

Don't mince your words when making payment holiday requests

By [PJ Veldhuizen](#)

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Financial managers are going to be kept busy over the next few months, prioritising payments, hopefully keeping people in their jobs, and managing the expected Covid-19 financial disaster. In negotiations with landlords, banks, financial institutions and creditors, getting the wording wrong in your notices can have severe consequences and open your business up to insolvency, liquidation or business rescue petitions and proceedings.



PJ Veldhuizen, Gillan and Veldhuizen Incorporated

Most businesses, other than those providing essential services, are faced with a complete lockdown, i.e. will not be permitted by law to operate. This will affect each business's ability to fund current and ongoing supplier and other commercial costs. In this situation (particularly in lease agreements) both parties are unable to perform reciprocally in terms of the agreement, but there's a big difference between requesting a payment moratorium and admitting that you are unable to honour payments.

The Companies and Intellectual Property Commission (CIPC), in its recent practice notice, stated that in light of Covid-19, it will not invoke its powers to issue compliance notices in accordance with Section 22 of the Companies Act to companies who are "temporarily trading in insolvent circumstances" if it believes that this is due to conditions caused by the pandemic.



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Insolvency Act

However, according to Section 8(e) of the Insolvency Act, a debtor commits an act of insolvency if he "makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts", or (g) "gives notice in writing to any one of his creditors that he is unable to pay any of his debts".

Sending a notice of your inability to pay your debt is an admission of liability and is going to leave you vulnerable, no matter what the CIPC assures. These disclosures entitle your creditors to institute winding-up proceedings against you. It is a little known fact that these communications are *not* privileged even if marked “without prejudice” and can be used in court proceedings.

Businesses must acknowledge the amount owed to a supplier and undertake to make the payment in due course. We are advising our clients not to request a release from any indebtedness but simply to apply for a moratorium until regular trade re-commences.

ABOUT THE AUTHOR

PJ Veldhuizen, Gillan and Veldhuizen Incorporated

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