

## Can a creditor apply for a delinquency order against a director?

Although a creditor is not specifically listed in the Companies Act of 2008 as a stakeholder allowed to bring an application for delinquency against a director of a company, there are public interest considerations that do allow others to bring such an application to court.

In terms of section 162 of the Companies Act, several stakeholders of a company may apply to court for a delinquency order against an individual who serves or served as a director within the 24 months preceding the application. The entitlement to bring such an application extends to shareholders, directors, company secretaries, prescribed officers, registered trade unions representing company employees, and other employee representatives.

In the case of *Vantage Mezzanine Fund II Partnership and Another v Hopeson and Others*<sup>1</sup> the applicants, being creditors of a company in liquidation, sought recourse under section 162 of the Companies Act declaring three respondents, who held directorial roles in the liquidated company and its affiliates, as delinquent. Quite predictably, the respondents raised an immediate objection saying that creditors lacked the right to initiate such proceedings under section 162, thereby challenging their *locus standi*. In response, the creditors argued that section 157(1)(d) of the Companies Act, which empowers any person acting in the public interest, with leave of the court, to bring applications if the Companies Act permits such interventions,<sup>2</sup> should be read to allow them, as creditors, to ask for the delinquency order.

The court agreed with Vantage and allowed the application to proceed. Even though the actual delinquency order must still be considered, this case underscores the intricate intersection of pure company law and public interest - section 162 of the Companies Act seems to have a closed list of who may apply for a delinquency order but the clear public interest grounds used in section 157 then operate to broaden that list. Going forward, it is now clear that section 162 is not actually a closed list and all stakeholders in a company would have the ability to bring such a delinquency order, making sure that directors really pay attention to their fiduciary duties.

This case exemplifies the evolving dynamics of the law, where the pursuit of justice intertwines with the protection of public interest in the realm of corporate governance, growing transparency and directorial responsibilities.

Find out more about declaring delinquent directors in Our **Directors Duties Guide** on our website.

<sup>1</sup> *Vantage Mezzanine Fund II Partnership and Another v Hopeson and Others* [2023] ZAGPJHC 1361.

<sup>2</sup> *Vantage* (n 2 above) para 4.

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