

# Dispute Resolution

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### SOUTH AFRICA

Recent Companies Act amendments are good news for creditors and shareholders, but not directors



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for creditors and  
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The recent amendments to sections 77(7) and 162(2) of the Companies Act 71 of 2008 (Companies Act), dealing with liability of directors, are good news for creditors and shareholders, but not so much for directors.

In terms of section 77 of the Companies Act, a director may be held liable for any loss, damages or costs sustained by the company as a consequence of any breach by a director of their fiduciary duties. Prior to these amendments, section 77(7) provided that any proceedings against a director to recover any loss, damages or costs could not be commenced more than **three years** after the act or omission that gave rise to that liability.

A claim in terms of section 77 lies in the hands of the company and the three-year time bar did not present a problem if the board of a company elected to proceed against one of its directors, as the board would have access to sufficient information to evaluate the merits of any such claim and proceed accordingly.

The problem arose where the board had no intention of proceeding with a claim against a defaulting director. In this instance, any such claim had to be brought by a shareholder as a derivative action (section 165 of the Companies Act), with the leave of the court. In order to obtain this leave, a shareholder would have to convince a court that it was *inter alia* in the best interest of the company to proceed by way of a derivative action. In order to do so it required access to company files, company information and other company documents, which a shareholder does not have.

The same problem arose in the event of a company being wound up and a liquidator wishing to proceed against directors of a company. In these circumstances, the lack of access to company files, company information and other company documents has historically been an obstacle to applicants attempting to institute derivative proceedings on behalf of a company, because the requester would have to request the required information in terms of the Protection of Access to Information Act 2 of 2000 (PAIA), failing which, they would have to approach the court to gain access to information in order to prove wrongful conduct, which comes with its own delays; cutting into the three-year period. A liquidator would similarly have to conduct an insolvency enquiry to get access to these documents.





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### Extending the time periods for proceedings

These difficulties have now been addressed by the amendment of section 77(7), which provides that a court may **on good cause shown**, extend the three-year period regardless of whether (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 amendment.

### Section 162 – similar difficulties

Section 162 of the Companies Act provides for an application to be made by certain categories of persons to declare a director delinquent or place them under probation. Pre-amendment, section 162(2) applied in respect of a person that was a director of the company within the 24 months immediately preceding the application. The category of persons and entities that have standing to bring such an application are the company, a shareholder, another director, the company secretary, a prescribed officer of a company, a registered trade union that represents employees of the company, or another representative of the employees of a company. If an application is not brought by the company, the applicant would be faced with difficulties similar to those stated above in obtaining the necessary information and documentation in order to establish a case for delinquency or probation within a period of 24 months.

This issue has similarly been addressed by the amendment of section 162(2), which provides that the person against whom the application is brought must have been a director of that company, within the 60 months immediately preceding the application, and the period of 60 months can be extended further, on application to court and on good cause shown, regardless of whether such period has expired or not, or the circumstances occurred prior to the promulgation of the amendment.

### Determining if good cause has been shown

In light of the above-mentioned amendments, the question now turns to what **“good cause shown”** means. Since there has not yet been any case law on this point i.e. what **“good cause shown”** means in the context of sections 77(7) and 162(2), we must, until the court has pronounced on this, look at similar judgments for some guidance.



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*Samancor Holdings (Pty) Ltd and Others v Samancor Chrome Holdings (Pty) Ltd and Another* [2021] (SCA), on appeal, dealt with the High Court's decision to grant the respondents an extension of time, in terms of section 8 of the Arbitration Act 42 of 1965, to initiate arbitration proceedings against the appellants. In this decision, some of the factors the court took into account, which in our view would in all likelihood be considered by courts in the context of sections 77(7) and 162(2) of the Companies Act, include:

- **The terms of the time-bar clause:** Here it would be important to note that sections 77(7) and 162(2) do not indicate that the extension must be granted only rarely or in exceptional circumstances.
- **The extent of the plaintiff's delay:** This will be a factual enquiry i.e. the extent of the delay after the expiry of the three-year or 24-month periods, and how quickly the court has been approached to grant the extension.
- **The explanation for the plaintiff's failure to bring the claim timeously:** Factors to be considered by the court would include the plaintiff's limited access to documents and information, and the time it may have taken to bring a PAIA application, conduct an insolvency enquiry or be granted leave to bring a derivative action.
- **The extent of the plaintiff's fault, if any, in relation to the delay:** This will again be a factual enquiry.
- **Whether the defendant caused or contributed to the non-compliance:** If there was, the extent of the defendant's fault in that regard.
- **The nature and importance of the claim.**
- **The extent of the prejudice:** If any, suffered by the defendant in consequence of the delay.

In light of the above, the amendments to sections 77(7) and 162(2) have provided creditors and shareholders with a reasonable opportunity to hold directors and prescribed officers of companies accountable, having regard to the standards of directors' conduct set out in section 67 of the Companies Act. This does not, however, mean that creditors and shareholders can delay the bringing of action – any such actions must be proceeded with as swiftly as possible.

**Lucinde Rhoodie and Caitlin Freddy**

Chambers Global  
2025 Results

## Dispute Resolution

Chambers Global 2022–2025 ranked our

Dispute Resolution practice in:

**Band 2:** Dispute Resolution.

Chambers Global 2018–2025 ranked us in:

**Band 2:** Restructuring/Insolvency.

**Tim Fletcher** ranked by Chambers Global 2025 as an "Eminent Practitioner", a category in which lawyers are ranked as highly influential lawyers and exceptional individuals.

**Lucinde Rhoodie** ranked by Chambers Global 2023–2025 in **Band 4:** Dispute Resolution.

**Natascha Harduth** ranked by Chambers Global 2025 in **Band 4:** Restructuring/Insolvency.

**Clive Rumsey** ranked by Chambers Global 2025 in **Band 5:** Dispute Resolution.

**Anja Hofmeyr** ranked by Chambers Global 2025 in **Band 5:** Dispute Resolution.

**Jackwell Feris** ranked by Chambers Global 2023–2025 as an "Up & Coming" dispute resolution lawyer.

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**BBBEE STATUS: LEVEL ONE CONTRIBUTOR**

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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