



Companies and Intellectual
Property Commission

a member of **the dtic** group

WELCOME TO TODAY'S WEBINAR



WEBINAR INTRODUCTION

ESTABLISHMENT OF CIPC

- Today's webinar will be recorded and will be made available on the CIPC website.
- We will have a Question & Answer session after the Presentation. You are welcome to post questions on the Chat function of MS Teams during the Presentations.
- We posted a link on the Chat function for a short Survey for feedback regarding this webinar. After the webinar, it will also be emailed to you. Please complete the survey.

VERY IMPORTANT

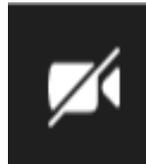
- **Microphones will be switched off during the webinar**, to prevent background noises during the webinar.
- Should you ask a question **during the Question & Answer session, raise your hand and you will be allowed to unmute** your microphone to ask your question. Please mute it again after asking your question.
- **Video Cameras will be switched off.** It draws attention to you instead of focusing on the presenter. It also uses more data during the webinar and influences the quality of the broadcast.



Chat



Muted



Camera Off



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INTRODUCTION TO CIPC



WEBINAR INTRODUCTION

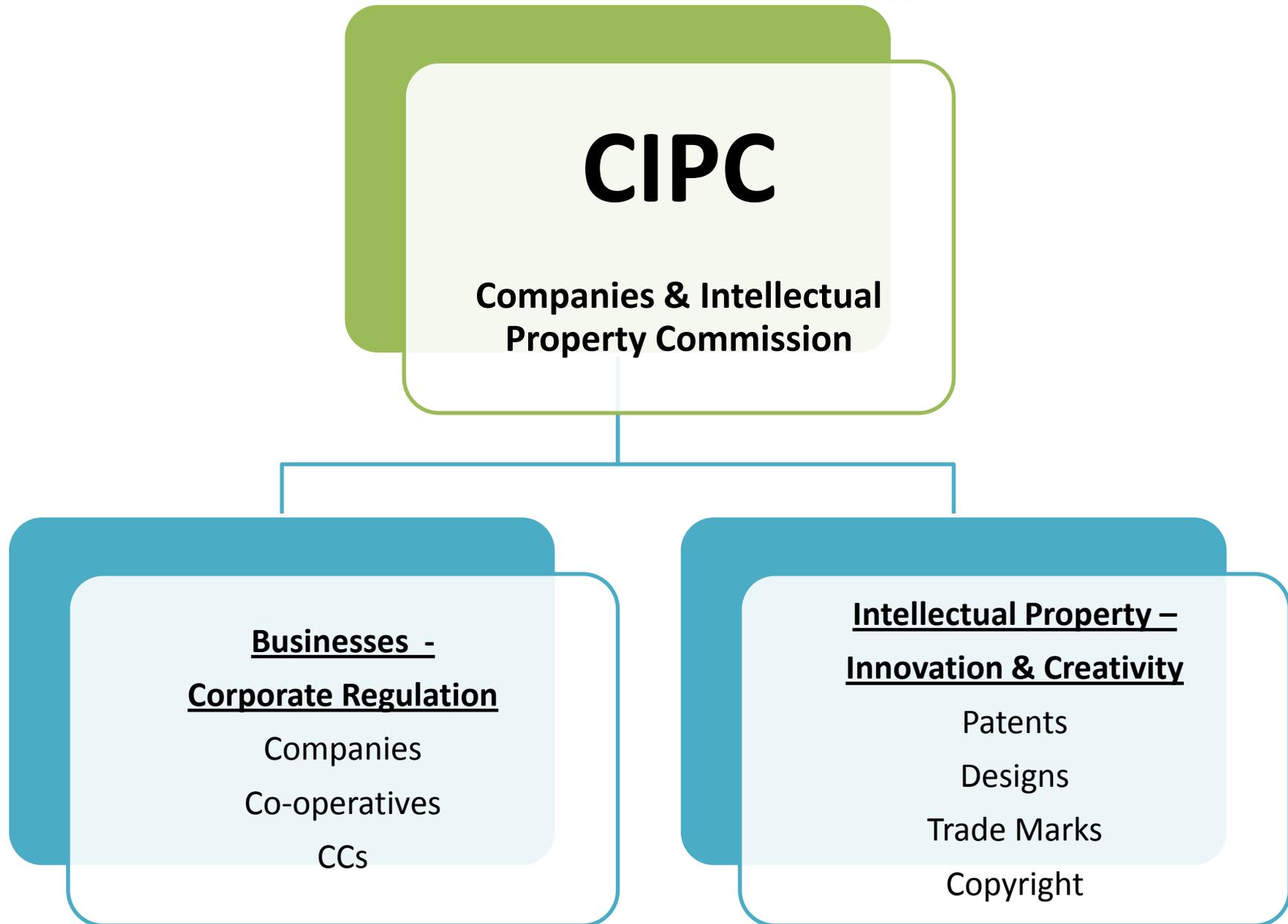
ESTABLISHMENT OF CIPC

CIPC was brought into existence By the Companies Act, 2008

In terms of Section 185(1) of the Companies Act, the Commission is established as a juristic person to function as an organ of state within the public administration, but as an institution outside the public service.

WEBINAR INTRODUCTION

CIPC OFFERINGS TO ENABLE SUSTAINABLE BUSINESSES



CIPC OBJECTIVES

- Registration of Companies, Co-operatives and Intellectual Property rights and the maintenance thereof
- Disclosure of information on its registers
- Enforcement of the relevant legislation
- Promotion of education & awareness of Company and Intellectual Property Law
- Licensing of business rescue practitioners
- Monitoring compliance with and contravention of financial reporting standards, and making recommendations thereto
- Report, research and advise the Minister on matters of national policy relating to company and intellectual property law

PROGRAMME



PROGRAMME

Welcome & Introduction To CIPC
(Elma Pinkham, Corporate Education)

Delinquent Directors
(Lucinda Steenkamp, *Senior Legal Advisor,
Corporate Legal*)

Questions & Answers

Closure





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PRESENTATION





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DELINQUENT DIRECTORS

Not a title any director should strive for



INTRODUCTION

One of the key objectives of the Companies and Intellectual Property Commission (CIPC) is to promote compliance with the Companies Act, 2008 and any other applicable legislation (Schedule 4 of the Companies Act, 2008) and to see to the efficient, effective and widest possible enforcement of the Act and any other applicable legislation.

In order to achieve its objectives, the Commission may consult with any person, organization or institution with regard to any matter (Section 186 of the Companies Act, 71 of 2008).

The CIPC forms part of the Inter Agency Work Group in an attempt to assist other organs of state in enforcing their respective legislation and to consult with such organizations regarding the best way to enforce the Companies Act (and other legislation) and to create a basis for inter-agency legislation alignment.

DISTINCTION BETWEEN DISQUALIFIED & DELINQUENT

It is very important to distinguish between being disqualified from being a director and being declared a delinquent director.

A director declared delinquent is automatically disqualified from acting as a director of a company or a member of a CC (see schedule 3 of the Act – Transparency and accountability of close corporations).

However, a person that is disqualified from acting as a director is not automatically a delinquent director, and may in some instances still act as the member of a close corporation.

It is clear from the recent SCA Judgment regarding director delinquency, that directors are starting to be held much more accountable for their actions and can even be held personally liable. The duty of acting as a director for a company **MUST** be taken seriously and only accepted if a person knows exactly what the duty of a director entails and what is required from that person in terms of code of conduct.

Sections 76 and 77 of the Companies Act provides clear guidance to directors with regards to their duties.

DIRECTORS / MEMBERS

Section 69(1) indicates clearly that the definition of a director includes: -

- An alternate director; and
- A prescribed officer; or
- Any person who is the member of a committee of a board of a company; or
- Any person who is a member of the audit committee of a company.

There is no distinction between executive and non-executive directors in the Act.

“It is unhelpful and even misleading to classify company directors as “executive” and “non-executive” for purposes of ascertaining their duties to the company or when any or specific affirmation is required of them. No such distinction is to be found in any statute. At common law, once a person accepts appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf.”

Howard v Herrigel 1991 (2) SA 660 (A)

DIRECTORS / MEMBERS

Section 1 of the Close Corporations Act, 69 of 1984 describes a member of a CC as -

“member means a person qualified for membership of a corporation in terms of section 29 and designated as a member in a founding statement of the corporation, including, subject to the provisions of this Act, a trustee, administrator, executor or curator, or other legal representative”

Section 29 of CC Act – qualification for membership:-

- Any natural person;
- Any natural / juristic person who is a trustee of a testamentary trust;
- Any natural / juristic person who is a trustee of an insolvent or deceased estate;
- Any natural person who is duly appointed as the legal representative of a member – in the event of mental disorder or incapability to manage his / her affairs.

INELIGIBILITY AND DISQUALIFICATION OF DIRECTORS

Ineligibility to be a director (section 69(7) of the Act):

- Juristic person;
- Unemancipated minor or similar legal disability; or
- Company specific qualification as set out in the MOI is not satisfied.

A company **MUST** not knowingly permit an ineligible person to serve or act as director.

Disqualified from being a director of a company (section 69(8):

- A court has prohibited that person from being a director **or** declared that person to be delinquent (section 162 of Companies Act / section 47 of Close Corporations Act);
- Unrehabilitated insolvent;
- Prohibited i.t.o any public regulation;
- Has been removed from an office of trust – misconduct involving dishonesty;

DISQUALIFIED FROM BEING A DIRECTOR

- Has been convicted, in SA or elsewhere, for theft, fraud, forgery, perjury or an offence-
 - ❑ Involving fraud, misrepresentation or dishonesty;
 - ❑ In connection with the promotion, formation or management of a company, or in connection with any act contemplated in subsection (2) or (5) – (eligibility and probation);
 - ❑ Under the Companies Act-
 - ❖ Insolvency Act;
 - ❖ Close Corporations Act;
 - ❖ The Competition Act;
 - ❖ The Financial Intelligence Centre Act;
 - ❖ The Securities Services Act; or
 - ❖ Chapter 2 of the Prevention and Combating Corruption Activities Act.



Disqualified
Director Register
(DDR)
(sect 69(13))

DISQUALIFIED FROM BEING A DIRECTOR

If a court therefore issues a sequestration order, that person is regarded as an unrehabilitated insolvent and cannot be appointed as a director of a company for a period of 10 years (automatic rehabilitation) or upon application to court to set aside the sequestration order.

A disqualification in terms of subsection (8)(b)(iii) and (iv) ends after five years or lapsing of any extensions that the court may have imposed, whichever is the latest.

The CIPC must be notified upon the issue of any sequestration order, or the issue of an order removing a person from an office of trust, or upon a conviction of an offence referred to in subsection (8)(b)(iv).

The Commission has an obligation in terms of section 69(11B) to notify each company which has a director to which the order relates. It is then the responsibility of the companies / cc's to take necessary steps with regards to removal, etc.



Vacancies on the
board – immediate
– section 70

DISQUALIFIED FROM BEING A MEMBER

Section 47 of the CC Act describes which persons are disqualified / ineligible to act as a member of a CC, namely –

- ❖ An unrehabilitated insolvent;
- ❖ Any person removed from an office of trust on account of misconduct;
- ❖ Any person convicted of theft, fraud, forgery, perjury, or any offence involving dishonesty and has been sentenced to imprisonment for at least six months; and
- ❖ Any person who is subject to any order of a court under the Companies Act disqualifying him from being a director of a company.

Any person disqualified from being a member of a Close Corporation, who directly or indirectly takes part in or is concerned with the management of any corporation, shall be guilty of an offence.

Despite being disqualified in terms of section 69(8)(b) of the Companies Act, ... a person may participate in the management of a corporation, if 100% of the member's interest in the corporation is held by-

- (a) that person; or
- (b) that person and other persons related to the disqualified member, and each such person has provided consent in writing. (Schedule 3 of the Companies Act, 2008).

APPLICATION FOR DELINQUENCY OF A DIRECTOR (SECTION 162 OF THE COMPANIES ACT)

South Africans are aware of many a scandal involving directors and their conduct in the management of companies, but non as relevant as the declaration of delinquency of Ms Dudu Myeni in the SAA matter.

Myeni was referred to as “grossly negligent”, “indifferent” and a “dishonest and “unreliable witness” in the matter ***Organisation Undoing Tax Abuse & South African Airways Pilot’s Association v Duduzile Myeni & Others (case number 15996/2017)*** and the High Court declared her to be a delinquent director and further declared such delinquency to be lifelong – landmark judgment in our law.

The Court further demonstrated its disapproval of her conduct, by allowing a punitive cost order (against her personally) on an attorney and client scale.

Also very important about this judgment is the fact that the Honourable Judge Tolmay, referred the matter to the NPA (National Prosecuting Authority) for consideration of a possible investigation into criminal conduct of Ms Myeni.

APPLICATION FOR DELINQUENCY OF A DIRECTOR (SECTION 162 OF THE COMPANIES ACT)

Section 162(1) of the Companies Act provides for the following persons to apply to court for a delinquency (or probation) order:-

- ❖ A company;
- ❖ A shareholder;
- ❖ A director;
- ❖ Company secretary or prescribed officer of a company; or
- ❖ A registered trade union that represents employees.

If:-

- (a) The person is a director of the company, or was a director within 24 months immediately preceding the application; and
- (b) Any of the circumstances contemplated in-
 - Declaration of delinquency – subsection 5 (a) – (c) apply; or
 - Probation – subsections 7 (a) and (8) apply.

APPLICATION FOR DELINQUENCY OF A DIRECTOR (SECTION 162 OF THE COMPANIES ACT)

“(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 subsection (5) apply,...”

In many court cases it was confirmed by the learned Judge that the Courts do not have a discretion with regards to the order of delinquency, if all of the grounds therefore exist. The only discretion lies with regards to the length of the delinquency.

Section 162(5) emphasizes the above sentiment expressed by the courts –

*“A court **must** make an order declaring a person to be a delinquent director if the person” – any of the grounds for delinquency exist.*

APPLICATION FOR DELINQUENCY OF A DIRECTOR (SECTION 162 OF THE COMPANIES ACT)

The grounds for an application for delinquency as set out in section 162(5)(a) – (f) are as follows:-

- (a) A person consented to serve, or acted in the capacity of director, while ineligible or disqualified in terms of section 69;
- (b) While under probation i.t.o this section or section 47b of CC Act, acted as a director in a manner that contravened that order;
- (c) While a director-
 - ❖ Grossly abused the position of director;
 - ❖ Took personal advantage of information or an opportunity contrary to sect 76(2)(a);
 - ❖ Intentionally or by gross negligence inflicted harm upon the company;
 - ❖ Acted in a manner that amounted to gross negligence, willful misconduct, or breach of trust in relation to the performance of a director's functions; or
 - ❖ Acted in a manner contemplated in section 77(3)(a),(b) or (c)-
 - acted on behalf of the company without authority;
 - Accepted without protest the carrying on of the company's business despite knowing it is prohibited by section 22 (reckless trading);
 - Been a party to an act or omission meant to defraud.

APPLICATION FOR DELINQUENCY OF A DIRECTOR (SECTION 162 OF THE COMPANIES ACT)

- (d) Has repeatedly been personally subject to a compliance notice or similar enforcement measure, in terms of any legislation;
- (e) Has at least twice been personally convicted of an offence or subjected to a fine, in terms of any legislation
- (f) Within a period of 5 years (not necessarily concurrent),
 - (i) was a director of company or member of CC, convicted of an offence, in terms of any legislation, while being a director or managing member of that company or CC; and
 - (ii) the court is satisfied that the declaration of delinquency is justified, having regard to the nature of the contraventions.

When acting as a director while ineligible or disqualified the order of delinquency is unconditional and subsists for that persons lifetime.

When any of the grounds as described in subsection 5 (c) to (f) apply, the delinquency order may be subject to conditions (as the court deems fit) and subsists for seven years or such longer period as determined by the court.

DELINQUENT DIRECTOR REGISTER (DDR)

In terms of the Companies Act, 2008 the Commission (CIPC) is required to maintain a register of disqualified directors (and managing members of CC's).

Any member of the public may have access to the disqualified director register (DDR)

Information on the DDR (as and when the CIPC is updated on judgments, etc) is thus available to all members of the public and any organs of state.

Any company that knowingly appoints a director (whose name appears on the DDR) may also be subjected to compliance notices, and subsequent legal action.

A person who becomes ineligible or disqualified while serving as a director ceases to be entitled to continue to act as a director immediately and filling of vacancies in terms of section 70 of the Act applies.

Responsibility of removal of these directors / members lies with the relevant companies and CC's and not the CIPC.



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THANK YOU

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QUESTIONS & ANSWERS

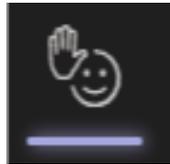


Q&A

Do's and Don'ts

Should you ask a question **during the Question & Answer session, raise your hand**

by clicking on this sign

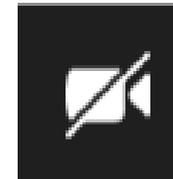


and then click on the hand sign.



Unmute your microphone to ask your question. Please mute it again after asking your question.

Keep your Video Camera switched off during Q&A.





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CLOSURE

