

# Director Law Developments Seminar

25 & 26 February 2025



# Speakers



**Yaniv Kleitman**

Director  
Corporate & Commercial Law

Personal liability of directors



**Roxanne Bain**

Professional Support Lawyer  
Corporate & Commercial Law

Fiduciary duties & to whom these are owed



**André de Lange**

Director  
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Directors' remuneration aspects



**Akhona Mdunge**

Associate  
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Removal of directors



**Akhona Mgwaba**

Associate  
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Personal financial interests



**Lucinde Rhodie**

Director  
Dispute Resolution

Dispute resolution perspectives



## Overview

- **Yaniv Kleitman:** Personal liability of directors
- **Roxanne Bain:** Fiduciary duties & to whom these are owed
- **Andre de Lange:** Directors' remuneration aspects
- **Akhona Mdunge:** Removal of directors
- **Akhona Mgwaba:** Personal financial interests
- **Lucinde Rhodie:** Dispute resolution perspectives

# Overview



Personal liability of directors



**Yaniv Kleitman**

Director

Corporate & Commercial Law

# Overview of liability regime

- Section 77 of the Companies Act
  - Company may sue directors
  - Loss, damages or costs suffered by the company
    - Can include secret profits other gains by directors
    - Can include wasted time in investigating the breach (*Delta Property Fund* case)
  - For breach of fiduciary duty or duty of care, skill and diligence
  - For certain breaches, liability attaches if you failed to vote *against*
- Section 22 – reckless trading (prohibition on *company*)
- **Section 218(2)** – liability to whoever suffers loss or damages as a result of contravention of Companies Act

## The vaunted (?) business judgment rule

- Section 76(4) – purpose to protect directors who acted rationally, without a conflict of interest and after having duly investigated the matter
- Case study:
  - *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) – refusal by board to approve transfer of shares – business judgment rule successfully relied on

## Section 218(2) - liability to the whole world?

- Can shareholders use it? No: reflective loss principle – *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* 2020 (5) SA 419 (SCA)
- Thus shareholder must use s165 (derivative action)
- Can creditors use it? (Reflective loss does not apply to creditors - *Sevilleja v Marex Financial Ltd* [2020] UKSC 31)
- Typical set of facts:
  - Creditor has claim against company
  - Company is financially distressed or on brink of insolvency
  - Creditor's claim against company is doubtful
  - Creditor alleges that company's distress is due to directors' breach of fiduciary duty or reckless trading (s76 and/or s22)
  - Creditor couples this with s218(2)

## Section 218(2) – the debate settled (for now)

- A number of high court cases held that creditors could use it, but there were conflicting decisions and *Steinhoff* reasoning started to gain more traction
- Finally the SCA held that creditors cannot use s218(2): *Venator Africa (Pty) Ltd v Watts and Another 2024 (4) SA 539 (SCA)*
- So what is the solution for creditors?
  - Contractual protections – suretyships etc.
  - S424 of Companies Act, 1973 – personal liability for debts of company if recklessness proved – but this applies only in liquidations
  - Piercing of corporate veil – s20(9) – but that is only for shams and frauds
  - Is s129(7) ("financial distress" notification) coupled with s218(2) perhaps a candidate?



# Overview



Fiduciary duties & to whom these are owed



**Roxanne Bain**

Professional Support Lawyer  
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# Fiduciary Duties and Delinquency: Overview

- Topics –
  - Fiduciary duties, particularly duty to act “in the best interests of the company”
  - Examples of breach (or not) of fiduciary duties, including successful delinquency applications

# Fiduciary Duties

- Directors' fiduciary duties regulated by the common law and partially codified in section 76
- In terms of section 76 –
  - Directors must not use position or any information obtained whilst acting as director to –
    - Gain personal advantage or an advantage for any other person other than the company
    - Knowingly cause harm to the company or a subsidiary of the company
  - Directors must exercise their powers and perform the functions of director –
    - In good faith and for a proper purpose
    - In the best interests of the company

# Grounds for delinquency



- Effect of delinquency?
- Declaration of delinquency protects the public against directors who engage in serious misconduct
- In terms of section 162(5), a court must declare a director delinquent if –
  - Grossly abused the position of director
  - Took personal advantage of information or opportunity
  - Intentionally or by gross negligence inflicted harm on the company or a subsidiary of the company
  - 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, contrary to sections 77(3)(a), (b) and (c) (lack of authority for actions, reckless trading and fraud)
- Declaration of delinquency subsists for 7 years or longer period determined by court

## Best interests of the company

- What does it mean to act in the best interests of the company, i.e. what is meant by the “company”?
- Traditionally – shareholders as a collective body, present and future
- Other stakeholders – no formal legal recognition under the Act
- Some argue for a “stakeholder inclusive approach”
  - King Code –
    - Stakeholder inclusivity
    - Becoming a yardstick for measuring fiduciary duties as per *OUTA v Myeni*
    - BUT voluntary
- Stakeholder inclusivity is a corporate governance issue for now
- **NB:** Shareholder primacy does not mean shareholders have a direct claim for breach of fiduciary duties

## Examples from case law (fiduciary duties and delinquency)

- *BTI v Sequana* (UK Supreme Court), 2022 –
  - Meaning of “best interests of the company” interrogated – can it ever mean “best interests of the creditors”?
  - Directors declared lawful dividend in solvent circumstances, but risk of insolvency in future
  - Is there a “creditor duty”?
  - When does the “creditor duty” kick in?
  - Not binding in SA, but could have persuasive force

## Examples from case law (fiduciary duties and delinquency)

- ***Modise v Tladi Holdings*** (SCA), 2020 (breach of fiduciary duty; corporate opportunities) –
  - Modise (director of Tladi) and his company took up an opportunity (shares in ARB) which he had been mandated to secure for Tladi
  - Court held –
    - Tladi had been actively pursuing the opportunity
    - Integral to Tladi's business strategy and Modise expressly mandated to pursue it
    - Modise failed to disclose that opportunity was offered to him and concealed it
    - Irrelevant that opportunity would not have materialised or that third party wanted to deal with director personally

## Examples from case law (fiduciary duties and delinquency)

- *Smuts v Kromelboog Conservation Services* (SCA), 2024 (delinquency application) –
  - Director (Smuts) removed by shareholder in terms of section 71 (breakdown of relationship between shareholder and director)
  - The following conduct formed the basis of a delinquency application –
    - Minutes before meeting to remove Smuts, he emptied company's bank account
    - After removal, froze company's bank account
    - Used company funds for personal legal fees and invoiced the company for "consultation fees"
    - Caused company to donate to another entity in which Smuts had a personal financial interest without the necessary approvals



## Examples from case law (fiduciary duties and delinquency)

- *Smuts v Kromelboog Conservation Services* (SCA), 2024 (delinquency application) (CONTINUED) –
  - Court held –
    - Clearly conflict of interest
    - Gross abuse of position of director
    - Infliction of harm on the company
    - Gross negligence, wilful misconduct and breach of trust

## Examples from case law (fiduciary duties and delinquency)

- *OUTA v Myeni* (HC), 2020 (delinquency application) –
  - Myeni frustrated transactions which were in the best interests of SAA (Emirates and Airbus swop transactions)
  - Court held –
    - No rational basis for blocking transactions
    - Almost all grounds for delinquency met
    - King III (applicable at the time) – Chair is responsible for setting the ethical tone of the board and failure to do this may be indicative of failure to act in accordance with fiduciary duties
    - Collective responsibility of the board does not absolve director from individual liability
    - NEDs have same duties as executive directors
    - Declared delinquent for life

## Examples from case law (fiduciary duties and delinquency)

- *Delta Property Fund v Nomvete and Others* (HC), 2025 (delinquency application and damages for breach of fiduciary duties) –
  - BoC transactions (bribes) –
    - Unlawful conduct
    - Breach of fiduciary duties
    - Deliberate attempt to conceal
    - Dishonest, corrupt and criminal
  - Mhlandla and Zimzin transactions (irregular payments for supposedly securing lease extensions) –
    - Breach of fiduciary duties
    - Recklessness
    - Dishonest conduct
    - Secret profit received
    - Breach of no conflict rule

## Examples from case law (fiduciary duties and delinquency)

- *Delta Property Fund v Nomvete* (HC), 2025 (delinquency application and damages for breach of fiduciary duties) **CONTINUED** –
  - EPF transactions (sub-lease with Municipality) –
    - Corrupt transaction
    - Breach of fiduciary duties
  - Shameless Way transaction (private aircraft hired by Delta) –
    - Failure to adhere to Delta's travel policy
    - Breach of fiduciary duty (personal interest in the matter)
    - Expose Delta to allegations of nepotism and reputational damage
  - Nomvete declared delinquent for life, Maharaj 15 years and Tshabalala 7 years

# Overview



Directors' remuneration aspects



**Andre de Lange**

Director

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# Remuneration of Directors



- Global focus on Remuneration of Company Executives (Say on Pay)
- Concerns around –
  - equity in respect of remuneration between stakeholders
  - high levels of income inequality
  - disclosure of senior executive remuneration and reasonableness of remuneration
- Evolving Regulation
  - Disclosure to Shareholders
  - Non-binding Advisory Votes by Shareholders
  - Binding Votes by Shareholders

# Remuneration of Directors



In South Africa

- Companies Act of 2008
  - Approval of Directors' fees in terms of section 66(9)
  - Disclosure of Directors and Prescribed Officers' remuneration in AFS
- King IV recommendations, 2016
- JSE Listings Requirements
- Companies Amendment Act of 2024
  - Prepare and Present Remuneration Policy and Remuneration Report to Shareholders for approval

## Approval of Directors' Fees

- Remuneration for services as Director [s 66(9)]
  - Special resolution (prior approval)
  - Approval obtained with 2 years, but must then be renewed
- Remuneration for other services falls outside of s66(9)





# Disclosure of Remuneration in Annual Financial Statements

- Section 30(4) of Companies Act disclosure requirement
- Applicable to every company that is required to be audited “in terms of the Companies Act”
  - Public and State Owned Companies
  - Other companies
    - required in terms of regulations based on public interest score & holding of funds as fiduciaries
    - required in MOI

# Disclosure of Remuneration in Annual Financial Statements



Disclosure [s 30(4), (5) and 6] – also in respect of Prescribed Officers, includes -

- Directors' fees
- Salaries, bonuses, performance related payments
- Expense Allowances
- Pension contributions
- Value of options
- Financial assistance (to acquire shares and otherwise)

Group companies

Amendment Act – remuneration of each director or prescribed officer should be individually disclosed by name

# Disclosure of Remuneration in Annual Financial Statements

- Companies Amendment Act - Section 26 [but not yet in operation]
  - any member of the public will have the right to inspect the AFS of a company, except –
    - where a private, non-profit or personal liability company prepares its AFS internally and has a public interest score of less than 100; or
    - where such company has its AFS independently prepared and has a public interest score of less than 350
- Aims to achieve greater transparency and corporate responsibility to public at large
- Larger private companies no longer so private – information available to competitors, creditors and labour unions



# King IV recommendations, 2016

## Recommendations

- Board to approve policy on fair, responsible and transparent remuneration
- Policy to address company-wide remuneration – fair and responsible remuneration to executive management – all elements
- Non-binding advisory vote on Remuneration Policy and Implementation Report at AGM

## JSE Listings Requirements

# Companies Amendment Act



- Amendment Act introduced enhanced remuneration provisions in Companies Act
- Not yet in operation
- Stated objectives of changes
  - To achieve equity in respect of remuneration between stakeholders
  - Addressing public concern on high levels of income inequality
  - Achieve better disclosure of senior executive remuneration and reasonableness of remuneration

# Companies Amendment Act



- NB - applicable only to Public and State-owned Companies
- Remuneration policy required to be prepared and approved by ordinary resolution (50% plus one) at AGM
  - Content of policy?
  - Present every three years or when material changes
  - No implementation without approval.

## Duty to Prepare and Present Remuneration Policy and Remuneration Report

- Remuneration Report to be prepared, consisting of -
  - Background statement
  - Copy of Remuneration Policy
  - Implementation Report:
    - Total remuneration of each director and prescribed officer  
  
(include all salary, benefits, incentives, share options and incentive rewards)

## Duty to Prepare and Present Remuneration Policy and Remuneration Report

- Total remuneration of Highest Earner
  - Total remuneration of Lowest Earner
  - Average and median (midpoint) remuneration of all employees
  - Remuneration gap reflecting ratio between total remuneration of top 5% and bottom 5% earners
- Remuneration Report to be approved by Board and presented to Shareholders for approval at each AGM by Ordinary Resolution



## Duty to Prepare and Present Remuneration Policy and Remuneration Report

- If Remuneration Policy is not approved, must be presented at next AGM or special shareholder meeting, until approved
- If Implementation Report is not approved –
  - Remuneration Committee must explain how concerns were dealt with at next AGM
  - Non-executive directors serving on Remuneration Committee must stand for re-election as members of committee at AGM where they gave explanation
  - If report again not approved, non-executive director committee members must stand for re-election as directors at that AGM and may not serve on Remuneration Committee for a period of two years thereafter [practicality?]
- Interaction between provisions of Act and JSE Listings Requirements
- “Employees”
- Effectiveness of provisions

# International Comparisons

- United States (Federal) – Listed public companies – Disclosure of executives and directors’ compensation & Non-binding advisory vote on remuneration of “Named Executives” at least once every 3 years
- Delaware (USA) – No express say on pay requirements but shareholders have previously sued directors for providing executive compensation that is in violation of their fiduciary duties [Elon Musk’s \$55.8 billion Tesla compensation package]
- United Kingdom – Listed public companies – binding vote on directors’ remuneration policy (+50%) (no implementation until approved – fall back to last approved policy), & Non-binding advisory vote on directors’ remuneration report
- Australia – Listed public companies – Disclosure of directors’ remuneration & Non-binding advisory vote at AGM on remuneration report – if at two consecutive AGMs over 25% votes against report, then spill resolution put to shareholders to determine if directors are required to stand for re-election



## International Comparisons

- European Union – Listed public companies – Disclosure of directors' remuneration policy and vote on policy (either binding or non-binding) (if binding, no implementation until approved – fall back to last approved policy) & Non-binding advisory vote on remuneration report (if not approved, explain how concerns were taken into account in next report), subject to laws of relevant jurisdiction
- Switzerland – Listed public companies – shareholders vote annually on all remuneration payable to board of directors, executive board and board of advisors



# Overview



Removal of directors



**Akhona Mdunge**

Associate

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# Board Removals



71(3) If a company has **more than two directors**, and a shareholder or director has **alleged** that a director of the company-

(a) has become-

(i) ineligible or disqualified; or

(ii) incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or

(b) has neglected, or been derelict in the performance of, the functions of director,

the board, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has **determined** to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.



# Board Removals



The Court is entitled, depending on the facts, to undertake a complete reconsideration, in the wide sense, of the board's determination.



# Board Removals



## Memorandum of Incorporation

A director shall resign his or her office as director if a majority of his co-directors sign a written notice in which he is requested to resign in his office and lodge it at the registered office of the Company (which shall come into effect upon lodging thereof at the registered office of the Company), but without prejudice to any claim for damages.



# Board Removals



Section 71(4)

**Before** the board of a company may consider a resolution contemplated in subsection (3), the director concerned must be given -

(a) notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and

(b) a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.





# Shareholder Removals



71(1) Despite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, **a director may be removed by an ordinary resolution** adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).



# Shareholder Removals



71(2) **Before** the shareholders of a company may consider a resolution contemplated in subsection (1) -

(a) the director concerned must be given **notice** of the meeting and the resolution, **at least equivalent to that which a shareholder is entitled to receive**, irrespective of whether or not the director is a shareholder of the company; and

(b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.



## NOTICE TO CUSTOMERS

(Notice No. 42 of 2019)

### PROCESSING REQUIREMENTS FOR THE REMOVAL OF DIRECTORS

Kindly note that all previous notices with regards to the removal of a director whether that director was elected or appointed in terms of MOI will be summarised in this notice. Therefore this notice will substitute the previous notices and provide the documentation and the contents thereof required for removal.

It is also important to note that the process and requirements for amending director status in the event of resignation or death, differs from the removal of director process.

In order for the notice of removal of director(s) to meet the processing requirements, the following documents must be filed:

- Notice regarding the meeting and the resolution, as well as proof that the, to be removed director was awarded the opportunity to make a presentation.
- Statement setting out the reasons for removal.
- Minutes of meeting OR copy of resolution by either the board or shareholders (depending on who made the decision)
- Proof that quorum was reached at meeting (attendance register)
- In the event that the meeting was held by shareholders, proof of shareholding (Certified copy of share register or share certificates)
- The notice of change of company and external company directors (CoR39), reflecting the correct status change i.e remove.

Companies are reminded on meeting legislative requirements when removing directors in order to avoid unnecessary queries.

Please note, unfortunately the application has been rejected with reason:

KINDLY ATTACH THE NOTICE OF THE MEETING SEND TO THE CONCERNED DIRECTOR. THE NOTICE MUST STATE THE REASONS FOR THE REMOVAL OF THE DIRECTOR. REFER TO PRACTICE NOTE NO.42 OF 2019.

Please re-apply with updated information required for approval.

Kind Regards,  
CIPC Director Amendments

# Overview



Personal financial interests



**Akhona Mgwaba**

Associate

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## Section 75 of the Companies Act and the common law

- Director's duty to not have a personal financial interest
- Broader common law principle: Directors must avoid a conflict of their interest and that of the company
- Duties which flow from no-conflict rule
- Common law conflicts of interest not excluded by section 75
- Section 75 requires disclosure and recusal from decision-making – endorses common-law position

# Personal Financial Interest

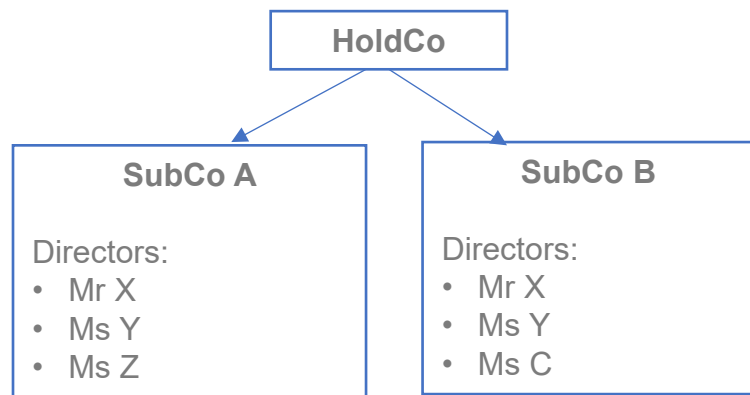


- Section 1 definition of ‘personal financial interest’ – direct material interest
  - *Atlas Park Holdings (Pty) Ltd v Tailifts South Africa (Pty) Ltd (28817/2020) [2022] ZAGPJHC 109; 2022 (5) SA 127 (GJ); [2022] 4 All SA 28 (GJ) (21 February 2022)*
    - a shareholding in a company which has a financial interest in a transaction meets the requirement for holding a direct financial interest if such shareholding is held by the director concerned or the director knows that a related person has a shareholding in a company which has a financial interest in the transaction.
  - *Dimension Data Facilities (Pty) Ltd and Others v Identity Property CO (Pty) Ltd and Others (2022/040174) [2024] ZAGPJHC 1209 (25 November 2024)*
    - “direct” is properly construed as being an interest which can be discerned by reference to the matter or transaction in issue to benefit the director directly.
    - What the requirement of directness does not mean is that the director has to from a technical perspective hold the interest in his personal capacity. Section 75 cannot be evaded by intricate structures which seek to hide the interests of parties.

## Cross-directorships between group companies

- Section 75(5): If a director of a company... knows that a related person has a personal financial interest in the matter...
- “Related person” definition for purposes of section 75:
  - section 1 meaning, but also includes a second company of which the director or a related person is also a director, or a close corporation of which the director or a related person is a member.

## Cross-directorships between group companies



- SubCo A and SubCo B want to enter into a transaction
- Mr X and Ms Y are common directors would be conflicted i.e other Subco constitutes a related person to him/her for purposes of s75

- Section 75(7): Decision by a board is valid despite any personal financial interest of a director or related person, only if –
  1. (a): it was approved following disclosure of that interest in the manner contemplated in section 75; or
  2. (b)(i): despite having been approved without disclosure of that interest, it has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest; or
  3. (b)(ii): despite having been approved without disclosure of that interest, it has been declared to be valid by a court in terms of subsection (8).



## Consequences of non-disclosure or non-recusal

- Section 75(5) key steps:
  - Is there a personal financial interest?
    - Personal financial interest of director (incl. alternate director, prescribed officer, committee member) or related person
  - Disclosure of personal financial interest
    - S75(5)(a): must disclose the interest and its general nature before the matter is considered at the meeting
    - S75(5)(b): must disclose to the meeting any material information relating to the matter, and known to the director
  - Recusal from deliberation and decision making
    - S75(5)(d): if present at the meeting, must leave the meeting immediately after making any disclosure
    - S75(5)(e): must not take part in the consideration of the matter

## Consequences of non-disclosure or non-recusal

- Director fails to disclose personal financial interest?
  - Non-disclosure will result in the resolution being invalid (*Lancaster 101 (RF) (Pty) Limited v Steinhoff International Holding NV and Others* (16389/19; 6578/19) [2021] ZAWCHC 193)
  - Whether the non-disclosure is treated under section 75 or in terms of the common law, the effect is the same notwithstanding that the mechanics are different: at common law the agreement is valid but voidable at the instance of the company; under section 75 the agreement is automatically void but can be ratified (*Dimension Data Facilities (Pty) Ltd and Others v Identity Property CO (Pty) Ltd and Others*)
  - A director is obliged to make disclosure where he is conflicted and failure to make proper disclosure renders the transaction *ipso facto* void unless a court exercising its discretion declares the transaction valid (*Atlas Park Holdings (Pty) Ltd v Tailifts South Africa (Pty) Ltd*).
- Director discloses personal financial interest but fails to leave meeting and votes on matter?
  - Whole resolution void or do not count conflicted director's vote? *Cook: Geoffrey v Hesber Impala (Pty) Ltd and Others* (2014/45832) [2016] ZAGPJHC 23 (19 February 2016)

# Overview



Dispute resolution perspectives



**Lucinde Rhodie**  
Director  
Dispute Resolution

## Section 77: Amendments and Developments

- Section 77 – director of a company may be held liable as a result of any breach of a fiduciary duty for any loss, damages or costs sustained by the company as a consequence of any such breach
- Prior to the amendment, section 77(7) provided that proceedings to recover any loss, damages or costs may not be commenced more than three (3) years after the act or omission that gave rise to that liability



## Section 77: Amendments and Developments

- Some cases dealt with the time bar set out in section 77(7), pre-amendment
- Nebavest 1 (Pty) Ltd t/a Minister Consulting v Central Plaza Investments 202 (Pty) Ltd and Others [2023] 2 All SA 795
- Derivate action in terms of section 165 of the Companies Act
- Time-bar created by section 77(7) creates an absolute time bar against the institution of such proceedings outside the stipulated three-year period



## Dilemma faced by shareholders/ third parties

➤ Ibex RSA Holdco Limited and Another v Tiso Blackstar Group (Pty) Ltd and Others [2024] ZASCA 166

- Certain media houses sought access to a report prepared by PwC in regard to its investigations into concerns raised about potential accounting irregularities within Steinhoff – its non-compliance with laws and regulations in terms of PAIA
- Steinhoff refused to produce the report – the report was privileged
- However, even if a refusal of access is justified, section 70 of PAIA provides for a ‘public interest override’, which authorizes disclosure of a record in the public interest
- Report is not subject to litigation privilege and should in any event be made available in the public interest



## Amendment of Section 77(7) - Court may extend period of liability of Directors

- Actions against directors to take place within three (3) years, or such longer period as determined by a court, on good cause shown, whether or not act or omission occurred before the promulgation of the Amendment Act
- Prescription Act does not apply



## Good cause shown

- There has not been any case law on point i.e. what does “*good cause*” mean
- Similar judgments for some guidance
- Samancor Holdings (Pty) Ltd and Others v Samancor Chrome Holdings (Pty) Ltd and Another 2021 (6) SA 380 (SCA)
- Some of the factors the court took into account in that matter - the terms of the time-bar clause





# Amendment of Section 77(7) - Court may extend period of liability of Directors

- The extent of the plaintiff's delay
- The explanation for the plaintiff's failure to bring the claim timeously
- The extent of the plaintiff's fault
- Whether the defendant caused or contributed to the non-compliance
- The nature and importance of the claim
- The extent of the prejudice, if any, suffered by the defendant in consequence of the delay



# Section 162 of the Companies Act: Amendments and Developments

- Application to be made by certain persons to declare a director delinquent or place him or her under probation
- Pre-amendment, section 162 – this section applied only in respect of a person that has been a director of that company within the 24 months immediately preceding the application
- The category of persons and entities that have standing to bring such an application:
  - The company, a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represent employees of the company



## Section 162 of the Companies Act: Amendments and Developments

- Shareholders and/or trade unions, faced with similar issues obtaining unnecessary information and documentation to make a case for delinquency or probation and by the time all such information and documentation are available, the 24 month period would have elapsed
- Amendment to section 162(2) – within the 60 months immediately preceding the application
- Period of 60 months to be extended further – on good cause shown



## Development: Parties with standing

- Vantage Mezzanine Fund II Partnership and Another v Hopeson and Others 2024 (2) SA 550
  - Somnipoint at the time owed Vantage R340,000,000. Vantage instituted an action *inter alia* asking for an order to declare the directors delinquent in terms of section 132 of the Companies Act
  - An exception filed – a plain reading of section 162: a creditor does not have the legal standing to apply to Court for an order declaring a director delinquent
  - Vantage – applicability of section 157 of the Companies Act which expressly makes provision for the extension of legal standing to apply for remedies available under the Companies Act



## Development: Parties with standing

- Section 157 provides that when, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may *inter alia* be exercised by a person acting in the public interest, with leave of the court
- Purpose of this Companies Act as set out in section 7:

*“(...) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic lift of the nation.”*



## Development: Parties with standing

- Court found that a creditor, with the leave of the court, has standing to bring an application to declare directors delinquent
- The Court made it clear that a creditor does not always have this right. In each instance there must be a further enquiry as to whether such creditor, seeking the leave of the court to bring such an application, on the specific facts of the case, acts in the public interest



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