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Abstract

The *Companies Act 71 of 2008* has introduced into our company law an innovative provision which permits a wide range of persons to apply to court to declare a director delinquent. This provision is contained in section 162 of the *Companies Act 71 of 2008*. The effect of an order of delinquency is that a person is disqualified for a specified period from being a director of a company. In *Gihwala v Grancy Property Limited* 2016 ZASCA 35 the Supreme Court of Appeal was faced with some important questions pertaining to the declaration of delinquency of a director. It was contended by the appellants that section 162(5)(c) of the *Companies Act 71 of 2008* is unconstitutional on the grounds that it was retrospective in its application, and that there was no discretion vested in a court to refuse to make a delinquency order or to moderate the period of such an order to less than seven years. It was further contended that section 162(5)(c) of the *Companies Act 71 of 2008* infringed the constitutional right to dignity, the right to choose a trade, occupation or profession and the right to access to courts. In assessing these contentions, the SCA addressed and clarified some important questions surrounding the declaration of delinquency of a director. This note discusses and analyses the judgment of the SCA. It points out some anomalies in section 162 of the *Companies Act 71 of 2008*. It contends that, in assessing the rationality of section 162(5) of the *Companies Act 71 of 2008*, the SCA ought to have considered the equivalent provisions in leading foreign jurisdictions that have influenced our Act, particularly since section 5(2) of the *Companies Act 71 of 2008* permits a court where appropriate to consider foreign law in interpreting the Act. Further, this note analyses the test applied by courts in determining whether the offences set out in section 162(5) of the *Companies Act 71 of 2008* have been committed, and argues that the courts ought to make more effective use of their power to impose ancillary conditions to declarations of delinquency.

Keywords

Company law; delinquent directors; section 162(5) of the *Companies Act 71 of 2008*; retrospectivity; prescription period; purpose of section 162(5); substantial misconduct of directors; discretion of court.

1 Introduction

An innovative provision of the *Companies Act* 71 of 2008 (hereafter the Act) is that for the first time in South African law, provision is made for a court to declare a director delinquent or to have him placed under an order of probation. Under section 162 of the Act a wide range of persons may apply to court to declare a person delinquent if the person is a director of the company or within 24 months immediately preceding the application was a director of that company, and any of the circumstances contemplated in section 162(5) of the Act are applicable.¹ Some of the grounds under which a court must declare a director delinquent under section 162(5) of the Act are if the director acted in the capacity as a director while ineligible or disqualified to do so, contravened a probation order, or while a director grossly abused his position or acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of his functions and duties as a director.

The effect of an order of delinquency is that a person is disqualified from being a director of a company and is thus prohibited from being a director of a company.² As the court in *Kukama v Lobelo*³ said, in view of the effect of an order declaring a director delinquent under section 162(5) of the Act, it is not necessary to also order his removal as such due to the automatic inherent effect of removal upon such an order. Section 162 of the Act is directed at protecting companies and corporate stakeholders against company directors who have proven themselves unable to manage the business of the company or have failed in, or are in neglect of, their duties and obligations as company directors.⁴ The rationale for this remedy is

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¹ The persons who have *locus standi* under s 162 of the *Companies Act* 71 of 2008 (the Act) are a company, a shareholder, a director, a company secretary, a prescribed officer, a registered trade union that represents employees of the company or another representative of the employees of a company, the Companies and Intellectual Property Commission, the Takeover Regulation Panel and an organ of state responsible for the administration of any legislation. It is important to guard against abuse by those persons with *locus standi* making these applications, because such persons may well use the mechanism of applying to court to declare a director delinquent to lodge vexatious claims, which may result in damage being caused to the reputation of directors (Cassim "Governance and the Board of Directors" 436).

² Section 69(8)(a) of the Act.

³ *Kukama v Lobelo* 2012 JDR 0062 (GSJ) para 21. Also see *Msimang v Katuliiba* 2012 JDR 2391 (GSJ) para 32.

⁴ *Msimang v Katuliiba* 2012 JDR 2391 (GSJ) para 29.

that a director who is guilty of a serious abuse of his position should not be permitted to continue to hold a directorship, or should be permitted to do so only under strict conditions imposed by a court.⁵ Section 162 of the Act sets out to raise the standards of good behaviour and integrity expected of directors and makes them accountable to the company, the shareholders, fellow directors, and even the employees of the company.⁶

In *Gihwala v Grancy Property Limited*⁷ (hereafter *Gihwala*) one of the issues before the Supreme Court of Appeal (hereafter SCA) was whether or not to confirm a declaration of delinquency made by the Western Cape Division of the High Court in *Grancy Property Limited v Gihwala*,⁸ (hereafter *Grancy*) against Mr Gihwala (First Appellant) and Mr Manala (Second Appellant). The court of first instance had declared the First and Second Appellants delinquent directors as contemplated in section 162(5)(c) of the Act. The SCA, per Wallis JA, unanimously approved the declaration of delinquency handed down by the court of first instance. This note will critically evaluate the relevant aspects of *Gihwala* relating to the declaration of delinquency. The judgment is noteworthy as it addresses and clarifies certain important questions surrounding the declaration of delinquency of a director.

2 The facts

The First and Second Appellants were directors of Seena Marena Investments (Pty) Ltd (hereafter SMI). The Dines Gihwala Family Trust and the Second Appellant were equal shareholders of SMI. In 2005 the First and Second Appellants entered into a verbal agreement with Grancy Property Limited for the company to acquire a one-third shareholding in SMI. SMI needed the funding from Grancy Property Limited to enable it to acquire a stake in a special purpose vehicle formed as part of a black economic empowerment transaction linked to a property loan stock company listed on the Johannesburg Stock Exchange. The Second Appellant lacked the resources to pay for his shares in SMI as a one-third shareholder. It was consequently agreed between the parties that the First Appellant and Grancy Property Limited would each loan a sum of money to the Second Appellant to enable the Second Appellant to pay for his shares in SMI. The agreement between the parties was that the loans would attract interest at a commercial rate and if and when the Second

⁵ Cassim 2013 *De Rebus* 29.

⁶ Cassim 2013 *De Rebus* 29.

⁷ *Gihwala v Grancy Property Limited* 2016 ZASCA 35 (*Gihwala*).

⁸ *Grancy Property Limited v Gihwala* 2014 JDR 1292 (WCC) (*Grancy*).

Appellant realised his interests at a profit, the First Appellant and Grancy Property Limited would share in a proportion of the profit. It was agreed that the First Appellant would draft an agreement acknowledging the one-third share of Grancy Property Limited in SMI.

The business relationship between the parties soured for various reasons. The First and Second Appellants failed to register Grancy Property Limited as a shareholder of SMI and resisted its attempts to secure its registration in the share register. Furthermore, information sought by Grancy Property Limited regarding its investment was not forthcoming from the First Appellant, and despite numerous requests, Grancy Property Limited was not given access to the books and records of SMI nor to its annual financial statements. Of great concern to Grancy Property Limited was that the First Appellant had failed to conclude the agreement acknowledging its one-third share in SMI. More worrying was the fact that the First and Second Appellants had made various payments to themselves, and had received dividend payments from the special purpose vehicle in question but had failed to share with Grancy Property Limited any funds received by SMI, even though Grancy Property Limited was a shareholder of SMI. Instead of repaying Grancy Property Limited its loan to SMI, at the instigation of the First Appellant, an investment was made by the First Appellant in a property development company in which the First Appellant's wife and the Dines Gihwala Family Trust had an interest.

In 2011 Grancy Property Limited sought an order *inter alia* declaring the First and Second Appellants delinquent directors in terms of section 162(5)(c) of the Act. The events relied upon to justify the delinquency order had occurred before 1 May 2011, which is the effective date of the Act. The court of first instance granted the delinquency order. The First and Second Appellants contended that section 162(5) of the Act was unconstitutional on the grounds that it was retrospective in its application, and that there was no discretion vested in the court by section 162(5)(c) as read with section 162(6)(b)(ii) of the Act to refuse to make a delinquency order or to moderate the period of such order to less than seven years. The First and Second Appellants contended further that section 162(5)(c) infringed the constitutional right to dignity (section 10 of the Constitution of the Republic of the South Africa, 1996, hereafter the *Constitution*), the right to choose a trade, occupation or profession (section 22 of the *Constitution*) and the right to access to courts (section 34 of the *Constitution*). The SCA was accordingly required to determine if section 162(5)(c) of the Act had retrospective effect and whether it was unconstitutional.

3 The judgment

The SCA ruled that, for the following reasons, the conduct of the First and Second Appellants fell squarely within the scope of section 162(5)(c) of the Act:

- (i) The directors of SMI in the performance of their duties had been under an obligation to ensure that the share register of SMI properly reflected the persons who were entitled to be registered as shareholders. This duty had been violated by the First and Second Appellants for some four years.
- (ii) The First and Second Appellants had failed to ensure that SMI kept proper accounting records.
- (iii) The loans provided to the Second Appellant had contravened section 226 of the Companies Act 61 of 1973 (hereafter the 1973 *Companies Act*), and this had caused loss to SMI because it had not been able to recover the loans from the Second Appellant.⁹ The SCA found that this loss was as a result of gross negligence on the part of both the First and Second Appellants. In the light of the fact that the First Appellant was, at the time, a businessman and attorney, the chairman of one of South Africa's largest law firms, and the chairman of Redefine Income Fund Limited, which was one of the largest property loan stock companies listed on the Johannesburg Stock Exchange, the SCA found that his failure to comply with the requirements of section 226 of the 1973 *Companies Act* was "inexcusable".¹⁰
- (iv) The conduct of the First and Second Appellants in appropriating financial benefits for themselves and in excluding Grancy Property Limited from the benefits of these investments had entailed gross abuses of the position of director. Such conduct, the court held, fell squarely within the scope of section 162(5)(c) of the Act.
- (v) The actions of the First and Second Appellants constituted wilful misconduct because such actions were intentional and done with knowledge of the obligations owed to Grancy Property Limited under the investment agreement. At the very least, the SCA said, it was gross negligence akin to recklessness, and had involved a

⁹ Section 226 of the *Companies Act* 61 of 1973 (1973 *Companies Act*) prohibited a company from making certain loans to a director of the company, subject to certain exceptions.

¹⁰ *Gihwala* para 136.

breach of trust in relation to the performance of the duties of the First and Second Appellants as directors.¹¹

In its finding that section 162(5)(c) of the Act was not retrospective, the SCA drew on the well-established legal principle emanating from *R v St Mary's Whitechapel (Inhabitants)*¹² that a statute is not retrospective merely "because a part of the requisites for its action is drawn from time antecedent to its passing".¹³

In assessing the constitutional challenge to section 162(5)(c) of the Act, the SCA dismissed the contention that the absence of a discretion conferred on a court to decide whether or not a director should be declared delinquent had rendered section 162(5)(c) unconstitutional. The First and Second Appellants had not attacked section 162(5)(c) of the Act on the basis that it was irrational, which was detrimental to their argument regarding the constitutionality of section 162(5)(c) of the Act.¹⁴ The SCA examined the purpose of section 162(5) of the Act and held that, contrary to the submissions on behalf of the First and Second Appellants, it is not a penal provision. Its purpose is to protect the sophisticated and unsophisticated investing public against the type of conduct that leads to a delinquency order, and to protect those who deal with companies against the misconduct of delinquent directors.¹⁵ The SCA proclaimed that section 162(5) of the Act was rational and found that the provision is an appropriate and a proportionate response by the legislature to the problem of delinquent directors and the harm they may cause to the public who place their trust in them.¹⁶ The SCA asserted that even though the legislation in other jurisdictions may give their courts a wider discretion in this regard, this does not render our legislation constitutionally problematic.¹⁷

Regarding the absence of a discretion to decide the period of delinquency when section 162(5)(c) has been infringed, the SCA pointed out that a court has been given the power to relax the minimum period of seven

¹¹ *Gihwala* para 139.

¹² *R v St Mary's Whitechapel (Inhabitants)* 116 ER 811 (1848) 814.

¹³ *Gihwala* para 141.

¹⁴ Legislation must serve a rational purpose and there must be a rational connection between the purpose of the legislation and the provision under consideration. The absence of such a rational connection would result in the provision being unconstitutional (*Gihwala* para 145; *New National Party of South Africa v Government of the Republic of South Africa* 1999 3 SA 191 (CC) paras 19 and 24).

¹⁵ *Gihwala* para 142.

¹⁶ *Gihwala* para 145.

¹⁷ *Gihwala* para 145.

years prescribed by section 162(6)(b) of the Act after a period of three years and to place the delinquent director under probation (in terms of section 162(11) of the Act). There is consequently a power to relax the full effect of a declaration of delinquency once the delinquent director has demonstrated that this is appropriate.¹⁸

The constitutional challenge that section 162(5)(c) of the Act infringed section 22 of the *Constitution* (the right to choose a trade, occupation or profession) also failed because the First and Second Appellants had failed to suggest that section 162(5)(c) was capricious or arbitrary. The SCA also dismissed the constitutional challenge that section 162(5) of the Act had infringed the right of access to courts under section 34 of the *Constitution* on the basis that this argument was misconceived because the court is in fact involved at every stage of an enquiry under section 162(5) of the Act. Consequently before a declaration of delinquency is made, the errant director gets an "entirely fair hearing before a court".¹⁹ Regarding the constitutional challenge that section 162(5) of the Act infringed the right to dignity (section 10 of the *Constitution*), the SCA ruled that this challenge may be pursued only by attacking the rationality of section 162 of the Act. The First and Second Appellants had failed to do this.²⁰

The SCA accordingly found that the court *a quo* in *Grancy* had correctly rejected the attacks on the constitutionality of section 162(5)(c) of the Act, and the appeal against the delinquency orders granted by the court *a quo* failed.²¹

4 Analysis

4.1 Purpose of section 162(5) of the Act

Regarding the purpose of section 162(5) of the Act, the SCA in *Gihwala* stated that this provision has a protective purpose. Its aim is to ensure that those who invest in companies are protected against directors who engage in serious misconduct of the type that violates the bond of trust that shareholders have in the people they appoint to the board of directors.²²

¹⁸ *Gihwala* para 144.

¹⁹ *Gihwala* para 147.

²⁰ *Gihwala* para 150.

²¹ *Gihwala* para 150.

²² *Gihwala* para 144.

In *Re Gold Coast Holdings Pty Ltd (In Liq); Australian Securities & Investments Commission v Papotto*²³ the Australian Securities and Investments Commission (hereafter ASIC) sought an order from the Supreme Court of Western Australia to prohibit the respondent from managing a company for a period to be determined by the court. The respondent had been convicted of repeated acts of dishonesty as a director. In disqualifying the respondent from managing any company for seven years, the court stated that the purpose of the order sought by ASIC was protective and not punitive, and that the interests to be protected by the order included those of the public who may unwittingly deal with companies run by people "who are not suitable to be involved in the management of companies".²⁴ The SCA in *Gihwala* relied on this case in ruling that section 162(5) of the Act is not a penal provision, but its purpose is to protect the investing public.²⁵

It is submitted, however, that while the purpose of section 162(5) of the Act may not be penal, there is undoubtedly a punitive element in the proceedings, and that if the power to declare a director delinquent is exercised by the court, there is inevitably a substantial and significant interference with the freedom of the individual. This is affirmed in *Re Lo-Line Electric Motors Ltd*,²⁶ where Browne-Wilkinson V-C asserted that the power to disqualify a person from acting as a director is not fundamentally penal but if the power to disqualify is exercised it does involve a substantial interference with the freedom of the individual.²⁷ It follows that the rights of the individual must be fully protected.²⁸ In a similar vein, in *Re Crestjoy Products Ltd*²⁹ the court approved of and adopted the above approach of Browne-Wilkinson V-C and commented further that proceedings to disqualify a person from acting as a director are a very serious matter, and that when a court is faced with a mandatory

²³ *Re Gold Coast Holdings Pty Ltd (In Liq); Australian Securities & Investments Commission v Papotto* 2000 WASC 201.

²⁴ *Re Gold Coast Holdings Pty Ltd (In Liq); Australian Securities & Investments Commission v Papotto* 2000 WASC 201 para 22.

²⁵ *Gihwala* para 142.

²⁶ *Re Lo-Line Electric Motors Ltd* 1988 2 All ER 692.

²⁷ *Re Lo-Line Electric Motors Ltd* 1988 2 All ER 692 696. An analysis of whether or not the infringement of the freedom of the individual is justifiable under the limitation clause in the *Constitution* is beyond the scope of this note.

²⁸ *Re Lo-Line Electric Motors Ltd* 1988 2 All ER 692 696. The court commented that ordinary commercial misjudgment is in itself not sufficient to justify disqualification, and that in the normal case the conduct complained of must display a lack of commercial probity (696). The court commented further that in an extreme case of gross negligence or total incompetence, disqualification could be appropriate (697).

²⁹ *Re Crestjoy Products Ltd* 1990 BCC 23.

disqualification period once the facts are proved, the matter becomes more nearly penal.³⁰

A further punitive effect of a declaration of delinquency is that it carries a definite stigma for a person who is disqualified from acting as a director. The reputational damage caused by such an order is extensive and is likely to endure for a long period of time. This was affirmed in *Re Westminster Property Management Ltd Official Receiver v Stern*,³¹ where the court emphasised that while proceedings to disqualify a person from acting as a director are intended primarily for the protection of the public, they do nevertheless involve serious allegations and almost always carry a degree of stigma for anyone who is disqualified from acting as a director. In *Rich v Australian Securities and Investments Commission*³² the High Court of Australia asserted that protective proceedings and punitive proceedings are not mutually exclusive categories, and that proceedings brought to protect the public could also have the effect of penalising the defendant.³³ In the light of the above dicta, it is submitted that while the purpose of section 162(5) of the Act may not be penal, as maintained by the SCA in *Gihwala*, proceedings to declare a director delinquent that disable him from acting as a director do have a punitive effect, even if the making of such a declaration has a protective purpose.

In *Cape Empowerment Trust Ltd v Druker*³⁴ (hereafter *Druker*) the Western Cape High Court declared that in the determination of the question of whether or not a person may be declared a delinquent director, the purpose of the Act as set out in section 7 must always be borne in mind.³⁵ The purposes of section 7 of the Act as emphasised by the court in this context are to promote compliance with the Bill of Rights as provided in the *Constitution* in the application of company law; to encourage the efficient and responsible management of companies, and to provide a predictable and effective environment for the efficient regulation of companies.³⁶ It is submitted that, at the same time, a further purpose ought to be considered, namely to promote the development of the South

³⁰ *Re Crestjoy Products Ltd* 1990 BCC 23 26.

³¹ *Re Westminster Property Management Ltd Official Receiver v Stern* 2001 BCC 121 para 36.

³² *Rich v Australian Securities and Investments Commission* 2004 HCA 42.

³³ *Rich v Australian Securities and Investments Commission* 2004 HCA 42 para 35. See further Austin and Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* 105, 265-266.

³⁴ *Cape Empowerment Trust Ltd v Druker* 2013 JDR 1360 (WCC) (*Druker*).

³⁵ *Druker* para 85.

³⁶ *Druker* para 85.

African economy by encouraging entrepreneurship and enterprise efficiency, as set out in section 7(b)(i) of the Act. Declaring a director delinquent is a severe remedy with harsh consequences for directors. It must not be applied without due and proper consideration by a court. As the Court of Appeal in *Secretary of State for Trade and Industry v Davies*³⁷ emphasised, per Hobhouse LJ, to be a director of a company is a privilege, but it is not one of which a person should be unjustly deprived.

4.2 Retrospectivity

The Act came into operation on 1 May 2011, and the gist of the retrospectivity challenge to section 162(5) of the Act in *Gihwala* was whether or not the provision applied in regard to conduct which occurred prior to this date.

At common law a statute is presumed not to have retrospective effect, save if the presumption is rebutted by provisions or indications in the statute, either expressly or by necessary implication.³⁸ The presumption against retrospectivity does not apply when it must be inferred from the provisions of the statute in question that the legislature intended the statute to be retrospective.³⁹ The presumption against retrospectivity is based on the elementary considerations of fairness that one should know what the law entails in order to adjust one's conduct accordingly, and that the legislature must not be taken to have intended anything unjust.⁴⁰ In *National Iranian Tanker Co v MV Pericles GC*⁴¹ the SCA defined what it means for a statute to be retrospective, as follows:

A statute is retrospective in its effect if it takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already past.⁴²

As stated earlier, Lord Denman in a much quoted dictum in *R v St Mary's Whitechapel (Inhabitants)*⁴³ asserted that a statute is not retrospective merely "because a part of the requisites for its action is drawn from time

³⁷ *Secretary of State for Trade and Industry v Davies* 1996 4 All ER 289 302.

³⁸ *Workmen's Compensation Commissioner v Jooste* 1997 4 SA 418 (SCA) 424.

³⁹ See *Lek v Estate Agents Board* 1978 3 SA 160 (C) 169.

⁴⁰ *National Director of Public Prosecutions v Carolus* 2000 1 SA 1127 (SCA) paras 31, 36.

⁴¹ *National Iranian Tanker Co v MV Pericles GC* 1995 1 SA 475 (A).

⁴² *National Iranian Tanker Co v MV Pericles GC* 1995 1 SA 475 (A) 483.

⁴³ *R v St Mary's Whitechapel (Inhabitants)* 116 ER 811 (1848).

antecedent to its passing".⁴⁴ In finding that section 162(5) of the Act is not retrospective, the SCA in *Gihwala* relied on this dictum of Lord Denman.⁴⁵

It is submitted, however, that in considering the retrospectivity of section 162(5) of the Act, the SCA overlooked the definition of retrospectivity as advocated in *National Iranian Tanker Co v MV Pericles GC*.⁴⁶ If this definition of retrospectivity is applied to section 162(5) of the Act, it is arguable that the provision is in fact retrospective as it creates "a new disability in regard to events already past".⁴⁷ In *Grancy* the court affirmed that section 162(5) of the Act introduces prospective consequences to conduct which was already unlawful,⁴⁸ and that the innovative aspect of section 162(5) of the Act is that it introduces a new civil remedy for those harmed by the conduct of delinquent directors.⁴⁹

Under section 219 of the 1973 *Companies Act* a court was empowered to make an order prohibiting a director from taking part in the management of a company in certain circumstances. In *Grancy* the court stated that all the categories of conduct provided in section 162(5)(c) of the Act were covered by section 219(1)(c)(ii) of the 1973 *Companies Act*.⁵⁰ It is respectfully submitted, however, that the grounds provided in section 219(1)(c)(ii) of the 1973 *Companies Act* were in fact much narrower than those provided in section 162(5)(c) of the Act. Section 219(1)(c)(ii) of the Act disqualified a person from being a director of a company if in the course of the winding-up or judicial management of the company it appeared that such a person had been guilty of fraud in relation to the company or of any breach of his duty to the company. Section 162(5)(c) of the Act, on the other hand, is much wider than section 219(1)(c)(ii) of the 1973 *Companies Act*, since an application to declare a director delinquent and thus to disqualify him from acting as a director would apply if a director breached his duties to the company at any time while a director. It is not required under section 162(5)(c) of the Act that such conduct must appear in the course of the winding-up of the company. It is consequently submitted that, contrary to the observation of the court in *Grancy*, not all

⁴⁴ *R v St Mary's Whitechapel (Inhabitants)* 116 ER 811 (1848) 814. See further *R v Grainger* 1958 2 SA 443 (A) 446; *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 3 SA 800 (A) 812, 817-818; *Swanepoel v Johannesburg City Council; President Insurance Co Ltd v Kruger* 1994 3 SA 789 (A) 793-794; and *Krok v Commissioner, South African Revenue Service* 2015 6 SA 317 (SCA) para 40.

⁴⁵ *Gihwala* para 141.

⁴⁶ *National Iranian Tanker Co v MV Pericles GC* 1995 1 SA 475 (A).

⁴⁷ See *National Iranian Tanker Co v MV Pericles GC* 1995 1 SA 475 (A) 483.

⁴⁸ *Grancy* para 164.

⁴⁹ *Grancy* para 155.

⁵⁰ *Grancy* para 175.

the categories of conduct provided for in section 162(5)(c) of the Act were covered by section 219(1)(c)(ii) of the Act. The remedy of declaring a director delinquent is a new disability which did not exist prior to 1 May 2011. Thus, even though a part of the requisites for the action under section 162(5) of the Act may be drawn prior to 1 May 2011, which, according to the dictum in *R v St Mary's Whitechapel (Inhabitants)*⁵¹ does not make section 162(5) of the Act retrospective, the fact that section 162 of the Act creates a new disability in regard to past events would, it is submitted, make section 162(5) of the Act retrospective.

In making its finding regarding the retrospectivity of section 162(5) of the Act, the SCA in *Gihwala* did not consider the earlier judgment of the North Gauteng High Court, Pretoria in *Pride 73 Properties (Pty) Ltd v Theunis Christoffel Du Toit*⁵² (hereafter *Pride 73 Properties*). In *Pride 73 Properties* the court held that conduct which occurred prior to 1 May 2011 could not be taken into account in any court application in terms of section 162(5) of the Act. The court reasoned that if section 162(5) of the Act had retrospective effect the rights of directors to engage freely in economic activities and to be involved in business ventures at all levels would be infringed.⁵³ In the view of the court, this was not envisaged by Parliament.⁵⁴ The court accordingly held that any retrospective application of section 162(5) of the Act would operate unfairly towards directors. Consequently, in considering the application which had been brought under section 162(5)(c) of the Act, the court declined to take into consideration the conduct of the relevant directors that had occurred prior to 1 May 2011.

However, as pointed out earlier, a statute may be interpreted retrospectively if it must be inferred from the provisions of the statute in question that the legislature intended the statute to be retrospective.⁵⁵ Item 7(7) of Schedule 5 to the Act would be an indication that the legislature intended section 162(5) of the Act to be interpreted retrospectively. Item 7(7) of Schedule 5 to the Act states as follows:

A right of any person to seek a remedy in terms of this Act applies with respect to conduct pertaining to a pre-existing company and occurring before the

⁵¹ *R v St Mary's Whitechapel (Inhabitants)* 116 ER 811 (1848) 814.

⁵² *Pride 73 Properties (Pty) Ltd v Theunis Christoffel Du Toit* 2013 JDR 2001 (GNP) (*Pride 73 Properties*).

⁵³ *Pride 73 Properties* para 43.

⁵⁴ *Pride 73 Properties* para 45.

⁵⁵ See *Workmen's Compensation Commissioner v Jooste* 1997 4 SA 418 (SCA) 424; and *Lek v Estate Agents Board* 1978 3 SA 160 (C) 169.

effective date, unless the person had commenced proceedings in a court in respect of the same conduct before the effective date.

Section 162(5) of the Act provides a remedy in the Act as referred to in item 7(7) of Schedule 5, that is, a remedy to have a director declared delinquent,⁵⁶ and accordingly section 162(5) of the Act would apply with respect to conduct pertaining to a pre-existing company⁵⁷ if such conduct had occurred prior to the effective date of 1 May 2011, provided no legal proceedings in respect of that conduct had been commenced before that date. In *Grancy* the Western Cape High Court found that the wording of item 7(7) of Schedule 5 to the Act is clear that in an application under section 162 of the Act past conduct of the relevant director may be taken into account, unless legal proceedings in respect thereof had already been commenced before 1 May 2011.⁵⁸ It appears that the court in *Pride 73 Properties* had in fact overlooked the provisions of item 7(7) of Schedule 5 to the Act.

It is submitted that even though the SCA in *Gihwala* did not consider and did not apply the definition of retrospectivity laid down in *National Iranian Tanker Co v MV Pericles GC*,⁵⁹ the correct conclusion regarding the retrospectivity of section 162(5) of the Act was nonetheless reached by the SCA because item 7(7) of Schedule 5 to the Act indicates clearly that the legislature intended that conduct prior to 1 May 2011 could validly be considered in proceedings under section 162(5) of the Act.

What is not clear from the Act, though, is how far back item 7(7) of Schedule 5 to the Act extends in the context of section 162(5)(c) of the Act. Item 7(7) of Schedule 5 simply states that the right of a person to seek a remedy in terms of the Act applies with respect to conduct pertaining to a pre-existing company and "occurring before the effective date". In applying the remedy in section 162(5) of the Act in *Gihwala* the SCA considered conduct of the First and Second Appellants which had occurred as far back as 2005. This raises the question whether there is any limit on how many years before the effective date conduct may be taken into account in an application under section 162(5) of the Act. The answer to the converse question is equally unclear, that is, how many

⁵⁶ See *Grancy* para 162. See further Delport *Henochsberg on the Companies Act* 564.

⁵⁷ A pre-existing company is a company registered in terms of the 1973 *Companies Act*; an existing company in terms of the 1973 *Companies Act* (other than an external company); a close corporation which converted to a company under the Act, or a company which was deregistered in terms of the 1973 *Companies Act* and was subsequently registered in terms of the Act (see s 1 of the Act).

⁵⁸ *Grancy* para 163.

⁵⁹ *National Iranian Tanker Co v MV Pericles GC* 1995 1 SA 475 (A).

years after the conduct has occurred may an application under section 162(5) of the Act be instituted.

Under section 162(5)(c) of the Act a court must make an order declaring a person to be a delinquent director if the person "while a director" grossly abused his position, took personal advantage of information or an opportunity contrary to section 76(2)(a) of the Act, intentionally or by gross negligence inflicted harm upon the company or a subsidiary of the company contrary to section 76(2)(a) of the Act, or acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within and duties to the company, or acted in a manner contemplated in section 77(3)(a), (b) or (c) of the Act. It is submitted that the words "while a director" indicate that the application may be brought at any time provided the offence was committed while the person was a director of the company. The only time limitation imposed in section 162 is that, in terms of section 162(2) of the Act, an application to declare a director delinquent may be brought if the person in question was a director of the company within the 24 months immediately preceding the application. Apart from this restriction, a prescription period has not been imposed under section 162 of the Act regarding the time period within which an application must be brought to declare a person a delinquent director. It is arguable that the Prescription Act 68 of 1969 would not apply in this instance because this statute applies primarily in regard to the acquisition of ownership by prescription, the acquisition and extinction of servitudes by prescription, and the prescription of debts, while section 162 of the Act relates to a declaration which affects the status of a person.

In contrast, a prescription period has been imposed under section 77(7) of the Act in terms of which proceedings to recover any loss, damages or costs for which a person is or may be held liable in terms of section 77 of the Act may not be commenced more than three years after the act or omission that gave rise to that liability. It is curious that the legislature did not impose a prescription period in regard to section 162(5)(c) when it imposed a prescription period in regard to the liability of a director under section 77 of the Act, particularly since there is an overlap between some of the grounds of delinquency under section 162(5)(c) of the Act and the grounds of liability under section 77 of the Act. For instance, a breach of section 76(2)(a) and section 77(3)(a), (b) and (c) of the Act are grounds for a declaration of delinquency⁶⁰ and at the same time are also grounds

⁶⁰ See s 162(5)(c) of the Act.

under which a director may be held liable for loss, damages or costs under section 77 of the Act.⁶¹ This means that one must recover loss, damages or costs from a director for a breach of section 77 of the Act within three years after the act or omission that gave rise to that liability, but one is not limited by this three year prescription period in regard to an application to declare a director delinquent for the same action under section 162(5)(c) of the Act. The failure of the legislature to expressly provide for a prescription period in section 162(5)(c) of the Act would suggest that a prescription period will not apply to section 162(5)(c) of the Act, but it remains to be seen how courts will interpret these provisions.

A further curious provision of the Act in this context is section 162(2)(a), under which provision an application to declare a director delinquent may be brought if the person is a director of a company or was a director of that company within the 24 months immediately preceding the application. It is not clear why the legislature imposed a 24-month prescription period in regard to bringing an application of delinquency against a former director who is no longer a director of the company in question, but did not impose any prescription period at all in regard to a person who is currently still a director of the company in question. A person could well commit any of the offences set out in section 162(5)(c) of the Act and then simply resign from the company, or worse, be removed as a director of the company in terms of section 71 of the Act. If an application to declare him delinquent is not instituted within 24 months after his departure from the company, such a person would be immune from such an action. More disconcerting is that it is possible that the misconduct of a director may be discovered only more than 24 months after his resignation from a company, in which case he would at that stage be immune from a declaration of delinquency.

The 24-month limitation in section 162(2)(a) of the Act strangely does not start to run once the applicant becomes aware of the misconduct of the director in question but starts to run as soon as the director in question ceases to be a director of the relevant company. It is not clear whether the 24-month prescription period is merely arbitrary or whether there is a policy underlying it. If so, it is not clear what the policy is and why a three-year prescription period was not adopted, bearing in mind that a declaration of delinquency may be instituted for serious misconduct and not for mere minor offences.

⁶¹ See ss 77(2)(a) and 77(3)(a), (b) and (c) of the Act.

It is submitted that the legislature should consider whether a prescription period should be imposed under section 162(5)(c) of the Act. As the Court of Appeal asserted in *Secretary of State for Trade and Industry v Davies*,⁶² per Hobhouse LJ, to be a director represents, or may represent a person's means of livelihood and his ability to carry on his business activities, and if he has to defend proceedings which may disqualify him from being a director, he should know about this within a reasonable time and not be left in a state of uncertainty.⁶³ It is submitted further that the 24-month prescription period imposed on a director who ceases to be a director of a company should be extended to three years, so as to have some consistency and harmony with the three-year prescription period imposed in regard to section 77 of the Act, particularly since there is some overlap between the offences in section 77 and those set out in section 162(5)(c) of the Act.

To revert to the question posed earlier, how far before the effective date of 1 May 2011 may conduct of a director be considered for purposes of an application under section 162(5) of the Act? In the absence of any clear guidelines from the Act and in the light of the fact that there is no prescription period imposed on instituting an application to declare a director delinquent as long as he is still a director of the company in question, it seems that there is no limit on how many years before the effective date of 1 May 2011 the misconduct of a director must have occurred before it may be taken into account for the purposes of an application under section 162(5) of the Act.

4.3 Discretion of a court under section 162(5) of the Act

4.3.1 No discretion to declare a director delinquent

The word "must" in section 162(5) of the Act makes it clear that a court is obliged to make an order declaring a person to be a delinquent director if any of the grounds set out in that section are satisfied, and that a court does not have any discretion in this regard. The SCA in *Gihwala* dismissed the argument of the First and Second Appellants that the absence of a discretion in section 162(5) of the Act rendered the provision unconstitutional, on the ground that section 162(5) is a rational and proportionate response by the legislature to the problem of delinquent directors.⁶⁴ The SCA held that it is rational to remove a person from

⁶² *Secretary of State for Trade and Industry v Davies* 1996 4 All ER 289.

⁶³ *Secretary of State for Trade and Industry v Davies* 1996 4 All ER 289 302.

⁶⁴ *Gihwala* para 145.

serving as a director on the basis that he was guilty of conduct falling within the categories specified in section 162(5)(c) of the Act.⁶⁵

In contrast, a court is given a discretion in deciding whether or not to remove a director from office in terms of section 71(6) of the Act.⁶⁶ In terms of section 162(7) of the Act a court has also been given a discretion to decide whether or not to place a director under probation. The effect of an order of probation is that the person may not serve as a director, except to the extent permitted by the order of probation.⁶⁷ Regarding the disqualification of a director, a court has again been given a discretion, under section 69(11) of the Act, to exempt a person from the application of any provision of section 69(8)(b) of the Act which sets out the instances when a person would be disqualified from being a director. It is questionable why a court has been given a discretion whether to remove a director from office, whether to place a director under probation, and whether to disqualify a person from being a director, but has not been given such a discretion under section 162(5) of the Act, when the effect of all of these provisions is that the director in question will not be permitted to serve as a director. The SCA in *Gihwala* did not address this issue.

It may be that a court was denied a discretion under section 162(5) of the Act in the light of the seriousness of the offences listed in that section. Fault in the form of intent or gross negligence is required for an order in terms of section 162(5)(c) of the Act.⁶⁸ As the SCA in *Gihwala* commented, the categories of conduct listed in section 162(5)(c) of the Act deal with instances of serious misconduct constituting gross abuses of the position of a director of a company.⁶⁹ Although it is not clear, it may be that this is the reason why the legislature decided not to give a court a discretion whether or not to declare a director delinquent under section 162(5) of the Act.

⁶⁵ *Gihwala* para 145.

⁶⁶ In terms of s 71(6)(a) of the Act, in the context of the removal of a director by the board of directors, if the board has determined that a director is not ineligible, disqualified or incapacitated, or has not been negligent or derelict in the performance of his functions as a director, any director who voted otherwise on the resolution or any shareholder who is entitled to vote in the election of that director, may apply to court to review the determination of the board of directors. Under s 71(6)(b) of the Act the court "may" on such an application confirm the determination of the board or remove the director from office if the court is satisfied that the director is ineligible or disqualified, incapacitated or has been negligent or derelict.

⁶⁷ See s 69(5) of the Act.

⁶⁸ Delport Henochsberg *on the Companies Act* 563.

⁶⁹ *Gihwala* paras 143-144.

It is notable that section 162(5)(c) of the Act is much stricter than the equivalent provisions in leading foreign jurisdictions that have influenced our Act. For instance section 8.09(a) of the United States of America Revised Model Business Corporation Act, 1984 (hereafter the MBCA) empowers a court to remove a director of a company if the court finds that "the director engaged in fraudulent conduct with respect to the corporation or its shareholders, grossly abused the position of director, or intentionally inflicted harm on the corporation" and, considering the director's course of conduct and the inadequacy of other available remedies, removal would be in the best interest of the corporation. The grounds set out in section 8.09 of the MBCA under which a court may remove a director from office are akin to those grounds set out in section 162(5)(c) of the Act, but the difference between section 162(5)(c) of the Act and section 8.09(a) of the MBCA is that before a court may remove a director from office under section 8.09(a) of the MBCA it must consider whether or not removal would be in the best interest of the corporation in the light of the director's course of conduct, and the inadequacy of other available remedies.

Similarly, under the Australian Corporations Act, 2001 (hereafter the *Australian Corporations Act*), a court is given a discretion, under grounds which are akin to those provided under section 162(5)(c) of the Act, whether or not to disqualify a person from managing a company. In terms of section 206C of the *Australian Corporations Act*, on application by ASIC a court may disqualify a person from managing corporations for a period that the court considers appropriate if a declaration is made under section 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision, and if a court is satisfied that the disqualification is justified. Civil penalty provisions include the fiduciary duties of company directors, such as the duty to exercise powers and discharge duties in good faith, the duty not to improperly use one's position as a director or information obtained in the capacity as a director to gain an advantage for oneself or someone else or to cause detriment to the corporation.⁷⁰ These grounds are very similar to the grounds provided for in section 162(5)(c) of the Act. However, unlike the position under the Act, in exercising its discretion under section 206C of the *Australian Corporations Act* whether or not to disqualify a director from managing corporations, the court may grant the disqualification if it is satisfied that the disqualification is justified. In determining if the disqualification is justified a court may have regard to the person's conduct in relation to the

⁷⁰ See ss 1317E, 180(1), 181(1), 182(1) and 183(1) of the *Australian Corporations Act*.

management, business or property of any corporation and to any other matters the court considers appropriate.

Not only does section 162(5)(c) of the Act not give a court a discretion whether or not to disqualify a person from acting as a director, as is the case under the MBCA and the *Australian Corporations Act*, but it does not require a court to consider whether any other available remedies are adequate or whether the removal of the director from office would be in the best interest of the corporation (as required by section 8.09(a) of the MBCA), or to have regard to any matters the court considers appropriate (as required by section 206C of the *Australian Corporations Act*). In *Gihwala* the SCA stated that the fact that the foreign legislation gives courts a wider discretion in this context does not render section 162(5)(c) of the Act constitutionally problematic and that the provision remains a rational one.⁷¹ It is imperative to note, however, that section 5(2) of the Act states that a court interpreting or applying the Act may consider foreign company law to the extent appropriate. It would have been useful and instructive if the SCA had considered the equivalent provisions of leading foreign jurisdictions, as discussed above, in ascertaining the rationality of section 162(5)(c) of the Act.

4.3.2 Discretion to determine whether the section 162(5)(c) grounds have been satisfied

It would be misleading to hold that a court does not have any discretion at all under section 162(5)(c) of the Act. While a court may not have a discretion whether or not to declare a director delinquent if any of the grounds set out in section 162(5)(c) of the Act are satisfied, a court does have a discretion to determine whether the director's conduct amounts to "gross abuse", "gross negligence" or "wilful misconduct", as referred to in section 162(5)(c) of the Act. These terms have not been defined in the Act. A court would have to interpret them in the context of section 162(5)(c) of the Act, although they are not new terms in our law.

Regarding the meaning of "gross negligence", in *Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas*⁷² the SCA stated that while gross negligence is not an exact concept capable of precise definition, it differs from ordinary negligence in that it involves a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme. In *Gihwala* the SCA found that there was a long

⁷¹ *Gihwala* para 145.

⁷² *Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas* 1996 4 All ER 289 para 7.

history of courts treating gross negligence as the equivalent of recklessness when dealing with the conduct of those responsible for the administration of companies,⁷³ and that recklessness is plainly serious misconduct.⁷⁴ In *KLM Royal Dutch Airlines v Hamman*⁷⁵ the court approved of and adopted into South African law the dictum regarding the meaning of the concept of "wilful misconduct" as advocated in *Rustenburg Platinum Mines Ltd v South African Airways*,⁷⁶ where the concept of "wilful misconduct" was described as meaning conduct which goes far beyond negligence and involves a person doing or omitting to do that which is not only negligent but which he knows and appreciates is wrong, and is done or omitted regardless of the consequences.⁷⁷ In *Msimang v Katuliiba*⁷⁸ the court commented that in the determination of the terms "gross negligence" and "wilful misconduct" in the context of section 162(5)(c) of the Act, a court must have regard to the conduct of the directors in the performance of their duties as directors of the company in terms of the company's memorandum of incorporation and the statutory framework. In *Druker* the court approved of this approach.⁷⁹

In finding that the First Appellant had been grossly negligent in regard to the loans which had been provided to the Second Appellant, which had contravened section 226 of the 1973 *Companies Act*, the SCA placed emphasis on the fact that the First Appellant was at the time both a businessman and attorney, and also the chairman of one of South Africa's largest law firms and the chairman of Redefine Income Fund Limited, which was one of the largest property loan stock companies listed on the Johannesburg Stock Exchange. These personal qualifications influenced the SCA in its finding that the failure of the First Appellant to observe the requirements of section 226 of the 1973 *Companies Act* was "inexcusable".⁸⁰

⁷³ *Gihwala* para 144. See *Philotex (Pty) Ltd v Snyman; Braitex (Pty) Ltd v Snyman* 1998 2 SA 138 (SCA) 143-44; *Ebrahim v Airport Cold Storage (Pty) Ltd* 2008 6 SA 585 (SCA) para 13; and *Tsung v Industrial Development Corporation of South Africa* 2013 3 SA 468 (SCA) paras 29-31.

⁷⁴ *Gihwala* para 144.

⁷⁵ *KLM Royal Dutch Airlines v Hamman* 2002 3 SA 818 (W) para 17.

⁷⁶ *Rustenburg Platinum Mines Ltd v South African Airways* 1977 1 Lloyd's Rep 564.

⁷⁷ *Rustenburg Platinum Mines Ltd v South African Airways* 1977 1 Lloyd's Rep 564 569.

⁷⁸ *Msimang v Katuliiba* 2012 JDR 2391 (GSJ) para 39.

⁷⁹ *Druker* para 84.

⁸⁰ *Gihwala* para 136.

In a similar vein, in *Lobelo v Kukama*⁸¹ the court found that the conduct of the first appellant, who was declared a delinquent director by the court, was "particularly inexplicable"⁸² considering the facts that he was a well-qualified and experienced director who held more than one tertiary degree, owned significant business interests, held directorships in various companies and had been active in the corporate world for more than a decade.⁸³ Based on these personal facts the court reasoned that the first appellant was quite able to familiarise himself with the obligations of a director of a company insofar as they related to the conduct of the business of the companies in question and that he was obliged to do so.⁸⁴ In *Druker*, too, the court drew attention to the fact that all the members of the board of directors, who were the respondents in the proceedings in terms of section 162(5)(c) of the Act, were persons with substantial tertiary qualifications, there being a medical practitioner, a legal practitioner, an accounting practitioner and other directors who held doctoral qualifications in their respective areas of knowledge.⁸⁵ For this reason the court asserted that each one of the members of the board of directors ought to and should apply such skill as each of them possessed for the benefit of the company.⁸⁶

It is evident from a review of the case law that, in ascertaining whether a director has grossly abused his position as a director or has acted in a manner that amounted to gross negligence or wilful misconduct, in the context of section 162(5)(c) of the Act, a court will take into account the personal background and qualifications of the director in question. To this extent the test is subjective. The expectations of a director will vary according to his knowledge and experience, and a higher standard will be expected of educated and experienced persons. Thus, if a director has tertiary degrees and extensive experience his conduct will be measured against this higher subjective standard. In ascertaining whether the grounds in section 162(5)(c) of the Act have been breached, it thus seems that courts, in their discretion, apply both an objective and a subjective assessment. The objective element lies in ascertaining whether the conduct in question amounts to "gross abuse", "gross negligence" or "wilful misconduct", as referred to section 162(5)(c) of the Act and as defined in our law, while the subjective element lies in considering and

⁸¹ *Lobelo v Kukama* 2013 JDR 1434 (GSJ).

⁸² *Lobelo v Kukama* 2013 JDR 1434 (GSJ) para 25.

⁸³ *Lobelo v Kukama* 2013 JDR 1434 (GSJ) para 25.

⁸⁴ *Lobelo v Kukama* 2013 JDR 1434 (GSJ) para 25.

⁸⁵ *Druker* para 9.

⁸⁶ *Druker* para 9.

weighing the personal qualifications and experience of the director in question in determining whether the offences in question have been committed by such a director.

4.3.3 No discretion to determine the minimum period of delinquency

In terms of section 162(6)(b)(ii) of the Act, a declaration of delinquency under section 162(5)(c) of the Act subsists for seven years from the date of the order or such longer period as determined by the court at the time of making the declaration. A court has a discretion to extend the duration of the declaration of delinquency but it has no discretion to reduce it. In contrast, under section 206C of the *Australian Corporations Act*, under circumstances akin to those set out in section 162(5)(c) of the Act, a court may disqualify a person from managing corporations for a period that it considers appropriate.

4.3.4 Discretion to convert the delinquency order into a probation order

While a court may not have a discretion to determine the minimum period of the declaration of delinquency, it does have a discretion to determine whether to relax the declaration of delinquency after a period of three years and to place the person under probation instead. In terms of section 162(11)(a) of the Act, save in certain instances⁸⁷ a person who has been declared delinquent may apply to a court to suspend the order of delinquency and replace it with an order of probation, with or without conditions, at any time more than three years after the order of delinquency was made. If the delinquency order is so suspended it may be set aside by a court at any time more than two years after it was suspended.⁸⁸

In considering these applications, a court may not grant the order applied for unless the applicant has satisfied any conditions that were attached to the order.⁸⁹ A court may in its discretion grant the 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 the applicant has demonstrated satisfactory progress towards rehabilitation and there is a

⁸⁷ In terms of s 162(11) of the Act, an application to court to suspend an order of delinquency or to set it aside may not be brought if a director consented to serve as a director or acted in the capacity of a director while ineligible or disqualified or while under a probation order acted as a director in a manner that contravened that order. In such instances the declaration of delinquency is unconditional and subsists for the lifetime of the person declared delinquent.

⁸⁸ Section 162(11)(b) of the Act.

⁸⁹ Section 162(12)(a) of the Act.

reasonable prospect that the applicant would be able to serve successfully as a director of a company in the future.⁹⁰

4.3.5 *Discretion to impose conditions to a declaration of delinquency*

A court is empowered to make a declaration of delinquency subject to any conditions it considers appropriate, including conditions limiting the application of the declaration to one or more particular categories of companies.⁹¹ An example of such a limitation, as provided by the SCA in *Gihwala*, is that a director may be declared delinquent in relation to a financial services company but may be permitted to be a director of an engineering firm.⁹² Another example emanates from *Druker*, where the court limited the declaration of delinquency to the directorship which the directors in question held in one particular company and did not extend it to any other corporate entities which the directors used in the conduct of practice of their profession.⁹³ In *Demetriades v Tollie*⁹⁴ the court also limited the declaration of delinquency to one particular company only.

Some of the conditions a court may determine in relation to a declaration of delinquency, in its discretion, are that the person concerned must undertake a designated programme of remedial education relevant to the nature of the person's conduct as a director, carry out a designated programme of community service, or pay compensation to any person adversely affected by the person's conduct as a director to the extent that such a victim does not otherwise have a legal basis to claim compensation.⁹⁵ This is not a closed list and a court's power to make conditions ancillary to the declaration of delinquency is not limited.⁹⁶

⁹⁰ Section 162(12)(b) of the Act.

⁹¹ Section 162(6)(b)(i) of the Act.

⁹² *Gihwala* para 144.

⁹³ *Druker* para 91.

⁹⁴ *Demetriades v Tollie* 2015 ZANCHC 17 (18 September 2015) para 61.

⁹⁵ Section 162(10) of the Act. The validity of this provision is questionable because it may be interpreted to mean that if one of the elements which ought to be present for contractual or delictual liability is not established a court may nevertheless order a director to pay compensation to a victim in circumstances when such an order would not ordinarily have been made under the principles of contract or delict law (Cassim "Governance and the Board of Directors" 438).

⁹⁶ See s 162(10) of the Act. In terms of s 69(13) of the Act the Companies and Intellectual Property Commission must establish and maintain a public register of persons who are disqualified from serving as a director. Under s 69(8)(a) of the Act a person would be disqualified to be a director if a court has declared the person to be delinquent in terms of s 162 of the Act. Accordingly the public register would arguably include persons who have been declared delinquent by a court in terms of s 162 of the Act.

In *Grancy* the Western Cape High Court asserted that, in view of the persistent serious misconduct of the First and Second Appellants, this was not a case where the court should consider imposing conditions limiting the application of the declarations of delinquency. The court accordingly issued unqualified declarations of delinquency against the First and Second Appellants.⁹⁷ Likewise, the SCA in *Gihwala* did not impose any conditions on the declaration of delinquency against the First and Second Appellants.

Once the delinquency order expires, the director in question would be free to act as a director of a company again. It is accordingly submitted that, particularly in the light of the purpose of section 162 of the Act being protective of the public rather than penal, as maintained in *Gihwala*,⁹⁸ courts ought to make better use of conditions and they ought to impose suitable ancillary conditions to declarations of delinquency in an effort to effectively protect the public from any repeat of the conduct by the directors in question and to facilitate the rehabilitation of delinquent directors.

5 Conclusion

In *Gihwala* the SCA undoubtedly clarified some important matters surrounding the declaration of delinquency of a director under section 162(5) of the Act. It is clear that, on account of item 7(7) of Schedule 5 to the Act, conduct which had occurred prior to the effective date of the Act, being 1 May 2011, may be considered in an application to declare a director delinquent. What is not clear from the Act, though, is how far back item 7(7) of Schedule 5 to the Act extends in the context of section 162(5)(c) of the Act. This note has argued that there does not appear to be any time limit on how many years prior to the effective date of 1 May 2011 the conduct of a director may be taken into account for the purposes of an application under section 162(5) of the Act. This note has discussed some anomalies in regard to the two-year prescription which has been imposed by section 162(2) of the Act in regard to a person who was a director of a company and who has since ceased to be a director of that company. It has suggested that the legislature should consider extending the two-year prescription period to a three-year prescription period. It was further suggested that a prescription period ought to be imposed in regard to

⁹⁷ See *Grancy* paras 207-208.

⁹⁸ See *Gihwala* para 142.

instituting an application to declare a director delinquent under section 162(5)(c) of the Act.

The SCA in *Gihwala* dismissed the argument that the absence of a discretion given to a court whether to make a declaration of delinquency under section 162(5) of the Act rendered the provision unconstitutional. As pointed out in this note, section 162(5)(c) of the Act is much stricter than the equivalent provisions under comparable leading foreign jurisdictions. It is regrettable that the SCA did not examine and consider the law of leading foreign jurisdictions that have influenced our Act in ascertaining the rationality of section 162(5)(c) of the Act, particularly in the light of the fact that section 5(2) of the Act states that a court interpreting or applying the Act may consider foreign company law to the extent appropriate.

In finding that the conduct of the First Appellant had constituted gross negligence, the SCA in *Gihwala* was influenced by the personal qualifications and experience of the First Appellant. This note has argued that in ascertaining whether the grounds specified in section 162(5)(c) of the Act have been breached, the courts apply both an objective and a subjective assessment. The objective element lies in ascertaining whether the conduct in question amounts to "gross abuse", "gross negligence" or "wilful misconduct", as referred to in section 162(5)(c) of the Act and as defined in our law, while the subjective element lies in considering and weighing the personal qualifications and experience of the director in question.

In *Gihwala* the SCA did not impose any conditions on the declaration of delinquency against the First and Second Appellants. A declaration of delinquency is a harsh and serious order, particularly so under section 162(5) of the Act, which is much stricter than the equivalent provisions in leading foreign jurisdictions. In the light of the fact that section 162(5) of the Act is said by the SCA in *Gihwala* to be protective of the public rather than penal, this note has argued that courts ought to make more effective use of their power to impose appropriate ancillary conditions to declarations of delinquency in an effort to protect the public from any repeat of the conduct by the directors in question and to facilitate the rehabilitation of delinquent directors.

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Re Crestjoy Products Ltd 1990 BCC 23

Re Gold Coast Holdings Pty Ltd (In Liq); Australian Securities & Investments Commission v Papotto 2000 WASC 201

Re Lo-Line Electric Motors Ltd 1988 2 All ER 692

Re Westminister Property Management Ltd Official Receiver v Stern 2001 BCC 121

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Workmen's Compensation Commissioner v Jooste 1997 4 SA 418 (SCA)

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Australian Corporations Act, 2001

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Companies Act 71 of 2008

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Revised Model Business Corporation Act, 1984

List of Abbreviations

ASIC	Australian Securities and Investments Commission
MBCA	Revised Model Business Corporation Act 1984
SCA	Supreme Court of Appeal
SMI	Seena Marena Investments (Pty) Ltd