

Companies Act, 71 of 2008

Delinquent Director

The Companies Act of 2008 (the "Act") imposes strict conditions on company directors and section 162 makes provision for a director to be declared "delinquent" or "under probation" in certain circumstances.

What you should do:

Familiarise yourself with the grounds for being declared delinquent or under probation.

An application to declare a person delinquent or under probation can be made by several entities, including the Commission, the Takeover Regulation Panel ("the Panel") and an organ of state.

What you should know:

Understand the duties and requirements of directors as contemplated in the Act in order to avoid a possible order of delinquency or being placed under probation.

In terms of section 162(2) of the Act, a company, a shareholder, a director, company secretary or prescribed officer of the company, a registered trade union that represents employees of the company, or any other representative of the employees of the company, may apply to court for an order declaring a person (i.e. a director) **delinquent**, in the following circumstance where:

- the person is a director of that company, or within 24 months immediately preceding the application, was a director of that company; and the director has:
- consented to serve as a director, or acted in the capacity of a director or prescribed officer, whilst **ineligible or disqualified** from being appointed as a director in terms of section 69 (refer to next paragraph for grounds for disqualification);
- while **under an order of probation** in terms of section 162 of the Act or section 47 of the Close Corporations Act, acted as a director in a manner that contravened that order;
- **grossly abused the position** of director;
- took **personal advantage** of information for an opportunity, contrary to section 76(2)(a);

- intentionally, or by gross negligence, **inflicted harm** upon the company or a subsidiary of the company, contrary to section 76(2)(a); or
- 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 or acted in a manner contemplated in section 77(3)(a) - (c).

A director will be **ineligible or disqualified** from being appointed as a director in the following circumstances, as contemplated in section 69, (grounds for disqualification) where the director:

- is an unrehabilitated insolvent;
- is prohibited in terms of any public regulation to be a director of the company;
- has been removed from an office of trust on the grounds of misconduct involving dishonesty; or
- has been convicted and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence:
 - involving fraud, misrepresentation or dishonesty;
 - in connection with the promotion, formation or management of a company, or in connection with any act that disqualifies or makes a person ineligible to be a director or was placed under probation;
 - under the Act, the Insolvency Act of 1936, the Close Corporations Act of 1984, the Competition Act of 1998, The Financial Intelligence Centre Act of 2001, the Securities Services Act of 2004, or Chapter 2 of the Prevention and Combating of Corruption Activities Act of 2004.

In terms of section 162(2) of the Act, individuals or entities as previously listed, may apply to court for an order declaring a person (i.e. a director) **under probation**, in the following circumstance where:

- the person is a director of that company, or within 24 months immediately preceding the application, was a director of that company; and
- the director has:
 - whilst serving as a director, was present at a meeting and **failed to vote** against a resolution despite the inability of the company to satisfy the solvency and liquidity test;
 - otherwise acted in a manner **materially inconsistent with the duties** of a director; or
 - acted in, or supported a decision of the company to act, in a manner contemplated in section 163(1), with **oppressive**

or unfairly prejudicial results to the interest of the applicant.

What you should know:

Any declaration of delinquency may subsist for the lifetime of the person declared delinquent on account of having consented to serve as a director whilst ineligible or disqualified under the Act or whilst under a probation order in terms of the Act or the Close Corporations Act and acted in a manner that contravened that order.

The **Commission and the Panel** may apply to court for an order declaring a person (i.e. a director) **delinquent or under probation**, in the following circumstance where:

- the director has repeatedly been personally subject to compliance notice or similar enforcement mechanism, for
- substantially similar conduct in terms of any legislation;
- the director has at least twice been personally convicted of an offence, or subjected to an administrative fine or similar penalty in terms of any legislation;
- within a period of five years, acted as a director in the circumstances stipulated in section 162(5)(f); or
- the criteria similar in an application by a company, shareholder or such persons.

Any **organ of state** responsible for the administration of any legislation may also apply to court for an order declaring a director delinquent if such director has repeatedly been personally subjected to a compliance notice or similar enforcement mechanism for substantially similar conduct in terms of any legislation.

A declaration made by the court may be made subject to any conditions that the court considers appropriate. Furthermore, a court may make an order placing a person under probation. This would occur under circumstances where the court is satisfied that the declaration is justified having regard to the circumstances of the company's conduct and the person's conduct in relation to the management, business or property of the company at the time. Such order for probation (similar to a suspended sentence) will be made subject to conditions that the court considers appropriate and may subsist for a period not exceeding five years.

Without limiting the powers of the court, a court may order as conditions applicable or ancillary to a declaration of delinquency or probation that the person concerned:

- undertakes a designated program of remedial education relevant to the nature of the person's conduct as director;
- carries out a designated programme of community service; or
- pays compensation to any person adversely affected by the person's conduct as a director to the extent that such a victim does not otherwise have a legal basis to claim compensation.

When under probation the court may furthermore, as contemplated in section 162(10), order that the person be supervised by a mentor in any future participation as a director while the order remains in force or be limited to serving as a director of a private company, or of a company of which that person is the sole shareholder.

Based on the above summary of the pertinent provisions of the Act, it is evident that directors have to ensure proper execution of duties and responsibilities while complying to the law at all times. Directors will thus be well advised to ensure that they have an adequate understanding of relevant requirements and provisions to sail safely through sometimes stormy waters.

NEED ASSISTANCE WITH THE IMPLICATIONS OF THIS ACT? CONTACT:

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