CGF RESEARCH INSTITUTE (PTY) LTD
Corporate Governance Framework®

ARTICLE

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IGNORANCE OF THE LAW IS NO EXCUSE – MAKE SURE YOU KNOW WHAT IS REQUIRED

Article by CGF

Experience shows that it is often not the complex legal issues that companies stumble over. In most cases, the complex legal issues tend to receive a lot more focus within a company and they are usually dealt with by teams of lawyers and accountants. Rather ironically, it's the so-called 'insignificant' administrative legal requirements that often create the biggest headaches for companies and if these are left unattended, it could attract massive penalties and even result in the company being closed through its non-compliance.

To illustrate this point, the submission of an *annual return* to the Companies and Intellectual Property Commission ('CIPC') -- together with the required documents and fees -- is a requirement of the South African Companies Act, 2008. Whilst this task is a relatively easy matter for any company to attend to, non-compliance with this matter can however have grave consequences for a company and its ability to transact and engage business.

What is required?

According to the CIPC; 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.

A clear distinction must be made between an *annual return* and a *tax return*. An annual return is a sort of 'renewal' and it has the purpose to confirm whether the CIPC is in possession of the most up-to-date information of a company, and that the company is still conducting business. A tax return on the other hand, focuses on taxable income of a company in order to determine the tax liability of the company and it is filed with the South African Revenue Services (SARS). Compliance with the one does not mean that there is automatic compliance with the other. Both these returns follow completely separate processes which are guided and administrated in terms of different legislation from two different government departments. Therefore, even if the tax return has been filed with SARS, the annual return must still be filed with CIPC.

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 legal effect of the de-registration process, is that the juristic personality is withdrawn and the company ceases to exist.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

1. any assets (including immovable property) of the de-registered company are forfeited to the state as *bona vacantia* assets at the time of deregistration;

2. 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;

3. 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

4. possible reputational damage to the shareholders, directors and the company itself.

To illustrate the effect of a company not filing its annual return; let's assume that a company has been formed as a property holding company with a large property portfolio and its shareholders own shares worth a few hundred million Rand. The company's shareholders then decide to purchase a further property to increase the company's value.

If the company has been de-registered, due to a failure of its directors to submit its annual returns to the CIPC, the CIPC may then de-register the company. In this event, the consequences may result in the existing shares becoming *bona vacantia* and the company cannot acquire the additional property and it loses its entire property portfolio.

Why do companies not submit their annual returns?

In most cases companies are not aware of the requirements to submit an annual return, or they may have no idea of the consequences they risk incurring when they do not submit their annual returns. Other possible reasons for non-compliance could be:

1. the directors of the company did not know how or where to submit the return;
2. the directors were not sure of how to calculate the turnover or calculate the company's Public Interest Score (PIS), both of which are required to be submitted with the return;
3. the directors were not sure of how to calculate the annual return fees due to the CIPC, or
4. the directors were unsure of what documents need to be submitted together with the annual return.

Whatever the reason may be, ignorance of the law is no excuse and failing to comply with this requirement can result in unwanted consequences for the company, including its shareholders and directors.

How can we help?

With CGF's recently launched company secretarial division which specifically focuses on compliance with the secretarial duties and responsibilities in the Companies Act, our team of dedicated resources are willing to assist all companies with their annual returns, amongst other secretarial statutory requirements.

Our trusted team has many years of experience in dealing with all company secretarial related issues. Some of the professional services provided by this division include:

CGF company secretarial division: Professional services		
Company formation	*Lodgments with CIPC*	*Company amendments & disclosures*
• Provision of shelf companies • Name reservations • Name reservation extensions • Company restorations (in the event of deregistration)	• Special resolutions • Memorandum of Incorporation (inclusive of drafting) • Amendments to Memorandum of Incorporation • Financial statements	• Annual Returns • Changes of directors • Name changes • Change of share capital • Change in registered office • Change of address • Change of financial year end • Change of auditor • Change of company secretary

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About CGF Research Institute (Pty) Ltd: Services

CGF is a Proudly South African, Exempt Micro Enterprise Level 4 B-BBEE complaint company. The company specialises in a variety of specilised governance consulting services, including conducting desktop research on Governance, Risk and Compliance (GRC) topics.

Through CGF's Lead Independent Consultants, our professional consulting capabilities extend to;

– strategic management consulting, business re-structuring, executive placements, executive coaching, board assessments and evaluation, outsourced company secretarial functions, minute-taking services, facilitation of Corporate Governance Awareness workshops, group wellness, employee wellness programme strategy, performance management, job profiling, ethics risk assessments

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