

WHO MAY BE APPOINTED AS A DIRECTOR

Certain people are not eligible to be appointed as directors of a company. In this article we look at who is disqualified from being a director as well as the effects of the actions of such persons while still acting as director.

A company must not knowingly permit an ineligible or disqualified person to serve or act as a director, according to section 69(3) of the Companies Act 71 of 2008. "Knowingly" includes the situation where the company should reasonably have known that the person is ineligible or disqualified.

Section 69(7) lists the persons on which there are an absolute prohibition, being juristic persons, minors or any persons disqualified in terms of the Memorandum of Incorporation. Section 69(8) lists the persons that are disqualified on a temporary basis, being someone who has been prohibited by the court or whom the court has declared a delinquent, unrehabilitated insolvents, persons who were removed from an office of trust on the grounds of misconduct involving dishonesty, and persons who were found guilty of a criminal offence and imprisoned without the option of a fine, or were ordered to pay a higher fine for being found guilty of any dishonesty crimes.^[1]

A question that arises here is what the effect would be of appointing a prohibited director. Section 69(4) says that a person immediately ceases to be a director if they are prohibited from being a director, but section 71(3) states that if a shareholder alleges that a person is disqualified then the person must be removed by a board resolution before they cease to be a director. This means that any act done by such a person, despite his disqualification, will be valid and binding on the company unless the third party who was involved in the act was aware that the person they were dealing with was disqualified.^[2]

Section 162(5) (a)-(f) sets out the grounds for an order of delinquency. A court *must* make an order declaring a person to be a delinquent director if the person:

1. consented to serve as a director, or acted in the capacity of a director or prescribed officer, while ineligible or disqualified to be a director;
2. acted as a director in a manner that contravened an order of probation;
3. grossly abused the position of director while being a director;
4. took personal advantage of information or an opportunity, or intentionally or by gross negligence inflicted harm upon the company or a subsidiary while being a director;
5. acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust while being a director; or as contemplated in section 77(3) (a), (b) or (c);
6. has repeatedly been personally subject to a compliance notice or similar enforcement mechanism;
7. has been convicted of an offence at least twice, or subjected to an administrative fine or similar penalty; or

8. was a director of a company or a managing member of a close corporation, or controlled or participated in the control of a juristic person that was convicted of an offence, or subjected to a fine or similar penalty, within a period of five years. [3] & [4]

If a person is declared a delinquent in terms of section 162(5) (a) or (b) it is unconditional and for the lifetime of the person. If a person is declared a delinquent in terms of section 162(5) (c)-(f) this is temporary for a minimum of 7 years.[5]

It is therefore very important, when appointing a director, to make sure that he is qualified in terms of the new Companies Act. One must do proper research about a person accordingly before appointing him as a director of a company because it is possible that if you do not do so, the company in which you are a shareholder may have to bear the consequences of the actions of this disqualified person.

Reference list:

- Companies Act 71 of 2008
- FHI Cassim et al *Contemporary Company Law* (2012)
- [1] Section 69(7) – (8) of the Companies Act 71 of 2008.
- [2] Section 69(4) and 71(3) of the Companies Act 71 of 2008.
- [3] Section 162(5) (a)-(f) of the Companies Act.
- [4] FHI Cassim et al *Contemporary Company Law* (2012) 435 – 437.
- [5] FHI Cassim et al *Contemporary Company Law* (2012) 438.

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