



fn inc

Attorneys Notaries Conveyancers

1st Floor, 2 Albury Park, Albury Road, Dunkeld West, 2196. Docex 11 Hyde Park. t +27 11 560 7100 f +27 11 759 7960. Stellenbosch Office: t +27 82 287 3173

---

## **COMPANIES AND DEALING WITH DIRECTORS NOT RECORDED WITH CIPC**

CIPC no longer required to approve company actions and documentation

CIPC's role has been revised. The Companies Act specifically reduces the company's reliance on the regulator, the CIPC. Although companies still have to comply with an administrative process to inform the CIPC of its decisions (for example the appointment of directors, changing of auditors, change of year end, amendment of the Memorandum of Incorporation), none of these decisions are dependent on the approval of the CIPC. In most instances, the company's decision is effective immediately and it merely needs to inform the CIPC of decisions or actions.

### **Appointment of directors**

In terms of section 66(7):

"A person becomes entitled to serve as a director of a company when that person:

- a) has been appointed or elected in accordance with this Part, or holds an office, title, designation or similar status entitling that person to be an *ex officio* director of the company; and
- b) has delivered to the company a written consent to serve as its director."

In turn, section 70(6) requires every company to file a notice (CoR39) within 10 business days after a person becomes or ceases to be a director of the company.

Thus, in terms of the Act the appointment of a director is effective as soon as he/she is appointed or elected, and has confirmed in writing that they are prepared to accept the appointment to the board. The CIPC has no role to play in the appointment of directors. The filing of the relevant notice does not affect the validity or the time of the appointment.

### **What would be the consequence if the CIPC fails to update its register of directors, delays the updating of the register, or includes incorrect information in the register?**

Despite the requirement to file a notice of the appointment or removal of a director to the CIPC, the company is obliged to keep a record of its directors (section 24(3)(b) and 24(5)). This record may be accessed by any person who holds or has a beneficial interest in any securities issued by a profit company, or who is a member of a non-profit company. Any other person has a right to inspect or copy the register of directors of a company, upon payment of a prescribed amount. As such one may conclude that the register held by the company should be regarded as the 'official' register of its directors, and it is this register that should be consulted where there is a discrepancy between the company's register and CIPC's register, or where there is confusion or uncertainty as to the identity of the company's directors.

### **Turquand Rule:**

The Turquand rule has essentially been codified in section 20(7) of the Companies Act, 2008 which provides that a person dealing with a company in good faith, other than a director,

prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules of the company, unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement.

The court addressed the codification of the Turquand rule as provided for in section 20(7) and (8) of the Companies Act and stated that the Companies Act is not intended to change the well-established principles of the common law Turquand rule, and as such cannot be seen to now allow a third party to presume the authority of an individual, ordinary director.

The Court emphasised that in order for the third party to presume compliance with the “formal and internal procedural requirements” of the constitution (as provided for in section 20(7)), the third party should have been dealing with the “company”.

The section does not state that the third party may make any assumption when dealing with a purported representative per se. This reinforces the view that in order for section 20(7) to apply (as with the common law rule), the third party must establish that he was contracting with someone who had actual or ostensible authority to bind the company, only in those circumstance can the third party say that he was dealing with the company. Consequently, it is of vital importance, when dealing with a representative of a company to establish the representative’s authority, as will be evidenced by a properly passed resolution.

*Although care has been taken to ensure the accuracy of the above information, FN Inc and its members, employees, agents and representatives cannot be held liable for any loss suffered, as a result of the use of this information.*

*Updated November 2017*