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# DISPUTE RESOLUTION ALERT

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### For organs of state, the institution of legal proceedings should not be a lottery


In the recent full court appeal of *Ithuba Holdings (Pty) Ltd v Lottostar (Pty) Ltd and Others* Case No. A46/2020 (Mpumalanga Division of the High Court, Mbombela) 31 August 2021, the Mbombela High Court was tasked with considering whether the National Lotteries Commission (Commission) or Ithuba Holdings (Ithuba), which operates the national lottery for the Commission, fell within the definition of an organ of state in terms of the Intergovernmental Relations Framework Act 13 of 2005 (Framework Act).

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- ii. compulsory business rescue proceedings – when application is made to court to place the company in business rescue by an affected person in terms of section 131 of the Act.

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## For organs of state, the institution of legal proceedings should not be a lottery

In the background to this case the Commission and Ithuba had applied for a declaration that Lottostar (Pty) Ltd's (Lottostar) "scheme, plan arrangement, or system whereby it offers bets, whether or not of a fixed-odds nature on the outcome of lotteries" was unlawful.

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In the background to this case the Commission and Ithuba had applied for a declaration that Lottostar (Pty) Ltd's (Lottostar) "scheme, plan arrangement, or system whereby it offers bets, whether or not of a fixed-odds nature on the outcome of lotteries" was unlawful. The Commission and Ithuba further sought an interdict preventing Lottostar from offering such bets.

In the court of first instance, Mphahlele J upheld a preliminary point raised by the Mpumalanga Gaming Board that the parties were not properly before the court as Ithuba and the board are organs of state and were obligated to first attempt all alternative measures to resolve a dispute prior to approaching the court.

This is based on section 41(3) and 41(4) of the Constitution, read together with the Framework Act.

On appeal, the full court found that this decision was incorrect based on an analysis of the applicable case law and legislation. Section 239 of the Constitution defines organs of state as:

*"any department or state or administration in the national, provincial or local sphere of government; or (b) any other function or institution – (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (iii) exercising a public power of performing a public function in terms of any legislation, but does not include a court or a judicial officer."*

The court found that section 41 of the Constitution, as given effect by the Framework Act, has a narrower definition of "organ of state". The Framework Act, in section 2(2)(g), excludes "any public institution that does not fall within the national, provincial or local sphere of government". The Commission was held to be such a public institution and thus not an organ of state for the purposes of the Framework Act.

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## For organs of state, the institution of legal proceedings should not be a lottery...*continued*

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### Legal Proceedings Act

A different concept of organ of state applies to the institution of legal proceedings against organs of state. This is governed by the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (Legal Proceedings Act). Section 1 of the Legal Proceedings Act defines an organ of state as:

- any national or provincial department;
- a municipality contemplated in section 151 of the Constitution;
- any functionary or institution exercising a power or performing a function in terms of the Constitution, or a provincial constitution referred to in section 142 of the Constitution;
- the South African Maritime Safety Authority established by section 2 of the South African Maritime Safety Authority Act 5 of 1998;
- the South African National Roads Agency Limited contemplated in section 3 of the South African National Roads Agency Limited and National Roads Act 7 of 1998;
- the National Ports Authority Limited, contemplated in section 4 of the National Ports Act 12 of 2005, and any entity deemed to be the National Ports Authority in terms of section 3 of that act.

The key distinction between the definition above and the definition of an organ of state in terms of section 239 of the Constitution is that the Legal Proceedings Act's definition specifically does not include an *"institution exercising a public power or performing a public function in terms of any legislation"*.

This was discussed in *Nicor IT Consulting (Pty) Ltd v North West Housing Corporation* [2010] (3) SA 90 (NWM). The defendant, the North West Housing Corporation, was a juristic entity created in terms of the North West Housing Corporation Act 24 of 1982 and took the point that the notices required by the Legal Proceedings Act had not been given before the commencement of the litigation.

It was common cause that the only part of the definition of *"organ of state"* contained in the Legal Proceedings Act that the defendant, the North West Housing Corporation, might fall under was paragraph (c) of the definition: *"any functionary or institution exercising a power or performing a function in terms of the Constitution, or a provincial constitution referred to in section 142 of the Constitution"*. With no provincial constitution in the North West Province, only the national Constitution could be looked at to determine whether the defendant was an organ of state.

The High Court noted that the legislature had not included the category (in section 239 of the Constitution) of organs of state exercising a public power or performing a public function in terms of any legislation in the definition in the Legal Proceedings Act. The preamble and title of the act, which refer to *"Certain Organs of State"*, also supported the conclusion that not all public entities would fall within the definition.



## For organs of state, the institution of legal proceedings should not be a lottery...continued

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The High Court also noted that the definition in the Legal Proceedings Act and the word "Certain" in the act's full title make it "abundantly clear" that the act will not apply to all organs of state.

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### Deriving power from the Constitution

The High Court established that the words "in terms of the Constitution" in the definition meant that the functionary and the power it exercises are identified in the Constitution. Meaning that the power or function exercised is identified in the Constitution itself. This led to the court to conclude that:

*"Clearly then, the defendant does not derive its powers or functions 'in terms of the Constitution', it derives its powers and functions from its enabling act, the North West Housing Corporation Act. It therefore follows that the defendant is not an organ of state as defined in the act."*

Additionally, the High Court found that the corporation was not an organ of state for purposes of the Act despite the fact that the North West Housing Corporation is represented by the Member of the Executive Council for Local Government and Housing and is listed in Part C of Schedule 3 of the Public Finance Management Act 1 of 1999.

In *Haigh v Transnet Ltd* 2012 (1) SA 623 (NCK) the High Court followed the reasoning in the *Nicor* case to reach the conclusion that Transnet was not an organ of state for purposes of the Legal Proceedings Act, as it derives its powers from, and has as its enabling legislation, the SATS Act and not the Constitution. Transnet may perform a public function

but it does not fall within the definition of an organ of state in terms of the Legal Proceedings Act. The High Court also noted that the definition in the Legal Proceedings Act and the word "Certain" in the act's full title make it "abundantly clear" that the act will not apply to all organs of state.

In *Haigh*, the court mentioned that in *National Gambling Board v Premier, KwaZulu-Natal, and Others* [2002] (2) SA 715 (CC) it was held that both the National Gambling Board, a juristic person established by section 2 of the National Gambling Act, 2010 and the KwaZulu-Natal Gambling Board, a juristic person established by the KwaZulu-Natal Gambling Act, were organs of state as intended in section 239 of the Constitution. Neither of these bodies was included in the definition of an organ of state for purposes of the Legal Proceedings Act.

In light of the above one must conclude that if legislation that uses the phrase "organ of state" without its own specific definition of the phrase is being considered, the definition in section 239 of the Constitution would apply and an entity such as a gambling board would thus be an organ of state because it exercises power or performs a function in terms of legislation.

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**Corne Lewis, Lawrence-John Maralack and Menachem Gudelsky**

## Online business rescue filings: The shortfalls of protocols implemented by the CIPC

In an effort to optimise its systems for the effective and efficient facilitation of the submission and filing of applications, the CIPC has introduced a eServices platform to be used for voluntary business rescue filings.

There are two ways in which a company can be placed in business rescue:

- i. voluntary business rescue proceedings – when the board of directors of a company passes a resolution to place the company in business rescue in terms of Section 129 of the Companies Act 71 of 2008 (Act); and
- ii. compulsory business rescue proceedings – when application is made to court to place the company in business rescue by an affected person in terms of section 131 of the Act.

In relation to commencing voluntary business rescue proceedings, the following must be attended to:

- the board of a company must pass a resolution resolving to place the company in business rescue due to the company being in financial distress and if there appears to be a reasonable prospect of rescuing the company; and
- the resolution (and supporting documents) must be filed with the Companies and Intellectual Property Commission (CIPC) with the relevant notice of Commencement of Business Rescue proceedings (known as the CIPC Form CoR 123.1).

Ordinarily, the company would be required to submit these documents to the CIPC via a dedicated CIPC email address for business rescue filings. The date of filing and effective date of commencement of business rescue proceedings will be the date the documents are received by the CIPC's email server.

However, in an effort to optimise its systems for the effective and efficient facilitation of the submission and filing of applications, the CIPC has introduced an eServices platform to be used for voluntary business rescue filings. However, as can happen with technological endeavours, this has come with some shortfalls.

On 28 July 2021, the CIPC issued Practice Note 3 of 2021 which states that:

*"As from 15 June 2021, information relating to the Form CoR 123.1 and legal documents in terms of section 129 of the Companies Act 71 of 2008, as well as court orders commencing business rescue proceedings in terms of section 131 of the Act, must be submitted via the electronic platform New eServices, [www.cipc.co.za/Online Transacting/eServices](http://www.cipc.co.za/Online%20Transacting/eServices)".*



### JACKWELL FERIS

Director in our Dispute Resolution practice area will participate in a panel discussion which will be hosted by **World Arbitration Update (WAU)** on Tuesday, 12 October 2021 from 14h00–15h30 (CAT)

The panel discussion will focus on *Influencing the Future of the Investor-State Dispute Settlement System through the Investment Chapter of the African Continental Free Trade Agreement (AfCTA)*.

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## Online business rescue filings: The shortfalls of protocols implemented by the CIPC

The protocols that have been introduced by the CIPC have unfortunately created some administrative problems and confusion around the effective date of commencement of business rescue proceedings.

The notice goes on to state that:

*"The date of filing or effective date of commencement of business rescue proceedings will be the date the relevant information was confirmed as correct by a team member of the CIPC, once submitted via new eServices. Therefore, mere submission of the information and required documents, does not constitute filing. CIPC will confirm the commencement of business rescue proceedings and the effective date of the proceedings, upon the issuing of a confirmation letter which, inter alia, indicates the date of submission and effective date of business rescue proceedings."*

Unfortunately, the protocols which the CIPC has sought to introduce are inconsistent with what is contemplated in the Act insofar as "filing" and "delivery" are concerned and appear to fall outside the ambit of the processes set out in the Companies Regulations, 2011 (Regulations).

### **Delivery of prescribed documents**

Firstly, the term "file" is defined in the Act as "when used as a verb, means to deliver a document to the Commission in the manner and form, if any, prescribed for that document".

Furthermore, Regulation 7 of the Regulations, read with Table CR3, deals with the delivery of documents and methods and times of delivery of documents. Delivery of prescribed documents to the CIPC (and as such "filing", in light of the Act's definition) is

deemed to have taken place on the date and at the time recorded by the CIPC's computer system, as verified by fax reply to the sender of the information in the instance where the necessary resolution and documentation have been entered on the website maintained by the CIPC. Thus, considering the Regulations, mere confirmation of receipt of the documents or of the date and at the time recorded by the CIPC's computer system should be deemed to constitute filing.

In considering the above, the protocols that have been introduced by the CIPC have unfortunately created some administrative problems and confusion around the effective date of commencement of business rescue proceedings. The effective date of commencement is critical because it is linked to and has an effect on the time periods within which the company is required to take further steps after the company has been placed in business rescue.

Our view is that the CIPC has, being a creature of statute, inadvertently acted outside the scope of its mandate in imposing these protocols, and the effective date of commencement of business rescue proceedings remains the date on which the resolution (and supporting documents) are delivered in the manner and form described in the Regulations. We hope that these protocols will be reconsidered, or that our courts will (as we have already seen) provide some clearer guidance on what the correct position is.

*Kgosi Nkaiseng and Jessica Osmond*

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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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