

Resolution for the voluntary winding up of a company or close corporation - requirements

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Conclusions

Requirements resolution to wind up company:

It must be clear from the resolution that it was

- a special resolution; and
- adopted by the members of the company; and
- which provides for a creditors' winding up of an insolvent company ; or
- which provides for the voluntary winding up of a solvent company.

Requirements insolvent company - registration of resolution:

The following must be filed with the Companies and Intellectual Property Commission (CIPC):

- Form CM 26 under the old Act;
- The prescribed fee of R80 (R150 for late lodgement);
- The special resolution stating the section of the Act or paragraph of the memorandum or articles terms of which the resolution has been passed;
- Copy of the notice convening the meeting; or consent to waive the period of notice of the meeting (form CM 25); or consent to propose and pass special resolution at meeting of which notice has not been given (form CM25A);
- The resolution must be lodged within 30 days of the passing of the resolution.

After the registration of the resolution the Commission must without delay transmit a copy thereof to the Master who has jurisdiction in the area where the company has its registered office.

Requirements solvent company - registration of resolution

The following must be filed with the Companies and Intellectual Property Commission (CIPC):

- Resolution for the winding up of the company;
- Notice of the resolution on Form CoR 40.1;
- The prescribed fee of R250;
- A certificate that security for the debts within no more than 12 months after the start of the winding-up of the company has been secured to the satisfaction of the Master or consent by the Master to dispense with security (Form JM12).

When a resolution has been filed the Commission must promptly deliver a copy of it to the Master who has jurisdiction in the area where the company has its registered office.

Close corporations

The requirements are the same as for companies with the necessary changes to refer to a resolution by members of the close corporation.

Effect of non-compliance with requirements

If the resolution does not comply with the requirements or has not been registered, it is of no force or effect. Appointments pursuant to resolutions which are of no force or effect are invalid.

Resolution for the voluntary winding up of a company or close corporation - requirements

1. Companies

In terms of the decision in **Botha NO v Van den Heever NO** (attached) a resolution for the voluntary winding up of an insolvent company (creditors' voluntary winding up) must comply with section 349 of the old Companies Act 61 of 1973 and be registered on the old form CM26 (not the new form CoR 40.1). The requirements for the resolution for the voluntary winding up of a solvent company (members' voluntary winding up) is similar except that form CoR 40.1 must be used.

Although this aspect is not discussed in detail in the decision, it is clear that sections 199 and 200 of the old Act must be applied despite its repeal by the Companies Act 71 of 2008. See Item 9(1) of Schedule 5 of the Companies Act 71 of 2008 which provides as follows:

Despite the repeal of the previous Act, until the date determined in terms of subitem (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to subitems (2) and (3).

Chapter 14 continues to apply **as if the Act has not been repealed**, not as if Chapter 14 only has not been repealed.

A. COMPANIES REQUIREMENTS FOR RESOLUTION

In order to be valid the resolution for the winding up of the company must comply with the statutory provisions:

Section 349 of the old Companies Act 61 of 1973 provides as follows:

“349. Circumstances under which a company may be wound up voluntarily.

A company, not being an external company, may be wound up voluntarily if the company has by special resolution resolved that it be so wound up.”

Section 1 of the old Act defines a special resolution as follows:

“‘special resolution’, in relation to a company, means a resolution passed at a general meeting of that company in the manner provided by section 199.”

Section 80 of the new Companies Act 71 of 2008 provides as follows:

“80. Voluntary winding-up of solvent company

(1) A solvent company may be wound up voluntarily if the company has adopted a special resolution to do so, which may provide for the winding-up to be by the company, or by its creditors.”

Section 1 of the new Act defines a special resolution as follows:

‘special resolution’ means-

- (a) in the case of a company, a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution, or a different percentage as contemplated in section 65(10)-
- (i) at a shareholders meeting; or
 - (ii) by holders of the company's securities acting other than at a meeting, as contemplated in section 60; or...

REQUIREMENTS RESOLUTION TO WIND UP COMPANY:

It must be clear from the resolution that it was

a special resolution; and

adopted by the members of the company; and

which provides for a creditors’ winding up for an insolvent company (see section 351(1) below); or

which provides for a voluntary winding up for a solvent company (see section 80(1) above).

B. COMPANIES REGISTRATION OF THE RESOLUTION

Insolvent company – creditors’ winding up

Section 351 (1) of the old Companies Act provides as follows:

"A voluntary winding-up of a company shall be a creditors' winding-up if the resolution contemplated in section 349 so states, but such a resolution shall be of no force and effect unless it has been registered in terms of section 200."

Section 200 provides as follows:

"200. Registration of special resolutions. -(1) Within one month from the passing of a special resolution a copy of such resolution together with either a copy of the notice convening the meeting concerned or a copy of the consent contemplated in section 199 (3A), as the case may be, shall be lodged with the Registrar, who shall, subject to

the provisions of subsection (2), and upon payment of the prescribed fee, register such resolution, ...”

Section 199(1) provides as follows:

199. Requirements for special resolutions

(1) A resolution by a company shall be a special resolution if at a general meeting of which not less than twenty-one clear days’ notice has been given specifying the intention to propose the resolution as a special resolution, the terms and effect of the resolution and the reasons for it ...

Section 352 provides as follows:

“352. Commencement of voluntary winding-up

(1) A voluntary winding-up of a company shall commence at the time of the registration in terms of section 200 of the special resolution authorizing the winding-up.

(2) The Registrar shall forthwith after the registration by him of a special resolution referred to in subsection (1), transmit a copy thereof to the Master.”

Section 356 provides as follows:

“356. Notice of winding-up of company

“... (2) Any company which has passed a special resolution under section 349 for its voluntary winding-up, shall within 28 days after the registration of that resolution in terms of section 200 -

(a) lodge with the Master a certified copy of the resolution concerned, together with -

... (ii) in the case of a creditors’ voluntary winding-up, two certified copies of the statement referred to in section 363(1) [CM 100 statement of affairs] ; and

(b) give notice of the voluntary winding-up of the company in the *Gazette*.

(3) Any company which fails to comply with any provision of subsection (2) and every director or officer thereof who knowingly authorized or permitted such failure, shall be guilty of an offence.”

The Registrar of Companies in terms of the old Act is no more, so the resolution and notice of the meeting must be lodged with the Companies and Intellectual Property Commission (CIPC) instituted under the new Act.

REQUIREMENTS INSOLVENT COMPANY - REGISTRATION OF RESOLUTION:

The following must be filed with the Companies and Intellectual Property Commission (CIPC):

- Form CM 26 under the old Act;
- The prescribed fee of R80 (R150 for late lodgement);
- The special resolution stating the section of the Act or the paragraph of the memorandum or articles in terms of which the resolution has been passed;
- Copy of the notice convening the meeting; or consent to waive the period of notice of the meeting (form CM 25); or consent to propose and pass special resolution at meeting of which notice has not been given (form CM25A);
- The resolution must be lodged within 30 days of the passing of the resolution.

After the registration of the resolution the Commission must without delay transmit a copy thereof to the Master who has jurisdiction in the area where the company has its registered office.

Solvent company – members' winding up

Winding up of a solvent company is dealt with in terms of the new Companies Act 71 of 2008.

Section 80 provides as follows:

(2) A resolution providing for the voluntary winding-up of a company must be filed, together with the prescribed notice and filing fee. ...

(3) If a resolution contemplated in this section provides for winding-up by the company, before the resolution and notice are filed the company must-

(a) arrange for security, satisfactory to the Master, for the payment of the company's debts within no more than 12 months after the start of the winding-up of the company; or

(b) obtain the consent of the Master to dispense with security, which the Master may do only if the company has submitted to the Master-

(i) a sworn statement by a director authorised by the board of the company, stating that the company has no debts; and

- (ii) a certificate by the company's auditor, or if it does not have an auditor, a person who meets the requirements for appointment as an auditor, and appointed for the purpose, stating that to the best of the auditor's knowledge and belief and according to the financial records of the company, the company appears to have no debts. ...

(6) A voluntary winding-up of a company begins when the resolution of the company has been filed in terms of subsection (2).

(7) When a resolution has been filed in terms of subsection (2), the Commission must promptly deliver a copy of it to the Master.

File when used as a verb is defined as follows in section 1 of the Act:

'file', when used as a verb, means to deliver a document to the Commission in the manner and form, if any, prescribed for that document;

Regulation 40(1) of the Companies Regulations, 2011 provides that a resolution by a solvent company to wind up must be filed with Form CoR 40.1.

REQUIREMENTS SOLVENT COMPANY - REGISTRATION OF RESOLUTION

The following must be filed with the Companies and Intellectual Property Commission (CIPC):

- **Resolution providing for the winding up of the company;**
- **Notice of the resolution on Form CoR 40.1;**
- **The prescribed fee of R250;**
- **A certificate that security for the debts within no more than 12 months after the start of the winding-up of the company has been secured to the satisfaction of the Master or consent by the Master to dispense with security (Form JM 12).**

When a resolution has been filed the Commission must promptly deliver a copy of it to the Master who has jurisdiction in the area where the company has its registered office.

2. CLOSE CORPORATIONS

Section 1 of the Close Corporations Act 69 of 1984 (as amended by the Companies Act 71 of 2008) provides as follows:

'this Act' includes the regulations, and any regulations made in terms of the Companies Act, to the extent that they apply to this Act.

Section 10(3) provides as follows:

(3) Regulations made by the Minister in terms of section 29(4) and (5), and 30(7) of the Companies Act apply to a corporation as if those regulations had been made in terms of this Act, but any reference in those regulations to a company must be read as a reference to a corporation.

Section 66 provides as follows:

66. Application of Companies Act, 1973

(1) The laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act, read with the changes required by the context, apply to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act. ...

(2) For the purposes of subsection (1) - ...

(b) a reference to a special resolution -

(i) referred to in sections 340 (2), 350 (1), 351 (1), 352, 356 (2), 357 (3) and (4), 359 (1), 362 (1) and 363 (1) of the Companies Act, shall be construed as a reference to a written resolution for the voluntary winding-up of a corporation in terms of section 67 of this Act; ...

Section 67 (as amended by Act 71 of 2008) provides as follows:

67. Dissolution of corporations

(1) Part G of Chapter 2 of the Companies Act, read with the changes required by the context, applies to a solvent corporation.

(2) This Part of this Act must be administered in accordance with the laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act.

The reference to a resolution in terms of section 67 is an error because after amendment of the Close Corporation Act by the Companies Act 71 of 2008 section 67 does not deal with a resolution for winding up. As indicated above, section 67 now provides that Part G of Chapter 2 of the Companies Act 71 of 2001 applies to a solvent corporation and Part 9 of the Close Corporations Act dealing with winding-up must be administered in accordance with the laws contemplated in item 9 Schedule 5 of the Companies Act, meaning the provisions applicable to insolvent companies. Form CK6 for the registration of a resolution for the winding up of a close corporation has in effect been repealed and the Companies Acts forms must be used – form CM26 for an insolvent corporation and form CoR40.1 for a solvent corporation – with the necessary changes to refer to a resolution by members of the close corporation.

REQUIREMENTS FOR CLOSE CORPORATIONS

The requirements are the same as for companies with the necessary changes to refer to a resolution by members of the close corporation

EFFECT OF NON-COMPLIANCE WITH REQUIREMENTS

If the resolution does not comply with the requirements or has not been registered, it is of no force or effect. Appointments pursuant to resolutions which are of no force or effect are invalid (**Botha NO v Van den Heever NO** [22] and [23]).