



Covid-19 Business Rescue

THE VALIDITY OF CIPC'S NOTICES RELATING TO BUSINESS RESCUE

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Business rescue proceedings commence either voluntarily, by a company in financial distress passing a resolution to this effect or by an affected person applying to court to have a company placed under business rescue. Section 129 of the Companies Act, 71 of 2008, (the "Act") sets out the process for commencing voluntary business rescue, and provides that the board may resolve that a company voluntarily begin business rescue proceedings, but that such resolution has no force or effect until it has been filed at the Companies and Intellectual Commission, Republic of South Africa (the "CIPC"). Section 129 of the Act provides further that a business rescue practitioner must be appointed within five days after a company has adopted and filed the resolution, and that within two days of making such appointment a notice to this effect must be filed at the CIPC, failing which the resolution lapses and the company may not file another resolution of this kind for a period of three months. The Supreme Court of Appeal, in *Panamo Properties (Pty) Ltd v Nel and Others NNO 2015 (5) SA 63 (SCA)*, held at paragraph 4 that "*Once a resolution is taken it only becomes effective when it is filed with the Companies and Intellectual Commission, Republic of South Africa*".

The Act defines "File", when used as a verb, to mean to deliver a document to the CIPC in the manner and form, if any, prescribed for that document. The Companies Regulations 7 and 123, read with Table CR3 to the Companies Regulations, provides that documents will be delivered, and therefore filed, with the CIPC as soon as they are transmitted as a separate file attached to an electronic mail message addressed to the CIPC on the date and at the time recorded by the CIPC's computer. In our view, it follows that a hard copy does not need to be physically delivered to the CIPC, and stamped to indicate receipt of same, in order for the filing requirements in section 129 of the Act to be met; the filing requirements shall be met on the electronic submission via email to the CIPC.





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Section 185 of the Act deals with the establishment of the CIPC and provides that that CIPC was established as a juristic person to function as an organ of state within the public administration, but as an institution outside of the public service. Section 185 of the Act goes on to provide that the CIPC has jurisdiction throughout the Republic and is only subject to the Constitution, the law and any policy statement, directive or request issued to it by the Minister in terms of the Act. As provided for in Companies Regulation 4, the CIPC may issue guidelines and practice notes, but such guidelines and practice notes must be regarding matters that fall within its authority.

In terms of section 223 of the Act, only the Minister of Trade and Industry, in consultation with the CIPC and by notice in the Gazette, may make regulations concerning the functions of the CIPC, including those relating to the time periods. Section 190 of the Act provides that the Minister of Trade and Industry may, by notice in the Gazette, issue policy directives to the CIPC with respect to application, administration and enforcement of the Act, but that such policy directives may not be inconsistent with the Act. This is to say that the allowance to issue regulations and policy directives to the CIPC which concern, *inter alia*, time periods, does not extend to any time periods that are already set out in the Act.

Section 27 of the Disaster Management Act, 57 of 2002, (the "DMA"), provides that the Minister of Cooperate Governance and Traditional Affairs may, if a national state of disaster has been declared, and after consultation with the responsible Cabinet member, make regulations or issue directions or authorise the issue of directions concerning, inter alia, steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster. Pursuant to section 27 of the DMA, the Minister of Cooperate Governance and Traditional Affairs issued regulations on 18 March 2020 and supplemented them on 26 March 2020 and again on 16 April 2020 with further regulations. Regulation 10 to the DMA makes provision for the Minister of Trade and Industry to issue regulations and directives. However, it must be noted that the Minister of Trade and Industry has not issued any regulations or directions relating to the operation of the CIPC during the national lockdown.





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On 24 March 2020, and again on 14 April 2020, the CIPC issued a notice to customers. The notices dealt with, *inter alia*, the time periods set out in section 129 of the Act. Pursuant to these notices, the CIPC purported to provide a general extension, until two weeks after the lockdown period or as otherwise communicated by the CIPC, for business rescue proceedings which had commenced but where the complete list of procedures contained in section 129 of the Act had not yet been fulfilled, to be fulfilled. The CIPC also purported to suspend the time period for business rescue proceedings under section 129 of the Act that had not yet commenced, until the national lockdown ceases or as otherwise communicated by the CIPC. The notice was not published pursuant to any authorising legislative provisions.

The effect of the notices is that no company may commence, or continue with business rescue proceedings where such proceedings were commenced prior to the national lockdown but not completed before lockdown, until after the national lockdown has ended. In our view the CIPC acted *ultra vires* in publishing the notice as it lacks the authority to extend or suspend the time periods contemplated in section 129 of the Act and, in the circumstances, the notices are unlawful and stand to be set aside on review.

The Companies Tribunal held in *Shiva Uranium PTY (Ltd) (in business rescue) and Another v The Companies and Intellectual Property commission and Others CT012OCT2018*, at paragraph 41, "*The First Respondent is a creature of statute and can only do what it is authorised to do in terms of legislation from which it derives its own existence and powers. In simple terms, the First Respondent cannot assign to itself powers which it does not have in terms of the Act (including the Regulations). It follows therefore that any conduct of the First Respondent that is done outside the parameters of the Act and Regulations will be unlawful and can be set aside on review.*"

In our view, despite the notices that have been issued by the CIPC, companies desirous of being placed into business rescue are entitled, during the national lockdown, to proceed to file the necessary section 129 documentation via email with the CIPC and the CIPC may not refuse to accept any documents which are filed in this manner. For the same reason, companies which commenced business





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rescue proceedings prior to the national lockdown, but which process was not completed before the lockdown commenced, are also entitled to proceed to continue to complete all of the section 129 requirements, during the national lockdown.

Unfortunately, given the position adopted by the CIPC in the notices, it may now actually be necessary for the companies described above to launch an application to seek a declarator on the matter and/or for companies where the time periods set out in section 129 of the Act have lapsed to launch an *ex parte* application in terms of section 129(5) of the Act to seek the court's sanction to file a further resolution. The extreme financial difficulty that a company may be facing as a result the national lockdown is the exact circumstance that section 129 of the Act provides for and precisely the reason why it was drafted. In light of the fact that the effect of the CIPC notices is to deprive companies of this lifeline, we are of the view that the applications referred to above ought to be entertained on an urgent basis.

It is during these extraordinary times, when companies are facing huge financial pressures and strains, that they need to rely on safety nets like that provided for in section 129 of the Act. We are experienced insolvency and business rescue legal practitioners and would welcome any questions on any queries that you may have relating to this article or indeed any other liquidation and/or business rescue related matter.

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