

[1] **Government Gazette 49116**, General Notice 1965 of 2023, 14 August 2023
[2] Notice, p.7
[3] Notice p.7
[4] Henochsberg on the Companies Act 71 of 2008, section 162, last updated: May 2023 – SI 31. Product developer: Sophia Khan, p.565 (Notes)
[5] Companies Act, section 162(5)(c)(i)
[6] Section 76(2)(a) of the Companies Act states the following: "A director of a company must – (a) not use the position of director, or any information obtained while acting in the capacity of a director- (i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or (ii) to knowingly cause harm to the company or a subsidiary of the company"
[7] Companies Act, section 162(5)(c)(iii)
[8] Companies Act, section 162(5)(c)(iv)(aa)
[9] Companies Act, section 162(6)(a)
[10] Companies Act, section 162(6)(b)(i)
[11] Companies Act, section 162(6)(b)(ii)
[12] Henochsberg on the Companies Act 71 of 2008, section 162, last updated: May 2023 – SI 31. Product developer: Sophia Khan, p.565 (Notes)
[13] Notice, p.8
[14] The standards of director's conduct are set out in section 76 of the Companies Act
[15] 2nd Amendment Bill, p.5, paragraph 2.1



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