



Companies and Intellectual
Property Commission

a member of the dti group

**NON-BINDING OPINION
IN TERMS OF
SECTION 188 (2) (b) OF THE COMPANIES ACT, 2008**

SUBJECT: INTERPRETATION OF SECTION 16 (9) OF THE COMPANIES ACT, 2008, IN RELATION TO THE DATE ON WHICH AN AMENDMENT OF A MEMORANDUM OF INCORPORATION OF A COMPANY TAKES EFFECT AND THE MEANING OF "FILING"

1. Werksmans Attorneys, per Mr. P le Roux, requested the CIPC to provide it with a non-binding opinion in terms of section 188 (2) (b) of the Companies Act, 2008, on the interpretation of section 16 (9) of the Act. The relevant provision reads as follows:

“(9) An amendment to a company’s Memorandum of Incorporation takes effect –

(a) in the case of an amendment that changes the name of the company, on the date set out in the amended registration certificate issued by the Commission in terms of subsection (8), read with section 14 (1) (b) m(iii); or

(b) in any other case, on the later of –

(i) the date on, and time at, the Notice of Amendment is filed; or

(ii) the date, if any, set out in the Notice of Amendment.”

2. Werksmans express the view, with which the CIPC is in agreement, that in practice it is very important for companies to understand when an amendment to their Memorandum of Incorporation becomes effective and questions the CIPC’s perceived approach that special resolutions to amend a Mol must be **registered** by the CIPC.

3. Werksmans contend –

“According to our opinion, when a company elects that an amendment to its Mol becomes effective on the date that the Notice Form CoR 15.2 is filed, its Mol will be amended from the date it is delivered to the Commission.

However, we are not sure that this view is shared by the CIPC. For instance we have noticed that in notices to customers dated 26 April 2011 and 29 July 2011 reference is made to ‘Special Resolutions to be **registered** with CIPC’. This resulted in uncertainty. The question now arises whether CIPC is of the view that some sort of registration must take place to complete the filing referred to in the Companies Act. Our view is that the Act does not support such an interpretation.

This also raise the question whether the CIPC considers itself responsible to review the content of a Mol or special resolution and to refuse registration or filing if it does not agree with the content thereof.

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If our interpretation as set out in 4 is correct and an amendment becomes effective on delivery there remains nothing to reject. If the CIPC is of the view that some sort of registration is required and it refuses that registration it will have no effect as filing has already taken place.

In our view CIPC is accordingly not obliged to read or consider the content of a special resolution and cannot refuse to accept filing provided it is done on and in accordance with the prescribed forms."

4. Werksmans then request the CIPC to confirm that –

- "(a) Filing as prescribed by 16 (9) (b) (i) of the Act of a special resolution (other than one amending the name) amending an Mol will (if that alternative has been selected) be completed the moment the special resolution, the Form CoR 15.2 and the appropriate fee has been delivered to the CIPC and that the amendment will be effective from that moment;
- (b) The confirmation received from the CIPC of registration or receipt of filing is merely of an administrative nature to act as evidence of the date that filing of the special resolution has been received. The refusal of the CIPC to issue such a confirmation does not affect the fact that the amendment has become effective on the date of delivery of the special resolution to the CIPC; and
- (c) The CIPC does (not?) register a(s?)rs special resolution amending an Mol and does not review the content of the Mol."

5. The CIPC acknowledges that "register" might have been an unfortunate choice of word in the notices to customers in relation to the filing of special resolutions for amendment of the Mol but it cannot agree that mere delivery constitutes an effective filing of an amendment to a Mol. The position of the CIPC under the Act is unfortunately not that simple and the CIPC as an office of company records, is in terms of both the Act and the Regulations required to also verify certain information and therefore **acceptance** of the Form CoR 15.2 is required in addition to filing to constitute effective filing. In general terms the CIPC is entitled to reject/not accept the filing of a specific document in the following circumstances:

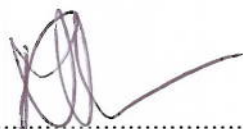
- When the prescribed fee for that document/form has not been paid;
- When the information required to be completed on the document is incomplete;
- When the company could not be properly identified – for instance, the company name and registration number do not match;
- When the document/form is not signed;
- When the CIPC is unable to confirm the identity of the person filing the document/form (reg 168);
- When the CIPC is unable to verify that the person filing the document/form has the right to file that document or is authorised to file it on behalf of another person who has the right to file it (reg 168). (In the latter two instances the CIPC's refusal to accept a document might be taken on direct appeal to the Companies Tribunal)

Should the filing be accepted by the CIPC after these additional requirements have been satisfied, the amendment would be effective in accordance with the option elected on Form CoR 15.2 in terms of section 16 (9) of the Act.

6. It is submitted that the CIPC further has the right and the duty to also ensure that the amendment filed with it complies with any further requirements that the Act or Regulations may have in relation to a particular amendment. For certain changes of a Mol additional requirements are set, e.g. for the conversion of par value shares into no par value shares regulation 31 (5) requires that a report by the board dealing with certain matters must be filed with the resolution. In cases of this nature it is the duty

of the CIPC to ensure that these requirements have been met. Furthermore in cases where an amendment of the Mol would result in a contravention of or non-compliance with the Act, e.g. an amendment setting the minimum number of directors for a public company lower than three or an amendment increasing the number of authorised par value shares of a pre-existing company, it would be incumbent on the CIPC to bring that fact to the attention of the company and not to accept that amendment.

7. Should filing be complete upon mere delivery, as Werksmans would like to believe, great uncertainty would be created as valid and invalid amendments of a Mol (and other company documents) would be placed on file as official documentation pertaining to the company concerned and interested persons would have to approach the court in many cases for a determination of validity.
8. In the light of the above observations the CIPC does not regard any document as effectively filed unless it has been accepted as complying with the criteria set out in paragraph 5 above and it also complies with any additional requirements of the Act or Regulations referred to in paragraph 6.
9. It is important to note that the filing of a document might also be undone when a company challenges such filing in terms of regulation 168 (6) and (7).



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Adv Rory Voller
Deputy Commissioner
2 November 2011