

COMPLIANCE FOCUS 1 OF 2017 : THE CONSEQUENCES OF FAILING TO SUBMIT YOUR ANNUAL RETURNS IN TERMS OF THE COMPANIES ACT 71 OF 2008

Introduction

A company is a juristic person from the date its incorporation is registered, and exists until the date upon which its name is removed from the companies register. When a company is removed from the register of companies it ceases to exist as a juristic person and is dissolved from that date.¹

A distinction must be made between an annual return and a tax return. An annual return is a “renewal of company information” and has the purpose to confirm whether CIPC is in possession of the most up to date information of a company or close corporation and that the company or close corporation is still conducting business. A tax return focuses on taxable income of a company or close corporation in order to determine the tax liability of the company or close corporation to the State and is filed with SARS.

Compliance with the one does not mean that there is automatic compliance with the other. It is two different processes administered in terms of different legislation by two different government departments.

The requirement

All companies which includes external companies, close corporations and non-profit companies are required to file their respective CIPC annual returns on an annual basis, and within a prescribed time period together with the prescribed fee. Filing requirements for annual returns arise from section 33 of the Companies Act and regulation 33 of the Companies Regulations.

What are the consequences of non-compliance?

If annual returns are not filed within the prescribed time period together with the required documents and fees, the assumption is that the company is inactive, and as such the CIPC will start the de-registration process to remove the company from its active records.

The deregistration consequence

In terms of the Companies Act a company can be deregistered as a consequence of failing to submit its annual returns for a period of two or more years by the CIPC this deregistration is done without application to court and in many cases without the knowledge of creditors. In terms of section 82(3)(a)(i) of the Act, the

¹ Section 83(1) of Act 71 of 2008

Commission may remove a company from the companies register if it has failed to file an annual return for two or more years. The commission can demand reasons from the company for why it failed to file its returns as it is required to do in terms of section 33 of the Act, or otherwise show satisfactory cause for the company to remain registered. ²

The effects of deregistration of a company

The legal effect of the de-registration process, is that the juristic personality is withdrawn and the company ceases to exist. This effectively means that:

- any assets (including immovable property) of the de-registered company are forfeited to the state as *bona vacantia* assets at the time of deregistration;
- the removal of the company's name from the Companies Register does not affect the liability of any former director or shareholder of the de-registered company in respect of any act or omission that took place before deregistration. These liabilities continue and may be enforced as if the company had not been deregistered;
- possible action could be instituted against the directors of the company for failing to fulfill their fiduciary duties. Such an action would be brought against the directors jointly and severally, and
- possible reputational damage to the shareholders, directors and the company itself

Relief

Fortunately the Act makes provision for "any interested person" to apply in the prescribed manner and form to the CIPC, to re-instate the registration of the company or corporation. Such a re-reinstatement can revive the company or closed corporation to such an extent, that all of its rights and obligations are as enforceable as before its deregistration. There are two potential methods of reviving a deregistered company, namely section 82(4) and section 83(4) of the Act. Section 82(4) of the Act gives a

² Section 82(3)(a)(ii) of the Act

mechanism whereby the commission reinstates the company to the companies register. Section 83(4) of the Act gives an interested party an opportunity to approach the court to void the dissolution.

Section 82(4) of the Act reads as follows:

If the Commission deregisters a company as contemplated in subsection (3), any interested person may apply in the prescribed manner and form to the Commission to reinstate the registration of the company.

In terms of this section, an interested person may apply to the commission to reinstate the company to the register. This section depicts an administrative reinstatement of a company without any intervention of the court. This section also deals specifically with a situation where a company is deregistered due to its failure to submit its annual returns for two years.

Section 83(4) of the Act reads as follows:

At any time after a company has been dissolved (a) the liquidator of the company, or other person with an interest in the company, may apply to a court for an order declaring the dissolution to have been void, or any other order that is just and equitable in the circumstances; and (b) if the court declares the dissolution to have been void, any proceedings may be taken against the company as might have been taken if the company had not been dissolved.

This section allows the court to intervene if a company has been dissolved. The section specifically deals with dissolution and declaring the dissolution void.

Conclusion

To keep your company in good standing with the CIPC and to avoid any penalties, possible deregistration, or the aggravation of trying to re-instate the company, every company is advised to lodge their annual returns timeously within the stipulated time frame.

This CIPC Compliance Focus is issued to create awareness and education amongst industry and concerned parties.

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