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The devil's in the detail: CIPC issues a notice regarding individualised disclosure requirements in respect of director remuneration and benefits

On 21 July 2020, the Companies and Intellectual Property Commission (CIPC) issued a notice stating that it is mandatory for annual financial statements to include a disclosure of not only the remuneration of directors and prescribed officers, but also a disclosure of all other benefits paid, payable or receivable as per sections 30 (4),(5) and (6) of the Companies Act 71 of 2008 (Act).

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Amendment and restatement of documents: Considerations for security providers

A key element of section 44 and section 45 is the confirmation by the Security Provider's board of directors regarding the Security Provider's solvency and liquidity pursuant to giving the financial assistance, as well as the fairness and reasonableness of the financial assistance.

In funding transactions (whether by means of debt or the issue of preference shares), funders typically require security for the funding provided. This security can take the form of guarantees from companies in the same group of the borrower/issuer (Security Providers). Upon the conclusion of the funding documents (Principal Documents) as well as the security documents, the Security Providers are required to adopt financial assistance resolutions in terms of section 44 (if applicable) and section 45 of the Companies Act No 71 of 2008. Debate normally arises upon the amendment of the obligations in terms of the Principal Documents in respect of whether the Security Providers require new financial assistance resolutions.

A key element of section 44 and section 45 is the confirmation by the Security Provider's board of directors regarding the Security Provider's solvency and liquidity pursuant to giving the financial assistance, as well as the fairness and reasonableness of the financial assistance.

There is an argument which proceeds as follows: Security Providers guarantee the performance of the borrower/issuer in terms of the Principal Documents. If the terms of the Principal Documents are amended, such amendment should not affect the validity of the security documents, and consequently the validity of the financial assistance resolutions because the obligations of the issuer/borrower are guaranteed (normally without specific reference to what those obligations are). This argument fails to take into account the fact that financial assistance resolutions which are adopted upon the conclusion of the Principal Documents are in respect of the obligations of the borrower/issuer at that time and not in respect of any future obligations that the principal issuer/ borrower may acquire. The argument similarly ignores of the wording of sections 44 and 45.

Section 44(2) requires a board and shareholder resolution in respect of financial assistance provided by a company to *"any person for the purpose of, or in connection with, the subscription of any option, or any securities, issued or to be issued by the company or a related or inter-related company"*. Section 44 seems to contemplate financial assistance which is provided after the issue of shares in a company, which suggests that *"new"* financial assistance resolutions would be required upon the amendment of the Principal Documents.

Section 44(3)(b)(i) further states that the board may only authorise (subject to the provisions of the memorandum of incorporation) the financial assistance if the board is satisfied that "*immediately after providing the financial assistance the company would satisfy the solvency and liquidity test*" and in terms of section 44(3)(b)(ii) *"terms under which the financial assistance is proposed to be given are fair and reasonable to the company"*. At the time of adopting the first set of financial assistance resolutions, the

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Amendment and restatement of documents: Considerations for security providers...*continued*

The board of the Security Provider will ultimately have to take a view on the nature of the amendment of the Principal Documents.

Security Provider will not have sight or knowledge of the terms of the amendment to be made at some point in the future, and consequently will not be a position determine whether it will pass the solvency and liquidity test (in the future) and will not be able to determine whether the terms will be fair and reasonable. The board bases its assessments in this regard on the original obligations of the principal borrower/issuer.

Section 44 typically finds application in preference share funding transactions where an issuer will issue funding preference shares; and it would also apply where debt securities such as debentures, bonds and notes are issued. As security for an issuer's obligations in respect of the preference shares or debt securities a company in the same group (a co-subsidiary for example) will provide a guarantee for the obligations of the issuer.

Similarly, section 45 states that the board may only authorise direct or indirect financial assistance to a director, prescribed officer of the company or to a related or inter-related company (or to a member of such related or inter-related company). The board of the Security Provider will have to be satisfied that the company will pass the solvency and liquidity test and that the terms of the financial assistance are fair and reasonable to the Security Provider. As stated above, the board could not have made determinations as required in terms of section 45 in respect of terms that are unknown to it at the time of passing the resolutions, unless of course its original resolution took account of a range of possible future variations to the principal obligations. This will depend on the wording of the particular resolution.

The board of the Security Provider will ultimately have to take a view on the nature of the amendment of the Principal Documents. However, in light of the wording of sections 44 and 45, it is strongly recommended that new financial assistance resolutions are passed upon the amendment of the Principal Documents; particularly in circumstances where the Principal Documents ultimately have the effect of increasing the scope of the obligations of the Security Provider pursuant to the guarantee or other security provided. Alternatively, the original resolution must be express in its terms and try to cater for future variations to the principal obligations, perhaps within a certain range or parameters, and confirm that the board is nevertheless satisfied on solvency/liquidity and fairness/reasonableness despite such future variations. This would avoid the necessity for additional financial assistance resolutions later on, provided the variations are within those parameters.

Sibusisiwe Khumalo and Ludwig Smith

The devil's in the detail: CIPC issues a notice regarding individualised disclosure requirements in respect of director remuneration and benefits

... it is incorrect to disclose remuneration as a single aggregated amount or as a single amount under each director without the names of the directors/prescribed officers and description of the payment/compensation.

On 21 July 2020, the Companies and Intellectual Property Commission (CIPC) issued a notice stating that it is mandatory for annual financial statements to include a disclosure of not only the remuneration of directors and prescribed officers, but also a disclosure of all other benefits paid, payable or receivable as per sections 30 (4),(5) and (6) of the Companies Act 71 of 2008 (Act).

The notice was published in response to a trend, observed by the CIPC, where *"some companies are not disclosing directors' or prescribed officers' remuneration as required and prescribed by the Act"*. Reacting to this trend, the notice included a prescribed order to the effect that it is incorrect to disclose remuneration as a single aggregated amount or as a single amount under each director without the names of the directors/prescribed officers and description of the payment/compensation. Further, where no remuneration was paid, a note is still required in the notes to the financial statements indicating that there were no payments made to the relevant directors.

Although the CIPC states that this level of disclosure is required in all audited (including voluntarily audited) annual financial statements, this aspect of the notice warrants further scrutiny. One could query the reference to companies that voluntarily have their annual financial statements audited, as section 30(4) of the Act applies the remuneration disclosure requirement to companies that are required *"in terms of this Act"* to be audited. It is unclear whether the fact that section 30(2)(b)(ii)(aa) of the Act refers to voluntary audits is sufficient to regard such an audit as one *"in terms of the Act"*.

This individualised disclosure requirement is in line with developments in many other jurisdictions, and probably represents the correct approach given the wording of the Act. It also reflects a practice already adopted by many South African companies, especially listed companies.

While the CIPC notice is not legally binding, there are two things to note in this regard. Firstly, this reflects the view of the regulator, and the CIPC will impose this standard when assessing annual financial statements filed together with annual returns. Secondly, this notice is in line with what the draft Companies Amendment Bill 2018 seeks to clarify – namely individualised disclosure for each director/prescribed officer.

It thus appears that the writing is on the wall, and all South African companies that have their annual financial statements audited would do well to disclose the remuneration and benefits of directors/prescribed officers on this basis.

Ryan Alho

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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