

REPUBLIC OF SOUTH AFRICA

COMPANIES SECOND AMENDMENT BILL

*(As agreed to by the Portfolio Committee on Trade, Industry and Competition
(National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF TRADE, INDUSTRY AND COMPETITION)

[B 26B—2023]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Companies Act, 2008, so as to amend the time bars, in respect of proceedings to recover any loss, damages or costs for which a person may be held liable in terms of section 77 of the Companies Act; to amend the time bar for the bringing of an application to declare a person delinquent or under probation in terms of section 162(2) and (3) of the Companies Act; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 77 of Act 71 of 2008, as amended by section 49 of Act 3 of 2011

1. Section 77 of the Companies Act, 2008 (Act No. 71 of 2008), (hereinafter referred to as the “principal Act”), is hereby amended by the substitution for subsection (7) of the following subsection: 5

“(7) In relation to the proceedings to recover any loss, damages or costs for which a person is or may be held liable in terms of this section—

(a) the Prescription Act, 1969 (Act No. 68 of 1969) does not apply; 10

(b) subject to paragraph (c), such proceedings may not be commenced more than three years after the act or omission that gave rise to that liability; and

(c) the court may, on good cause shown, extend the period referred to in paragraph (b) regardless of whether— 15

(i) such period has expired or not; or

(ii) the act or omission that resulted in the loss, damages or costs contemplated in this section, occurred prior to the promulgation of the Companies Second Amendment Act, 2023 (Act No. of 2023).”.

Amendment of section 162 of Act 71 of 2008, as amended by section 101 of Act 3 of 2011 20

2. Section 162 of the principal Act is hereby amended—

(a) by the substitution in subsection (2) for paragraph (a) of the following paragraph:

“(a) the person is a director of that company or, subject to subsection (2A), within the [24] 60 months immediately preceding the 25

application, was a director of that company; and”;

(b) by the insertion after subsection (2) of the following subsection:

- “(2A)(a) The court may, on good cause shown, extend the period contemplated in subsection (2)(a) in respect of any of the circumstances contemplated in subsection (2)(b) regardless of whether—
- (i) such period has expired or not; or
 - (ii) the circumstances occurred prior to the promulgation of the Companies Second Amendment Act, 2023 (Act No. of 2023).” 5
- (c) by the substitution in subsection (3) for paragraph (a) of the following paragraph:
- “(a) the person is a director of a company or, subject to subsection (3A), within the [24] 60 months immediately preceding the application, was a director of a company; and”; and 10
- (d) by the insertion after subsection (3) of the following subsection:
- “(3A)(a) The court may, on good cause shown, extend the period contemplated in subsection (3)(a) in respect of any of the circumstances contemplated in subsection (3)(b) regardless of whether—
- (i) such period has expired or not; or
 - (ii) the circumstances occurred prior to the promulgation of the Companies Second Amendment Act, 2023 (Act No. of 2023).” 15

Short title and commencement

3. This Act is called the Companies Second Amendment Act, 2023, and comes into operation on a date to be fixed by the President by proclamation in the *Gazette*. 20

**MEMORANDUM ON OBJECTS OF COMPANIES SECOND
AMENDMENT BILL**

1. BACKGROUND

- 1.1 The Zondo Commission of Enquiry into State Capture (“Zondo Commission”) made a recommendation to amend the Companies Act, 2008 (Act No. 71 of 2008) (the “Companies Act”), to extend the time bar which is contained in section 162(2) and (3) of the Companies Act.
- 1.2 Section 162 of the Companies Act makes provision for an application to a court for an order declaring a person delinquent or under probation.
- 1.3 Section 162(2) of the Companies Act provides as follows:
- “162(2) A company, a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another representative of the employees of a company may apply to a court for an order declaring a person delinquent or under probation if—*
- (a) the person is a director of that company or, within the 24 months immediately preceding the application, was a director of that company; and*
- (b) any of the circumstances contemplated in—*
- (i) subsection (5)(a) to (c) apply, in the case of an application for a declaration of delinquency; or*
- (ii) subsections (7)(a) and (8) apply, in the case of an application for probation.”.*
- 1.4 Section 162(3) of the Companies Act provides as follows:
- “162(3) The Commission or the Panel may apply to a court for an order declaring a person delinquent or under probation if—*
- (a) the person is a director of a company or, within the 24 months immediately preceding the application, was a director of a company; and*
- (b) any of the circumstances contemplated in—*
- (i) subsection 5 apply, in the case of an application for a declaration of delinquency; or*
- (ii) subsections (7) and (8) apply, in the case of an application for probation.”.*
- 1.5 As appears from the above in both subsections (2) and (3) of section 162 of the Companies Act, an application in terms of those sections may be brought if the person concerned is a director of that company, or within the 24 months immediately preceding the application, was a director of that company.
- 1.6 The Zondo Commission made a recommendation in respect of two specific companies and certain persons connected with those companies that section 162 of the Companies Act be amended so as to ensure that the application for a declaration of delinquency may be brought even after the two years on good cause shown.
- 1.7 Whilst the aforesaid recommendations of the Zondo Commission were limited to specific cases, it is considered to be in the public interest that any amendments to the Companies Act to extend the time bar set out in section 162(2) and (3) should be of wider application and should apply generally.
- 1.8 Following research undertaken, it appears that a number of jurisdictions have different time bars in respect of applications for declarations of delinquency. It appears, from such research, that the corresponding provisions in New Zealand’s Companies Act have the longest time bar, being five years.

- 1.9 It is appreciated that the time bar in applications for declarations of delinquency must be balanced and fair to both plaintiff and defendant, having regard to the implications of lapse of time, reduced memories and inability to find relevant records.
- 1.10 Having regard to all of the foregoing, it was considered that the period of five years used in New Zealand is appropriate.
- 1.11 There is, however, a further dimension, namely that in certain circumstances even the time bar of five years may be insufficient and that the court be empowered on good cause shown to extend that time period in a specific case. Furthermore, when good cause is shown to the court to extend the time bar, such power of the court should include the right to extend the time period, even in respect of any of the circumstances mentioned in section 162 of the Companies Act which may have occurred in the period before the extension. In exercising its powers in this regard, the court will take into account the interests of justice and fairness.
- 1.12 The proposed legislation should be expressed to be retrospective. Thus, the legislation should state that the court, on good cause shown, may extend the time bar even though the conduct in question was committed during the period before the extension.
- 1.13 Although not the subject of any recommendation of the Zondo Commission, it appears on reflection that the time bar in section 77(7) of the Companies Act also requires amendment. Section 77 deals with the liability of directors and prescribed officers for breaching their fiduciary duties and duties of care, skill and diligence, as well as certain statutory duties.
- 1.14 Section 77(7) reads as follows:
- “77(7) Proceedings to recover any loss, damages or costs for which a person is or may be held liable in terms of this section may not be commenced more than three years after the act or omission that give rise to that liability.”.*
- 1.15 Whilst the period of three years in section 77 of the Companies Act conforms with international best practice, it is considered appropriate that the court should also be empowered, on good cause shown, to extend the time bar of three years, on the basis that such extended period may also cover acts or omissions that occurred during the period before the extension.

2. CLAUSE BY CLAUSE SUMMARY OF BILL

- 2.1 **Clause 1** amends section 77(7) to hold the director liable for damages and to recover any loss, damages or costs for which a person is or may be held liable in terms of this section. Actions in terms of this section must take place within a period of three years or such longer period as is determined by the court on good cause shown. The effect of this amendment is retrospective.
- 2.2 **Clause 2** amends section 162(2) and (3) which extends the time bar from 24 months to 60 months. It also gives the court the power to extend the period on good cause shown, with retrospective effect.
- 2.3 **Clause 3** provides for the commencement and short title of the Act.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The Department of Trade, Industry and Competition was informed about the Judicial Commission of Inquiry into State Capture Report: Part 1, Chapter 1 and its recommendation. The Report was completed in January 2022 and the Department was informed that the amendments to the Companies Act are recommended. In

August 2022, the Department was consulted by the Presidency regarding the Zondo Commission recommendations on the amendments required in the Act. The amendments are urgent because applications to declare directors as being delinquent are subject to the time bar of two years and thus no such application for declaration of delinquency can be made in respect of the persons mentioned in the Zondo Commission Report unless the time bar is extended. This will also be relevant to other persons involved in state capture. In addition, such amendments should apply widely, and be of general application. The Department was reporting to the Presidency on the amendments to the Act since late in 2022. The Consultations have been held internally within the Department. The Specialist Committee on Company Law was consulted on the Zondo Commission recommendation and the required amendment to the Companies Act. The Committee is established in terms of the Companies Act to advise the Minister on matters pertaining to the Companies Act. The Committee also recommended an amendment to the Act to empower the court to extend the period of the time bar relating to actions to recover loss or damage resulting from the breach by directors of their fiduciary duties, duties of care, skill and diligence and certain statutory duties. A Socio Economic Impact Assessment System has been developed for the Bill.

4. FINANCIAL IMPLICATIONS FOR STATE

Any financial requirements will be accommodated within the existing budget.

5. PARLIAMENTARY PROCEDURE

- 5.1 The Constitution of the Republic of South Africa, 1996 (“the Constitution”), regulates the manner in which legislation may be enacted by the legislature and thus prescribes the different procedures to be followed for such enactment. The national legislative process is governed by sections 73 to 77 of the Constitution. The Constitution distinguishes between four categories of Bills: Bills amending the Constitution (section 74); ordinary Bills not affecting provinces (section 75); ordinary Bills affecting provinces (section 76); and money Bills (section 77). Furthermore, Schedules 4 and 5 to the Constitution list functional areas of concurrent national and provincial legislative competence and functional areas of exclusive provincial legislative competence, respectively.
- 5.2 The tagging of Bills is dealt with either in terms of section 75 or section 76 of the Constitution, and these sections set out the process that must be followed when a Bill is submitted for approval. A Bill must be correctly tagged otherwise it would be constitutionally invalid. The Bill must be considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 and Schedule 5 to the Constitution.
- 5.3 The test for tagging is not concerned with determining the sphere of government that has competence to legislate on a matter, nor the process concerned with preventing interference in the legislative competence of another sphere of government.* In *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC) (“Tongoane judgment”), the Constitutional Court ruled on the test to be used when tagging a Bill. The court held in paragraph 70 that the “*test for determining how a Bill is to be tagged must be broader than that for determining legislative competence.*† *Whether a Bill is a section 76 Bill is determined in two ways. First by the explicit list of legislative matters in section 76(3), and second by whether the provisions of*

* *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*, 2010 (6) SA 214 (CC), at paragraph 60.

† At paragraph 70.

a Bill in substantial measure fall within a concurrent legislative competence.”* The court held[†] that the tagging test focuses on all provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4, and not on whether any of its provisions are incidental to its substance.

- 5.4 The Department holds the view that the Bill must be classified as a section 75 Bill. The Companies Amendment Bill of 2008 was tagged by Parliament as a section 75 Bill. The Companies Amendment Bill of 2011 was tagged by Parliament as a section 75 Bill. The amendments to the Companies Act made through the General Laws Amendment Act, 2022, was tagged by Parliament as a section 75 Bill.
- 5.5 The Department holds the view that matters of ‘trade’ set out in Schedule 4 to the Constitution refers to the activities in local markets, rather than corporate governance of firms in the economy. Given that the Companies Act has a long pedigree of tagging as a section 75 Bill, and in light of the content of the Bill (which does not deal with local trading arrangements but instead with governance of firms in the economy), it is appropriate that it be tagged as a section 75 Bill.
- 5.6 The Office of the Chief State Law Adviser is of the view that the provisions in the Bill relates to a declaration on application by a court in certain circumstances, of a person as delinquent or under probation if that person is a director of a company. The effect that the relevant declaration may have on a company, arguably, will have a negligible bearing on such company’s trade.
- 5.7 It is accordingly our view that this is a Bill as contemplated in section 75 of the Constitution because it does not concern matters that are dealt with under section 76 of the Constitution.

6. REFERRAL OF BILL TO HOUSE OF TRADITIONAL AND KHOI SAN LEADERS

The Office of the Chief State Law Adviser is of the opinion that it is not necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39 of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions pertaining to traditional or Khoi-San communities or pertaining to customary law or customs of traditional or Khoi-San communities, nor any matter referred to in section 154(2) of the Constitution.

* At paragraph 72.

† At paragraph 59.

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