The Suspension and Setting Aside of Delinquency and Probation Orders under the *Companies Act* 71 of 2008

R Cassim*

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Author

Rehana Cassim

Affiliation

University of South Africa

Email cassir@unisa.ac.za

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Abstract

A significant innovation of the *Companies Act* 71 of 2008 is contained in section 162. This provision empowers a court to declare a director delinquent or under probation on various grounds. The effect of a delinquency order is that a person is disqualified from being a director of a company, while being placed under probation means that he or she may not serve as a director except to the extent permitted by the order. A delinquency order may be unconditional and subsist for the director's lifetime, or it may be conditional and be effective for seven years or longer, as determined by the court. A probation order generally subsists for a period not exceeding five years, and may be subject to such conditions as the court considers appropriate. The harsh effects of these orders are alleviated by section 162(11) of the *Companies Act*. Under this provision, a delinquent director may apply to court after three years have elapsed, to suspend the delinquency order and to substitute it with a probation order, with or without conditions. A person who was placed under a probation order may apply to court after two years for the probation order to be set aside. This article examines the procedure under section 162(11) of the *Companies Act* for the suspension and setting aside of delinquency and probation orders. The factors that a court must take into account in exercising its discretion whether or not to grant the application, as set out in section 162(12) of the *Companies Act*, are also examined. This article draws on relevant jurisprudence as decided on the equivalent provisions in the corporate legislation in the United Kingdom and Australia. The method of interpretation used in these jurisdictions provides useful guidance on how best to apply and interpret sections 162(11) and (12) of the *Companies Act*. Recommendations are made regarding the proper approach to interpreting, applying and enhancing sections 162(11) and (12) of the *Companies Act*.

Keywords

Company law; delinquent directors; sections 162(11) and 162(12) of the *Companies Act* 71 of 2008; suspension of delinquency orders; setting aside of probation orders; rehabilitation of delinquent directors; discretion of court.

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1 Introduction

A significant innovation of the *Companies Act* 71 of 2008 (hereafter the Act) is contained in section 162, which empowers a court to make an order declaring a director delinquent or under probation on various grounds.[1] The innovation in section 162 lies in the introduction of a new civil remedy for those harmed by the conduct of delinquent directors.[2] The effect of an order of delinquency is that a person is automatically disqualified from being a director of a company.[3] A delinquency order may be unconditional and subsist for the director's lifetime or it may be conditional and subsist for seven years or longer, as determined by the court.[4] The effect of a probation order is that a person may not serve as a director except to the extent permitted by the order.[5] A probation order generally subsists for a period not exceeding five years,[6] and may be subject to such conditions as the court considers appropriate.[7] While the effects of delinquency and probation

* Rehana Cassim. BA *(cum laude)* LLB (*cum laude*) LLM (*cum laude*) (Witwatersrand), LLD (Unisa). Associate Professor, Department of Mercantile Law, University of South Africa, attorney and notary public of the High Court of South Africa. E-mail: cassir@unisa.ac.za. This article is based on sections of the author's LLD thesis.

1 A discussion of delinquency orders and probation orders in general is beyond the scope of this article. For a general discussion on delinquency and probation orders see *Kukama v Lobelo* 2012 JDR 0663 (GSJ); *Lobelo v Kukama* 2013 JDR 1434 (GSJ); *Msimang v Katuliiba* 2013 1 All SA 580 (GSJ) (hereafter *Msimang*); *Rabinowitz v Van Graan* 2013 5 SA 315 (GSJ); *Grancy Property Limited v Gihwala* 2014 JDR 1292 (WCC) (hereafter *Grancy*); *Gihwala v Grancy Property Limited* 2017 2 SA 337 (SCA) (hereafter *Gihwala*); *Lewis Group Limited v Woollam* 2017 2 SA 547 (WCC) (hereafter *Lewis Group*); Delport *Henochsberg on the Companies Act* 565-574; Cassim 2016 *PELJ* 1-28; and Du Plessis and Delport 2017 *SALJ* 274-295.

2 *Grancy* para 155. Some examples of conduct which have resulted in delinquency orders are: (a) failing to refund money to the South African Revenue Service (*Kukama v Lobelo* 2012 JDR 0663 (GSJ); (b) taking financial benefits and unlawfully excluding a shareholder from such benefits to which he is entitled (*Gihwala*); (c) failing to prepare annual financial statements or not holding annual general meetings for a number of years (*Msimang*); (d) allowing a company to trade knowing that it is insolvent (*Companies and Intellectual Property Commission v Cresswell* 2017 ZAWCHC 38 (27 March 2017)); and (e) soliciting and accepting directors' emoluments from the South African Nuclear Energy Corporation SOC Limited to which the director was not entitled (*Companies and Intellectual Property Commission v Zwane* 2019 ZAGPPHC 381 (8 August 2019)).

3 Section 69(8)(*a*) of the *Companies Act* 71 of 2008 (the Act). See further *Rabinowitz v Van Graan* 2013 5 SA 315 (GSJ) para 20; *Grancy* para 159 and *Lewis Group* para 5.

4 Section 162(6) of the Act.

5 Section 69(5) of the Act.

6 Section 162(9)(*b*) of the Act.

7 Section 162(10) of the Act.

orders are undeniably harsh, their effects are alleviated by section 162(11)[8] of the Act.

In terms of section 162(11)(*a*) of the Act, a delinquent director may, at any time after three years since the order of delinquency was made, apply to court to suspend the delinquency order and to substitute it with a probation order, with or without conditions. A person who is subsequently placed under a probation order by way of the substitution of the delinquency order may apply to court at any time more than two years thereafter for an order setting aside the probation order.[9] A person who was originally placed under a probation order may apply to court for the probation order to be set aside after a period of at least two years has elapsed since the probation order was made.[10] The implication of a successful application under section 162(11) is that, in effect, the minimum periods of a delinquency order and a probation order are three years and two years respectively. This article examines the procedure as envisaged in section 162(11) of the Act for the suspension and setting aside of delinquency and probation orders. The factors that a court must consider in exercising its discretion whether to grant the application, as set out in section 162(12) of the Act, are also examined.

The jurisprudence on this procedure has not yet been developed by South African courts. Section 17 of the United Kingdom (hereafter the UK) *Company Directors Disqualification Act* 1986[11] (hereafter the CDDA) and section 206G of the *Australian Corporations Act*, 2001[12] (hereafter the

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8 Section 162(11) of the Act provides as follows: "(11) A person who has been declared delinquent, other than as contemplated in subsection (6)*(a)*, or is subject to an order of probation, may apply to a court- (a) to suspend the order of delinquency, and substitute an order of probation, with or without conditions, at any time more than three years after the order of delinquency was made; or (b) to set aside an order of- (i) delinquency at any time more than two years after it was suspended as contemplated in paragraph *(a)*; or (ii) of probation, at any time more than two years after it was made."

9 Section 162(11)(*b*)(i) of the Act.

10 Section 162(11)(*b*)(ii) of the Act.

11 In accordance with s 17 of the *Company Directors Disqualification Act*, 1986 (the CDDA) a disqualified person may apply for leave to act as a director. A court may, in its discretion, waive the disqualification of a director to some extent and permit a disqualified director to act as a director of specific companies, with or without conditions, as determined by the court. The effect of a successful application under both this provision and s 162(11) of the Act is that a disqualified person may act as a director to the extent permitted by the court and subject to the conditions imposed by the court. For a further discussion of s 17 of the CDDA, see Davies and Worthington *Gower: Principles of Modern Company Law* 235-253.

12 Under s 206G(1) of the *Australian Corporations Act*, 2001 a court may grant leave to a person who is disqualified from managing corporations to manage corporations

Australian Corporations Act) contain procedures similar to those provided in sections 162(11) and (12) of the Act. This article examines the relevant provisions of the CDDA for the reason that South African company law is historically based on the English company law system and the company law in both these jurisdictions was recently reviewed. Relevant provisions of the *Australian Corporations Act,* which is historically largely based on UK company law, will also be reviewed in order to ascertain whether any useful guidelines may be deduced which are relevant to South African law. This approach is reinforced by section 5(2) of the Act, which provides that, to the extent appropriate, a court interpreting or applying the Act may consider foreign law. For these reasons this article draws on relevant jurisprudence in the UK and Australia for useful guidance on how best to interpret and apply sections 162(11) and (12) of the Act. Recommendations are proffered regarding the proper construct to be afforded to these provisions, and how they should be applied.

2 Procedure to suspend or set aside a delinquency order or probation order

2.1 Application to suspend or set aside a delinquency order or probation order

Section 162(11) of the Act applies to directors who have been declared delinquent by a court or who are subject to a probation order (hereafter the applicant). It does not apply to those directors who have been declared delinquent under sections 162(5)(*a*) or (*b*) of the Act, that is, on account of: (a) having consented to act as a director or having acted in the capacity of a director while ineligible or disqualified;[13] or (b) having acted as a director while under a probation order in a manner that contravened that probation order.[14] In these instances, the declaration of delinquency subsists for the lifetime of such a person and cannot be suspended or set aside.

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or a particular class of corporations or a particular corporation, with or without conditions, as determined by the court. The process under s 206G of the *Australian Corporations Act* is likewise similar to that under s 162(11) of the Act.

13 Section 162(5)(*a*) of the Act states that this ground of delinquency does not apply if the person was acting under the protection of a court order contemplated in s 69(11) or as a director contemplated in s 69(12). Under s 69(11) of the Act a court may exempt a person from the application of the grounds of disqualification set out in s 69(8)(*b*) of the Act. The reference to s 69(12) in s 162(5)(*a*)(ii) is an error as s 69(12) was deleted by s 46(*c*) of the *Companies Amendment Act* 3 of 2011. Refer to s 69 of the Act on the grounds of ineligibility and disqualification to be a director.

14 Refer to ss 162(5)(*a*) and (*b*), 162(6)(*a*) and 162(11) of the Act.

Section 162(11) of the Act may not be invoked unless the applicant has served a minimum of three years of the delinquency order. With regard to a probation order, the provision may be invoked only after a period of two years has passed since the order was made. A probation order may be imposed for a period not exceeding five years, as determined by the court.[15] In the event that a probation order of two years or less is imposed on a director, the provisions of section 162(11) of the Act would not come to the assistance of a director. The director would have no choice but to serve the full period of his or her probation order.[16]

Setting aside a delinquency order is a two-stage process under section 162(11) of the Act. The applicant must first apply to have the delinquency order suspended and substituted with an order of probation. After a period of at least two further years, he or she may thereafter apply for the substituted probation order to be set aside.[17] It is submitted that the mandatory two-stage approach adopted under the Act is commendable as it affords a court time and opportunity to monitor and assess the conduct of the delinquent director during the period that the order is substituted with a probation order. If a court is not satisfied with the conduct of the delinquent director during this period, it may decline to set aside the substituted probation order. Monitoring the delinquent director's conduct during the suspension of the delinquent order is critical in the light of the fact that a delinquency order is aimed at protecting companies and corporate stakeholders against directors who have proven themselves unable to manage the company's business or who have neglected their duties and obligations as company directors.[18] It is submitted that a two-stage process to have a delinquency order set aside facilitates this object.

It is notable that section 17(5) of the CDDA imposes a duty on the Secretary of State to appear on an application of a person for leave to act as a director,

15 Section 162(9)(*b*) of the Act.

16 In contrast, the CDDA does not specify any time period after which an applicant may apply for leave to act as a director. In fact, under s 17 of the CDDA a person who faces the possibility of a disqualification order is encouraged to immediately seek leave to act as a director (see further *Secretary of State for Trade and Industry v Collins & Ors* [2000] BCC 998 1010 (hereafter *Collins & Ors*) and *Hennelly v Secretary of State for Trade and Industry* [2004] EWHC 34 (Ch) (hereafter *Hennelly*)).

17 Sections 162(11)(*a*) and (*b*) of the Act.

18 See *Msimang* para 29; *Gihwala* para 144 and *Lewis Group* para 40 on the purposes of delinquency orders.

and to call the attention of the court to any relevant matters.[19] Likewise, the Australian Securities and Investments Commission (hereafter ASIC), Australia's national corporate regulatory authority, may intervene in proceedings under section 206G of the *Australian Corporations Act* for leave to manage a corporation.[20] A very wide range of persons has been given *locus standi* to apply to court to declare a director delinquent or to place him or her under probation. These persons are a company, a shareholder, a director, a company secretary, a prescribed officer of a company, a registered trade union that represents employees of the company or another employee representative, the Companies and Intellectual Property Commission, the Takeover Regulation Panel and an organ of state responsible for the administration of any legislation.[21] Nevertheless, such persons have no *locus standi* to intervene in the application to suspend or set aside these orders. This has the effect of attenuating the power conferred on such persons since a court may suspend or set aside the order that they had successfully obtained without any input from them.

2.2 Imposing conditions on a suspended delinquency order

In suspending a delinquency order and substituting it with a probation order under section 162(11)(*a*) of the Act, a court has a discretion whether or not to impose any conditions on the order. The determination of the conditions, typical conditions that may be imposed, and the breach thereof are discussed below.

2.2.1 Determination of conditions

It is unclear from section 162(11) of the Act whether the applicant is required to propose appropriate conditions to the court that would be imposed if his or her application under section 162(12) succeeds, or whether the court itself determines what the conditions should be.[22] With regard to applications under section 17 of the CDDA, in many instances the applicants themselves propose to the court appropriate conditions that a

19 This may be done by the Secretary of State giving evidence himself or herself or calling witnesses to do so. For an example of a case where the Secretary of State intervened in an application under s 17 of the CDDA, see *Collins & Ors*.

20 Section 1330 of the *Australian Corporations Act*.

21 Sections 162(2), (3) and (4) of the Act.

22 Du Plessis and Delport 2017 *SALJ* 283.

court should consider imposing in order to protect the public.[23] Bristoll remarks that most applicants offer fairly standard conditions drawn from the Secretary of State's guidelines, which are tailored to the facts of their particular case.[24] In other instances the courts set the conditions themselves.[25] Often the conditions of leave to act as a director are a combination of those proposed by the applicant and those imposed by the court.[26] For example, in *Harris v Secretary of State for Business, Innovation and Skills*[27] the applicant proposed certain conditions for the court to consider imposing if his application for leave to act as a director was successful. The court granted the application in respect of one company on the basis of the conditions suggested by the applicant, but imposed its own additional conditions with regard to his appointment as a director of a second company in order to minimise the risk of harm to the public.[28] A similar approach is adopted by the courts under section 206G of the *Australian Corporations Act*.[29]

While the decision whether to impose conditions as well as the type of conditions to impose is in the discretion of the court, it is submitted that, in accordance with the approach adopted in the UK and Australia, it would be advisable for the applicant to propose appropriate conditions that a court may consider imposing, should his or her application be successful. This would not only guide the court on the conditions to be imposed but might also serve to persuade a court to suspend a delinquency order if the applicant were able to demonstrate that the conditions proposed by him or her would protect the public from a recurrence of his or her misconduct.

2.2.2 Typical conditions

It is useful to examine the type of conditions imposed by courts in the UK and Australia when granting leave to disqualified directors to act as

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23 See *Re Tech Textiles Ltd, Secretary of State for Trade and Industry v Vane* [1998] 1 BCLC 259 268 (hereafter *Vane*) for a further discussion of the approach to determining the conditions under s 17 of the *CDDA*.

24 Bristoll 2014 *Insolvency Intelligence* 52. The guidelines issued by the Secretary of State include a list of the information which should generally be included in an application for leave to act as a director, although the evidence must be tailored to the facts of the particular case. For a discussion of the Secretary of State's guidelines see Bristoll 2014 *Insolvency Intelligence* 53.

25 Belcher 2012 *Edin LR* 404.

26 Belcher 2012 *Edin LR* 404.

27 *Harris v Secretary of State for Business, Innovation and Skills* [2015] BCC 283 (hereafter *Harris*).

28 *Harris* 295.

29 See for example *Hosken v Australian Securities and Investments Commission* [1998] TASSC 101 (hereafter *Hosken*).

directors. This might provide guidance to South African courts on the appropriate conditions to impose in the event of a delinquency order being suspended under section 162(11) of the Act.

Some of the conditions generally imposed by UK courts are conditions appointing a third party to supervise a director; conditions limiting the roles which the director may undertake; conditions regarding the composition of the board of directors in the particular company; and conditions relating to accounting controls.[30] Examples of such conditions include:

- that an independent chartered accountant or solicitor approved by the court acts as a co-director;[31]
- that a director's loan owed by the company to the applicant not be repaid unless all the creditors of the company are first paid;[32]
- that the applicant not be granted any security over the company's assets;[33]
- that cheques be countersigned;[34]
- that directors would receive only a board-approved salary;[35]
- that the total emoluments that may be paid by the company to the director be restricted;[36]
- that a company gives an undertaking that it would convene monthly board meetings and that these would be attended by a representative of the company's auditors.[37]

30 See *Re Gibson Davies Ltd* [1995] BCC 11 17-18 (hereafter *Gibson*); *Vane* 268; *Re Dawes and Henderson (Agencies) Ltd* [2000] 2 BCC 204 213 (hereafter *Dawes*); Hicks 2001 *JBL* 447; Belcher 2012 *Edin LR* 404 and Bristoll 2014 *Insolvency Intelligence* 52.

31 *Re Majestic Recording Studios Ltd* [1989] BCLC 1 7; *Secretary of State for Trade and Industry v Palfreman* [1995] BCC 193 196; *Re Brian Sheridan Cars Ltd Official Receiver v Sheridan* [1996] 1 BCLC 327 337 (hereafter *Brian Sheridan*); *Hennelly* para 67.

32 *Gibson* 17.

33 *Gibson* 17; *Harris* 292.

34 *Gibson* 17; *Vane* 272.

35 *Harris* 292.

36 *Gibson* 17; *Harris* 292.

37 *Re Chartmore Ltd* [1990] BCLC 673 676; *Vane* 272; *Hennelly* para 67.

Some of the conditions imposed by Australian courts are conditions relating to the financial authority of the applicant,[38] and appointing an independent person to supervise the company's business while the applicant was involved in management.[39] In *Re Minimix Industries Ltd*[40] the court imposed a condition restricting the applicant from signing any cheques drawn on the company's bank account for the remainder of his disqualification period.[41] In *Re Jarret*[42] the court imposed a condition that a registered auditor be appointed as the auditor of the company, and also that the company lodge audited accounts with ASIC while the applicant is acting as a director of the company.

It is submitted that the type of conditions imposed on a suspension of a delinquency order under section 162(11) of the Act should be determined by the nature of the particular case. It is suggested that the guiding principle should be that courts must impose conditions that are both enforceable and realistic.[43] The conditions imposed by courts in the UK and Australia are tailored specifically to protect the public from the nature of the misconduct committed by the director, and to ensure that the public would be protected if leave to act as a director again is granted. It is submitted that a similar approach should be adopted by South African courts. The conditions imposed should relate to the original misconduct which had resulted in the delinquency order being granted, and should furthermore ensure that the public would be protected from a recurrence of such misconduct. For instance, if a director was declared delinquent because he or she had signed documents on behalf of the company despite knowing that he or she lacked the authority to do so,[44] a condition that a court could appropriately impose would be that the director may not sign any documents on behalf of the company, including cheques drawn on the company's bank account. This would ensure that during the suspension of the delinquency order the risk of the director's committing the same offence again would be minimised.

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38 *Hosken* para 15. In this case the Supreme Court of Tasmania imposed conditions restricting the amount of money that could be spent by the company without the prior consent of the accountant who was appointed to supervise the business of the company.

39 *Hosken* para 15.

40 *Re Minimix Industries Ltd* (1982) 1 ACLC 511 513 (hereafter *Minimix*).

41 See further *Re Chapman* [2006] NSWSC 99 paras 18, 19 (hereafter *Chapman*).

42 *Re Jarret* [1999] FCA 503 para 9 (hereafter *Jarret*). See further *Re Hamilton-Irvine* (1990) 8 ACLC 1067 1075.

43 See *Hennelly* para 70.

44 This is a ground of delinquency in terms of s 162(5)(*c*)(iv)(*bb*) of the Act read with s 77(3)(*a*) of the Act.

2.2.3 Breach of conditions

Under the CDDA if a person contravenes a disqualification order and by implication contravenes the conditions of a disqualification order, he or she commits both a criminal and a civil offence. Under section 13 of the CDDA, if a person acts in contravention of a disqualification order he or she is liable on conviction on indictment to imprisonment for not more than two years or a fine, or both, and on summary conviction to imprisonment for more than six months or a fine not exceeding the statutory maximum, or both. Accordingly, the sanction for a breach of a condition is severe in that the person would be acting in breach of a disqualification order and would commit a criminal offence.[45] In addition, a breach of a disqualification order in the UK exposes the director to potential personal liability.[46] Sections 15(1) and 15(2) of the CDDA state that a disqualified person involved in the management of a company in contravention of a disqualification order is personally liable, jointly and severally with the company, for the debts of the company incurred during the term of the disqualification.

In sharp contrast, the Act is silent on the consequences of a director failing to comply with the conditions imposed on him or her while the delinquency order is suspended. It is submitted that the word "suspended" in section 162(11) of the Act implies that the "suspension" of the delinquency order may be revoked, and that the original delinquency order may be reinstated. On this basis, it is arguable that if a director were to breach any of the conditions imposed on him or her in terms of section 162(11) of the Act, the original delinquency order could be reinstated in full. The director would thus have to serve out the full term of the original delinquency order. If a director breaches the conditions imposed on him or her while under a probation order, he or she must, in terms of section 162(5)(*b*) of the Act, be declared a delinquent director.[47]

The delinquency remedy under the Act is a civil remedy.[48] It follows that the breach of a delinquency order or of a suspended delinquency order would

45 *Brian Sheridan* 346; *Collins & Ors* 1018; Griffin 2002 *NILQ* 220.

46 *Brian Sheridan* 346; Davies and Worthington *Gower: Principles of Modern Company Law* 239.

47 Section 162(5)(*b*) of the Act states that a court must make an order declaring a person a delinquent director if, while under a probation order, the person acted as a director in a manner that contravened the probation order. If a director were to breach the conditions imposed to a probation order, this would arguably constitute a breach of the probation order itself.

48 *Grancy* para 155.

not be a criminal offence.[49] Nevertheless, if a delinquency order is suspended by a court and the conditions attached to it are thereafter breached by a director, it is submitted that the director ought to be severely sanctioned by a court. The suspension of a delinquency order is an indulgence granted by a court to a delinquent director. Any conditions attached to the suspension of a delinquency order must be scrupulously observed and fully respected and complied with by a director. As the Chancery Division in *Brian Sheridan*[50] emphasised, it is of "cardinal importance" that any conditions imposed by a court on a disqualified director are strictly observed. It is not clear from the Act whether a court would be empowered to extend the delinquency period to a term longer than the original period of delinquency, in the event of a director's breaching the conditions of a suspended delinquency order. It is suggested that a court should be empowered to do so in appropriate circumstances, but this must be clarified by the legislature by amending the Act.

2.3 Discretion of the court to suspend or set aside the delinquency or probation order

A court has a discretion whether or not to grant the application to suspend the delinquency order or to set aside the probation order. This is made clear by section 162(12) of the Act, which states that in considering an application in section 162(11) "the court may" grant the order if "the court is satisfied" that the requirements in section 162(12)(*b*) are met.

Neither the CDDA nor the *Australian Corporations Act* provides explicit statutory guidance to the courts on the manner in which they should exercise their discretion to grant leave to a disqualified director to act as a director. Accordingly in these jurisdictions the courts' "discretion [is] unfettered by any statutory condition or criterion."[51] The courts in these jurisdictions have accordingly developed criteria for determining whether to grant such leave, and are guided by case law with regard to the overall approach to be adopted.[52] In contrast, the Act has in section 162(12) usefully provided statutory criteria to be considered by the courts in exercising their discretion under section 162(11) applications. These criteria

49 If, however, the delinquent director intentionally breaches a delinquency order this may in certain circumstances amount to contempt of court.

50 *Brian Sheridan* 346.

51 *Dawes* 211.

52 Belcher 2012 *Edin LR* 387, 400.

are as follows:

> (12) On considering an application contemplated in subsection (11), the court may-
>
> (a) not grant the order applied for unless the applicant has satisfied any conditions that were attached to the original order, or imposed in terms of subsection 11 (*a*); and
>
> (b) grant an order if, having regard to the circumstances leading to the original order, and the conduct of the applicant in the ensuing period, the court is satisfied that –
>
> (i) the applicant has demonstrated satisfactory progress towards rehabilitation; and
>
> (ii) there is a reasonable prospect that the applicant would be able to serve successfully as a director of a company in the future.

The word "and" in section 162(12)(*b*)(i) makes it clear that the provisions are conjunctive and that the requirements of both sections 162(12)(*b*)(i) and 162(12)(*b*)(ii) must be satisfied before a court may consider suspending or setting aside a delinquency order or probation order. The applicant bears the onus of persuading a court that the requirements in section 162(12)(*b*) of the Act have been fulfilled.

In exercising their discretion under section 17 of the CDDA, courts in the UK balance the need for a director to act as such against the protection of the public from the conduct that had led to the disqualification order.[53] While both the need of the disqualified person to earn a living and the need of the company to have the work done for the purposes of its business are considered, the latter need is more influential.[54] In *Collins & Ors*[55] the UK Court of Appeal remarked that the argument for leave to act as a director is more cogent in instances where the company needs to have the job done by the particular applicant. The approach of courts in the UK is that the starting point to bear in mind is that the purpose of a disqualification order is protective, and further, that leave must not be granted too freely.[56] Concerns have been raised by the UK Courts of Appeal that in some

53 *Secretary of State for Trade and Industry v Barnett* [1998] 2 BCLC 64 68-70; *Dawes* 210; *Collins & Ors* 1003; *Re Britannia Homes Centres Ltd, Official Receiver v McCahill* [2001] 2 BCLC 63 71-74; *Hennelly* para 63; *Secretary of State for Trade and Industry v Swan (No 2)* [2005] EWHC 2479 para 10; *Harris* 297; Belcher 2012 *Edin LR* 402.

54 *Collins & Ors* 1003.

55 *Collins & Ors* 1003.

56 *Vane* 267.

instances leave is granted too easily by the courts of first instance. For example, in both *Re Westmid Packing Services Ltd Secretary of State for Trade and Industry v Griffiths*[57] and *Collins & Ors*[58] the UK Court of Appeal expressed the view that the directors concerned had been "fortunate" that the court of first instance had granted leave to them to manage corporations.

In exercising its discretion under section 206G of the *Australian Corporations Act* in deciding whether to grant leave to an applicant to manage a corporation, the Australian courts generally take into account several factors: (a) the nature of the offence; (b) the nature of the applicant's involvement in the offence; (c) the applicant's general character; (d) the structure of the companies in which the applicant may be a director; and (e) the risk posed to persons connected with the company and the public.[59] This is not a closed list of factors.[60] The importance of protecting the public is emphasised on the ground that those who have dealings with the company are entitled to find that they are dealing with persons of integrity and that the funds of the company are not dissipated by dishonest activities.[61] Hardship is not generally a compelling factor taken into account by Australian courts for the reason that any hardship to the applicant was "self-created".[62] As is the position in the UK, Australian courts have cautioned that the leave of the court to act as a director is not to be granted lightly.[63]

It is submitted that in exercising their discretion under section 162(12) of the Act, South African courts should, as the UK and Australian courts do, bear in mind that section 162 is a remedy to protect the public interest.[64] Courts

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57 *Re Westmid Packing Services Ltd Secretary of State for Trade and Industry v Griffiths* [1998] 2 All ER 124 131.

58 *Collins & Ors* 1012.

59 *Re Magna Alloys & Research Pty Ltd* (1975) 1 ACLR 28353 28354 (hereafter *Magna Alloys*); *Re Zim Metal Products Pty Ltd* (1977) ACLC 29556 29557-29559 (decided under s 122 of the *Companies Act*, 1961 (Victoria), the equivalent provision to s 206G of the *Australian Corporations Act*) (hereafter *Zim Metal Products*); *Murray v Australian Securities Commission* (1994) 12 ACLC 11 13, 14 (hereafter *Murray*); *Jarret* para 7; *Adams v Australian Securities & Investments Commission* [2003] FCA 557 para 8 (hereafter *Adams*); *Chapman* paras 7-10. For a further discussion of these factors see Cassidy 1995 *C&SLJ* 228-234.

60 *Adams* para 8; *Chapman* para 9.

61 *Minimix* 512; *Magna Alloys* 28354; *Re Van Reesema* (1975) 11 SASR 28249 28255 (hereafter *Van Reesema*); *Re C & J Hazell Holdings Pty Ltd and Related Companies* [1991] TASSC 11 paras 4, 5 (hereafter *Hazell Holdings*); *Jarret* para 7; *Chapman* paras 7-11.

62 *Van Reesema* 28255. See further *Murray* 14; *Adams* para 8; *Chapman* para 9 and Cassidy 1995 *C&SLJ* 232, 233.

63 See *Zuker v Commissioner for Corporate Affairs* [1980] ACLC 34334 34340 (hereafter *Zuker*).

64 See further *Msimang* para 29; *Gihwala* para 144 and *Lewis Group* para 40.

must thus exercise caution in considering applications under section 162(11). The protection of the public would include all the relevant interest groups and stakeholders, such as shareholders, employees, investors, customers, creditors and all those with whom the company will do business.[65] While the protection of the public is not explicitly specified in section 162(12) as one of the factors to be taken into account by a court in a section 162(11) application, it is submitted that the purpose of a court in considering the other factors listed in section 162(12) (discussed in paragraph 3 below) – whether the applicant has demonstrated satisfactory progress towards rehabilitation and there is a reasonable prospect that he or she would be able successfully to serve as a director in the future – is to ensure that the applicant would not pose a risk to the public if the application were granted. It follows that a court would implicitly take into account the protection of the public in exercising its discretion under section 162(12) of the Act, even if this factor is not explicitly specified in the provision. It is further submitted that in accordance with the approach adopted in the UK and Australia, the hardship on the applicant should not weigh too heavily as a factor to be considered by a court in exercising its discretion under section 162(12) of the Act.

3 Factors to be taken into account by a court in exercising its discretion under section 162(12) of the Act

The factors that a court must take into account in exercising its discretion whether or not to suspend or set aside an order of delinquency or probation are set out in section 162(12) of the Act. Each of these factors is examined below.

3.1 Compliance with conditions

Section 162(12)(*a*) of the Act prohibits a court from granting the order under section 162(11) of the Act unless the applicant has satisfied any conditions that were attached to the original order, or which are imposed on him or her when the court suspended the delinquency order and substituted it with a probation order. If an applicant has not satisfied such conditions, the application must not be granted. A court does not have any discretion in this regard. It is submitted that section 162(12)(*a*) highlights the importance of the conditions imposed by a court on a delinquency order and a probation

65 *Minimix* 512; *Vane* 268; *Murray* 13; *Collins & Ors* 1011; *Hennelly* para 63.

order. In similar vein, in *Brian Sheridan*[66] the Chancery Division found that the approach of courts in the UK is not to tolerate imperfect compliance with the conditions attached to a disqualification order.

The applicant bears the onus of proving that he or she has complied with all the conditions that were attached to the delinquency order or the probation order. For instance, if a court had imposed as a condition to the delinquency order that the director must undertake a designated programme of remedial education or carry out a designated programme of community service,[67] the applicant must prove to the court that he or she has complied with these conditions. It is advisable for delinquent directors or those under probation orders to ensure that they retain evidence of their compliance with the conditions imposed by a court so as to facilitate any application under section 162(11) of the Act at a later stage.

The UK Court of Appeal in *Collins & Ors*[68] cautioned against courts imposing conditions that are of such a nature that they are too easily disregarded and almost impossible to police. The court's concern was that a breach of a condition might well not come to light unless and until the company or another company managed by the disqualified director "has come to grief",[69] by which stage it would be too late to secure the intended protection for the public.

Since compliance with relevant conditions is fundamentally important in order to protect the public, it is submitted that it would be advisable for South African courts to appoint someone to monitor whether the applicant does in fact comply with such conditions. For example, in *Hennelly*[70] the Chancery Division appointed the finance director of the company to provide quarterly reports to the Department of Trade and Industry on the level of compliance by the disqualified director with the conditions imposed by the court. Appointing such a person would also facilitate an application under section 162(11) of the Act, since the appointed person would be in a position to report to the court on the extent of the applicant's compliance with the court-imposed conditions.

An alternative suggestion to monitor the director's compliance with the

66 *Brian Sheridan* 342.
67 These conditions are listed in s 162(10) of the Act as possible conditions which a court may impose to a delinquency or probation order.
68 *Collins & Ors* 1018.
69 *Collins & Ors* 1019.
70 *Hennelly* para 68.

conditions imposed by a court, and which should be applied in South African law, would be to require such a director to lodge an affidavit with the court after a specified period of time confirming that he or she has complied with the relevant conditions. For example, in *Brian Sheridan*[71] the Chancery Division imposed a condition to the effect that within 21 days of the date of the court order the director concerned had to lodge an affidavit with the court confirming that all the conditions laid down by the court had been satisfied. Such a condition, the Chancery Division remarked, would serve to concentrate the mind of the director on the necessity to comply strictly with the terms of the court order.[72]

A further suggestion to monitor the director's compliance with any conditions would be to serve a copy of the court order, together with the conditions, on all the parties who would be affected by any failure of the director to comply with such conditions. Such parties could be the shareholders and creditors of the company and, if applicable, the company's bank and the South African Revenue Service. It is submitted that if the fact that a delinquent director were functioning as such under the terms of a suspended delinquency order were to be publicised to the relevant parties, this would limit the risk of the director failing to fully comply with the conditions imposed on him or her.

3.2 The circumstances leading to the original order

This factor requires a court to consider the reason why the director was initially declared delinquent or placed under probation. In a similar vein, the seriousness of the conduct which led to the original disqualification order is also taken into account by courts in the UK[73] and Australia.[74] Some of the factors that UK courts consider to "loom very large"[75] are if the director's conduct involved any dishonesty; if the company had been allowed to continue trading while it had been insolvent, and if a director had been withdrawing excessive amounts of remuneration in anticipation of the company's collapse and in effect living off the company's creditors.[76] Where the circumstances leading to the original order related to dishonesty on the

71 *Brian Sheridan* 343.
72 *Brian Sheridan* 346.
73 See *Vane* 268; *Re Barings plc (No 3), Secretary of State for Trade and Industry v Baker* [1999] 1 All ER 1017 1020 (hereafter *Baker*) and *Collins & Ors* 1017.
74 See *Magna Alloys* 28354; *Zim Metal Products* 29559; *Zuker* 34340; *Murray* 13; *Chapman* paras 9, 13 and Cassidy 1995 *C&SLJ* 229.
75 *Baker* 1020.
76 *Baker* 1020.

part of the director, courts in both the UK[77] and Australia[78] are reluctant to grant leave to disqualified directors to act as such. In *Magna Alloys* the Supreme Court of New South Wales remarked that in a case which involves dishonesty in the handling of money a court would be particularly reluctant to grant leave to an applicant to manage a corporation because it would not want to afford the person "an opportunity of renewing his depredations".[79]

On the other hand, where the offence is not connected with the conduct of a company's affairs, Australian courts are more likely to grant leave to an applicant to manage a corporation.[80] For example, in *Hazell Holdings* the applicant had been convicted of certain offences in terms of traffic legislation and was consequently disqualified from being a director. In granting the applicant's application for leave to act as a director of various companies, the court held that there was no risk that the applicant's reinstatement as a director would pose any danger to shareholders, employees, competitors, customers or anyone including Government departments with whom he or any of the companies was likely to have dealings.[81]

In accordance with the approach adopted by the UK and Australian courts, it is submitted that, in considering the circumstances leading to the original delinquency or probation order, a court should take into account the gravity of the misconduct which led to the original order. A heavier burden of convincing the court to grant an application under section 162(11) of the Act should lie on an applicant who has committed a more serious offence which resulted in the original order, particularly an offence which involved dishonesty. For instance, if the applicant had intentionally inflicted harm upon the company, as opposed to doing so by gross negligence,[82] this factor should weigh more heavily against him or her. It is further submitted that, in accordance with the approach adopted in Australia, a distinction should be drawn between offences connected to the conduct of a company's affairs and those unrelated to the affairs of the company. The

77 See *Secretary of State for Trade and Industry v Barnett* [1998] 2 BCLC 64 72; Goddard 2004 *Company Lawyer* 222 and Bristoll 2014 *Insolvency Intelligence* 51.
78 See *Magna Alloys* 28354.
79 *Magna Alloys* 28355.
80 See *Van Reesema* 28256; *Zim Metal Products* 29559; *Minimix* 512; *Hazell Holdings* 11 para 13 and Cassidy 1995 *C&SLJ* 230.
81 *Hazell Holdings* para 10.
82 This ground of delinquency is set out in s 162(5)(*c*)(iii) of the Act.

grounds of delinquency listed in sections 162(5)(*b*),[83] (*c*)[84] and (*f*)[85] of the Act relate to offences committed by a director while he or she was a director of the company, and relate to the company's affairs. The grounds of delinquency referred to in sections 162(5)(*d*)[86] and (*e*)[87] of the Act do not necessarily relate to offences committed by a director in connection with the conduct of the company's affairs. If, for example, an applicant had been declared delinquent because he or she had twice been personally convicted of an offence in terms of legislation unrelated to his or her position as a director in a company, arguably this factor should be taken into account in favour of the applicant, in the application to suspend the delinquency order.

3.3 The conduct of the applicant in the ensuing period

This factor relates to the manner in which the applicant conducted himself or herself between the time that the delinquency order or probation order was granted and the time of the application in terms of section 162(11) of the Act. The Act provides no guidance on whether a court should take into account the applicant's conduct only in relation to his or her dealing with companies, or whether his or her conduct generally is to be taken into account. In the absence of any statutory guidance on this point, it is submitted that a court should take into account the conduct of the applicant in relation to his or her dealings with companies as well as the general conduct of the applicant which may demonstrate the progress of the rehabilitation and the applicant's prospects of being able to serve successfully in the future as a director of a company.

UK courts similarly take into account a director's conduct in relation to his or her dealings with companies, in considering whether to grant leave to him

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83 This offence relates to acting as a director in a manner that contravenes a probation order.

84 These offences relate to a director grossly abusing his or her position; taking personal advantage of information or an opportunity; intentionally or by gross negligence inflicting harm upon the company or a subsidiary of a company; committing gross negligence, wilful misconduct or breach of trust; and fraudulent conduct as contemplated in ss 77(3)(*a*), (*b*) or (*c*) of the Act.

85 This offence relates to being a director of one or more companies which were convicted of an offence or subjected to an administrative fine or similar penalty in terms of any legislation within a period of five years.

86 This offence relates to a director being personally subject to a compliance notice or similar enforcement mechanism for substantially similar conduct in terms of any legislation.

87 This offence relates to a director being at least twice personally convicted of an offence or subjected to an administrative fine or similar penalty, in terms of any legislation.

or her to manage corporations. In *Vane*[88] the Chancery Division remarked that if a director had acted as such whilst the disqualification proceedings were pending, it would be relevant for the court to determine whether the companies had carried on business satisfactorily. Relevant factors to consider are whether the companies were trading profitably, whether they had complied with their obligations under the relevant company legislation, fiscal legislation and other applicable legislation, and whether the companies had paid their liabilities in full.[89]

Australian courts likewise, in considering whether or not to grant leave to a disqualified director to act as a director, take into account the conduct of the applicant in the period from the time of the disqualification order to the time of the application for leave to act as a director.[90] This factor has been particularly persuasive in cases where leave has been successfully granted to an applicant to act as a director.[91] For example, in granting leave to the applicant to act as a director in *Zuker*[92] the Supreme Court of Victoria attached much significance to the applicant's good behaviour since his disqualification to act as a director. The court regarded the applicant's good behaviour as "strong positive reasons"[93] for exercising its discretion in the applicant's favour.

In considering an application under section 162(11) of the Act it is submitted, following the approach adopted in the UK and Australia, that a court should consider whether the applicant has successfully acted as a director of other companies while the original delinquency or probation proceedings were pending, and thereafter. The court should assess whether the companies were trading profitably, whether they had complied with their obligations under the relevant company legislation, income tax and other applicable legislation, whether the companies had paid their liabilities in full and whether there had been any complaints against the applicant during the period that he or she had been acting as a director of a company. Of course, if the delinquency order had prohibited the applicant from acting as a director of any company, these factors would not be relevant to the applicant's application under section 162(11) of the Act. In such an event, it is submitted that a court should take into account the applicant's general

88 *Vane* 269.
89 *Vane* 269.
90 *Zim Metal Products* 29558; *In Re Marsden* (1981) 29 SASR 454 466 (hereafter *Marsden*); *Hosken* para 15; *Chapman* para 9.
91 Cassidy 1995 *C&SLJ* 231.
92 *Zuker* 34340.
93 *Zuker* 34340.

conduct in the ensuing period. For instance, any dishonest conduct by the applicant in the period after the delinquency order or probation order was made would be a relevant factor for a court to take into account. If the applicant had tried to mislead the court in his or her application in terms of section 162(11), this ought to weigh heavily against him or her. For example, in *Van Reesema*[94] one of the grounds on which the Supreme Court of South Australia refused to grant leave to a disqualified director to manage a corporation was that his affidavit in court had been misleading and "less than frank".[95]

3.4 Rehabilitation of the director

This factor requires a court to determine whether, based on the circumstances leading to the original order and the conduct of the applicant in the ensuing period, the court is satisfied that the applicant has demonstrated satisfactory progress towards rehabilitation. The Act does not define the term "rehabilitation" in the context of section 162(12)(*b*)(i), nor does it provide any guidance on the factors a court should take into account to assess whether the applicant has made satisfactory progress towards rehabilitation. Consequently, courts would have to develop criteria for determining whether the applicant has demonstrated satisfactory progress towards rehabilitation. Under section 162(12)(*b*)(i) the applicant need not have been fully rehabilitated for a court to suspend a delinquency order or set aside a probation order – he or she merely needs to demonstrate "satisfactory progress" towards rehabilitation.

The term "rehabilitation" is akin to the term "reformation",[96] which term was found by the High Court of Australia in *Rich v Australian Securities and Investments Commission*[97] to resemble sentencing principles under criminal law.[98] In criminal law the concept of being rehabilitated means that the offender has learnt new values, has reformed and is now fit to take his or her place in society.[99] The term "rehabilitation" or "reformation" connotes

94 *Van Reesema* 28252.

95 See further on this point *Zim Metal Products* 29558.

96 *S v Nkambule* 1993 1 All SA 485 (A) at 491; Terblanche *Guide to Sentencing in South Africa* 163.

97 *Rich v Australian Securities and Investments Commission* [2004] 220 CLR 129 para 52.

98 Du Plessis and Delport also maintain that the term "rehabilitation" used in s 162(12)(*b*)(i) of the Act sounds like a criminal-law issue (Du Plessis and Delport 2017 *SALJ* 284).

99 *S v Nombewu* 1996 12 BCLR 1635 (E) 1647; Terblanche *Guide to Sentencing in South Africa* 163; Kemp *et al Criminal Law in South Africa* 23.

positive impressions of the betterment of individuals.[100] The notion of whether an offender is rehabilitated or has reformed focuses attention on the offender as an individual, as opposed to the offence itself or the harm caused by the offence.[101] In the penal context the rehabilitation of a criminal is achieved either while the offender is incarcerated in prison, through rehabilitation programmes, or through making the completion of some rehabilitation programme a condition of the suspension of a punishment of imprisonment.[102] The notion of rehabilitation is thus based on the premise that the delinquent may be re-educated to become a useful member of society.[103]

In an application under section 162(11) of the Act a delinquent director would have to present evidence to the court over a period of at least three years demonstrating that he or she has made satisfactory progress towards rehabilitation. In *Grancy*[104] the court remarked that an applicant would most probably not be able to demonstrate satisfactory progress towards rehabilitation in a period shorter than three years. The applicant could, for example, present evidence showing that he or she has complied satisfactorily with all of the conditions imposed by the court in terms of the delinquency order. While compliance with the conditions imposed by a court is one of the factors that a court would take into account in deciding whether to grant the application to suspend or set aside the order of delinquency or probation, compliance with the conditions imposed by a court may also serve to demonstrate that an applicant has made satisfactory progress towards rehabilitation. For instance, compliance by an applicant with a condition that he or she undertake a designated programme of remedial education relevant to his or her conduct as a director, or that he or she carry out a designated programme of community service[105] might indicate to a court that the applicant has made progress towards rehabilitation, and that there is a reduced need for public protection from the applicant. It is submitted that courts ought to make more effective use of their power to impose appropriate ancillary conditions to declarations of delinquency so as

100 Kemp et al *Criminal Law in South Africa* 23.

101 Ashworth *Sentencing and Criminal Justice* 86.

102 Terblanche *Guide to Sentencing in South Africa* 163; Ashworth *Sentencing and Criminal Justice* 86.

103 *S v Nombewu* 1996 12 BCLR 1635 (E) 1647; Kemp *et al Criminal Law in South Africa* 23.

104 *Grancy* para 195.

105 These conditions may be imposed by a court to a delinquency order or a probation order in terms of ss 162(10)(*a*) and (*b*) of the Act.

to facilitate the rehabilitation of delinquent directors.[106]

If an applicant is permitted to be a director of another company while under a delinquency order or a probation order he or she would be able to present evidence to the court of his or her conduct that demonstrates progress towards rehabilitation as a director in the other company during the delinquency order. Presenting evidence of rehabilitation would be more challenging in the case of an applicant who has been absolutely prohibited from being a director of any company during the delinquency period. In such an event, an applicant could present evidence to the court demonstrating that his or her conduct in the previous three years in a position other than a director indicates that he or she is on the path towards rehabilitation. For instance, if the applicant were appointed as a manager of a company (in the position of an employee, as opposed to a director) and has satisfactorily complied with all his or her duties without any complaint from any party, this would indicate satisfactory progress towards rehabilitation. Alternatively, if the applicant had successfully carried on a business as a sole trader with unlimited liability during the delinquency period, this might serve as evidence to a court that the applicant has made satisfactory progress towards rehabilitation. It would be important for an applicant who intends to apply to court for a suspension of his or her delinquency order or for his or her probation order to be set aside to take steps towards rehabilitation during the delinquency or probation period, and to present the court with sufficient evidence demonstrating satisfactory progress towards his or her rehabilitation.

3.5 Reasonable prospect of serving successfully as a director in the future

This factor requires the court to consider whether the applicant is likely to be a future risk to the public, as opposed to focusing on the applicant's past misconduct. The court has to determine whether, based on the circumstances leading to the original order and the conduct of the applicant in the ensuing period, it is satisfied that there is a "reasonable prospect" of the applicant being able to serve successfully as a director of a company in the future. It is not clear what a "reasonable prospect" would comprise since the Act does not define this term in the context of section 162(12)(*b*)(ii). Its meaning has been left to the courts to determine.

The phrase "reasonable prospect" has been used in the Act in the context

106 Cassim 2016 *PELJ* 25.

of business rescue proceedings and jurisprudence on its meaning has developed. For this reason, until the jurisprudence develops on the meaning of this phrase in the context of section 162(12)(*b*)(ii) of the Act, it is useful to refer to its meaning in the context of business rescue proceedings.[107] Courts have proclaimed that in the context of business rescue the concept of a "reasonable prospect" is a lesser requirement than a "reasonable probability" but more than a mere *prima facie* case or an arguable possibility.[108] Emphasis has been placed on the fact that the prospect must be "reasonable", which it is said means that it must be a prospect based on reasonable grounds – a mere speculative suggestion would not suffice.[109] The existence of a reasonable prospect is a factual question, albeit involving a value judgment.[110] In *Prospec*[111] the court asserted that a "prospect" means an expectation, which may or may not come true, and therefore signifies a possibility. A possibility is reasonable if it rests on a ground that is objectively reasonable.[112] Consequently, the court reasoned, a "reasonable prospect" means no more than a possibility that rests on objectively reasonable grounds.[113] A cogent evidential foundation must be placed before the court to support the existence of a reasonable prospect that the desired object can be achieved.[114]

To apply the interpretation of a "reasonable prospect" in the context of section 131(4)(*a*) of the Act to section 162(12)(*b*)(ii) of the Act, in an application to suspend a delinquency order or to set aside a probation order, the applicant would have to satisfy a court that, based on objectively reasonable grounds, there is a possibility that he or she would be able to

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107 See Du Plessis and Delport 2017 *SALJ* 284. Under s 131(1) of the Act an affected person may apply to court for an order placing a company under supervision and commencing business rescue proceedings. After considering the application, a court may make an order commencing business rescue proceedings if it is satisfied, *inter alia*, that there is a "reasonable prospect" for rescuing the company (s 131(4)(*a*)).

108 *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 2 SA 423 (WCC) para 21; *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa v Bestvest 153 (Pty) Ltd* 2012 5 SA 497 (WCC) para 39; *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 4 SA 539 (SCA) para 29 (hereafter *Oakdene*); *Luthuli Power Corporation (Pty) Ltd v Transfix Transformers SA (Pty) Ltd* 2017 JDR 0806 (FB) para 39.

109 *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* 2012 2 SA 378 (WCC) para 20 (hereafter *Koen*); *Prospec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* 2013 1 SA 542 (FB) para 11 (hereafter *Prospec*); *Oakdene* para 29.

110 *Tyre Corporation Cape Town (Pty) Ltd v GT Logistics (Pty) Ltd* 2017 3 SA 74 (WCC) para 76.

111 *Prospec* para 12.

112 *Prospec* para 12.

113 *Prospec* para 12. See further *Mtolo Guilder Investments 10 (Pty) Ltd* 2017 ZAKZDHC 6 (2 March 2017) para 15.

114 *Koen* para 17; *Khan v Sprint Logistics SA (Pty) Ltd* 2016 JDR 2002 (KZD) para 13.

serve successfully as a director of a company in the future. While vague averments and mere speculative suggestions would not suffice, an applicant need not go so far as to establish a reasonable probability that he or she would be able to serve successfully as a director of a company in the future. Based on the evidential foundation put before the court by the applicant, the court would have to make a value judgment whether the applicant would be able to serve successfully as a director in the future.

In those instances where the delinquency order completely excludes the applicant from being a director of any company it would be more challenging for a director to be able to present to court evidence of a "reasonable prospect" of him or her being able to serve successfully as a director in the future.[115] If the declaration of delinquency permits a director to serve as a director of another company, he or she would have to present evidence to the court of having successfully served on the board of directors of the other company or companies. He or she might, for instance, present to the court affidavits from his or her fellow board members attesting to his or her ability to successfully serve as a director of such companies.

4 Conclusion

This article has analysed the suspension and setting aside of delinquency and probation orders under section 162(11) of the Act. While courts have a discretion whether or not to grant an application, they are bound by the statutory guidelines set out in section 162(12) of the Act in exercising their discretion. Unlike the position in the UK and Australia, a third party may not intervene in the application. Some challenges that may be faced by an applicant under section 162(11) include demonstrating to a court that satisfactory progress has been made towards rehabilitation, and convincing a court that there is a reasonable prospect of the applicant's being able to serve successfully as a director in the future. These challenges are augmented if a director was absolutely prohibited from being a director of any company for the duration of the order.

It is recommended that, in exercising its discretion in terms of section 162(11) of the Act, a court should, in accordance with the approach adopted in the UK and Australia, bear in mind that section 162 of the Act is intended to protect the public interest. Consequently, suspending or setting aside a delinquency order or a probation order must not frustrate the achievement of this object. In accordance with the approach adopted in Australia, the

115 Du Plessis and Delport 2017 *SALJ* 284.

hardship on the applicant should not weigh too heavily as a factor to be considered by the court.

It is suggested that the applicant should guide the court by proposing appropriate conditions which it might consider if the application succeeds. In order to minimise the risk of a recurrence of the misconduct complained of, it is submitted that the conditions imposed by a court must be specifically tailored to address the misconduct that was committed by the director, which resulted in the delinquency order being granted. It is submitted that courts should ensure that the conditions imposed on a suspended delinquency order are capable of being monitored and that they are not easily disregarded by a director. For example, the court could appoint a suitable person to monitor compliance with the conditions. A court could also require the applicant to lodge an affidavit with it confirming that he or she has complied with the conditions, or it could serve a copy of the court order and the conditions on relevant parties. It is suggested that if an applicant breaches any of the conditions imposed by the court during the suspended delinquency order, the original delinquency order should be reinstated in full. The legislation is unclear as to whether a court may extend the delinquency period if the conditions are breached by the applicant. It is submitted that a court should be empowered to do so in appropriate circumstances, but this should be clarified by the legislature by amending the Act.

In considering the circumstances leading to the original delinquency or probation order in terms of section 162(12)(*b*) of the Act, in accordance with the approach adopted in the UK and Australia, a court should take into account the gravity of the misconduct which had led to the original order. A distinction should be drawn between offences that are connected with the conduct of the company's affairs and those that are unrelated to the company's affairs.

Clarity is required on the meaning of the term "conduct" as used in section 162(12)(*b*) of the Act. It is suggested that in considering the conduct of the applicant in the ensuing period, a court should take into account both the specific conduct of the applicant in relation to his or her dealing with companies as well as his or her general conduct which may demonstrate progress towards rehabilitation. The meaning of the term "rehabilitation" as used in section 162(12)(*b*)(i) of the Act should be clarified. It is suggested that guidance on the meaning of these terms may be sought in the criminal law context, where the term "rehabilitation" is used in sentencing proceedings. Certainty is furthermore required on the meaning of the phrase

"reasonable prospect" of serving successfully as a director in the future, as used in section 162(12)(*b*)(ii) of the Act. Drawing on the interpretation of this phrase in the context of business rescue proceedings, it is submitted that it means a possibility, and not a probability, based on objectively reasonable grounds that the director will be able to serve successfully as a director in the future.

In the light of the gravity of a delinquency order and a probation order, granting leave to an applicant under section 162(11) of the Act to act as a director must be carefully considered by a court. This is particularly important in order to accord with the purpose of the Act in section 7(*j*), that is, to encourage the efficient and responsible management of companies. It is hoped that the above recommendations would offer some guidance to courts on interpreting and applying the remedy in section 162(11) of the Act and in exercising their discretion in such applications.

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List of Abbreviations

ASIC	Australian Securities and Investments Commission
C&SLJ	Company and Securities Law Journal
CDDA	Company Directors Disqualification Act, 1986
Edin LR	Edinburgh Law Review
JBL	Journal of Business Law
NILQ	Northern Ireland Legal Quarterly
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal