



The Non-Profit Lawyer

NPO Legal Issues

Keeping an eye on non-profit laws

Volume 14:
Sept/Oct 2011

GLOBAL FORUM ON CIVIL SOCIETY LAW 2011

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ABOUT NPO LEGAL ISSUES:

This is an electronic newsletter published by:

RICARDO WYNGAARD ATTORNEYS which is aimed at updating the non-profit sector on relevant legal issues.

IN THIS EDITION:

- [Global Forum on Civil Society Law 2011](#)
- [Professional Fundraisers and the Consumer Protection Act](#)
- [National Wills Week](#)

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ATTORNEYS is a law practice that specialises in rendering advice and assistance on non-profit law and governance.

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The Global Forum on Civil Society 2011 was hosted by the *International Center for Not-for-Profit Law* (ICNL) in Stockholm, Sweden from August 21-23, 2011. The Forum was attended by more than 200 global leaders from civil society organisations, governments, multilateral institutions, and the donor community representing over 80 countries. The Forum covered a range of diverse topics impacting on civil society law

I was, amongst other, asked to participate in a panel discussion entitled: *We have got a New Law Governing CSOs, Now What?* The session was aimed at considering innovative ways to deal with the real challenge of ensuring effective implementation and compliance with noble laws governing or affecting civil society organisations.

It was clear from the panel discussion that laws itself are not a guarantee of an enabling environment. Ensuring effective implementation of legislation is equally important. Laws that are not effectively implemented can have negative implications for a country's enabling environment. Delegates at this session of the Forum came up with some innovative and concrete proposals to ensure effective implementation of legislation. Proposals included; the need for civil society to establish constructive relationships with institutions responsible for implementation; paying careful attention to the preparation of regulations to be promulgated in terms of legislation; ensuring that formal and informal mechanisms are in place to monitor the implementation of legislation; and regularly evaluating the effectiveness of such implementation.

South Africa has one of the most enabling legal environments for non-profits in the world. The Nonprofit Organisations Act is, for example, aimed at encouraging and supporting nonprofit organisations in their contribution to meeting the diverse needs of the population of the Republic by creating an environment in which NPOs can flourish.

However, South Africa sadly has many good laws that are poorly implemented. For example, the dismal start of the Companies and Intellectual Property Commission (the Commission) has, in my opinion, made the incorporation of a non-profit company in South Africa a less appealing option compared to other non-profit entities. The Commission has simply failed to live up to the noble objectives contained in the Companies Act of 2008.

The sample Memoranda of Incorporation have proven to be more complicated compared to the old Memorandum and Articles of Association. Furthermore, the Commission has in some instances retained the prehistoric practice of requiring companies to incur the additional expense of appointing Pretoria-based correspondents to physically collect documents at the offices of the Commission. It is difficult to understand how this practice is aimed at creating flexibility and simplicity in the formation and maintenance of companies, as captured in the Companies Act of 2008.

The situation is unfortunately not much better when dealing with other institutions responsible for the implementation of laws affecting civil society organisations. Civil society in South Africa will have to become more involved in ensuring that good laws are not nullified through poor implementation. The Department of Trade and Industry and its counter-parts responsible for implementing civil society law can clearly benefit from the above proposals that came from delegates at the Forum.

Professional Fundraisers and the Consumer Protection Act

By Ricardo Wyngaard

National Wills Week

National Wills Week will take place from **17 to 21 October 2011**. According to the Cape Law Society; "The aim of this campaign is twofold: to make attorneys' services better known to the public and improve the image of the profession; and to encourage members of the public who would not normally make use of the services of an attorney, or who may hesitate to consult an attorney for fear of the possible high fees, to consult an attorney to draft a basic will."

The Cape Law Society further states that; "During this period members of the public will be able to approach an attorney participating in the National Wills Week initiative to receive an explanation of the advantages of having an attorney draft a will, as well as the necessity of having a properly and professionally drafted will. A basic will is then executed free of charge. No existing wills will be redrafted or amended. Interviews with the clients may be conducted at the office of the participating attorney."

The National Wills Week is a joint initiative of the six constituent members of the Law Society of South Africa (the Cape Law Society, the Law Society of the Free State, the KwaZulu-Natal Law Society, the Law Society of the Northern Provinces, the Black Lawyers Association and the National Association of Democratic Lawyers).

To obtain a list of attorneys participating in National Wills Week, please visit:
<http://www.lssa.org.za> and click on *For the Public*.

The Consumer Protection Act (CPA) has brought about important changes for professional fundraisers who conduct fundraising activities on behalf of non-profit organisations. The definition of an *intermediary*, in terms of the CPA, includes a person who, in the ordinary course of business and for remuneration or gain, engages in the business of representing another person with respect to the actual or potential supply of any goods or services. The term *service* includes, in terms of the CPA, any work or undertaking performed by one person for the direct or indirect benefit of another. This would include, in my view, a person who fundraises on behalf of a non-profit organisation and receives payment for such service.

Section 27 (1) of the CPA provides, amongst other, that an intermediary must disclose prescribed information to any person whom the intermediary solicits and keep the prescribed records of all relationships and transactions contemplated in that section. The CPA Regulations provides that an intermediary must, amongst other:

- disclose his, her or its full names, physical business address, postal address, phone numbers, cellular telephone number, facsimile number, email address;
- provide his or her identity number, or registration number;
- specify the exact service to be rendered by the intermediary;
- at the request of the consumer, disclose the fee payable to the intermediary for services provided by the intermediary including the basis for calculating the fee; and
- inform the consumer of any other costs the intermediary is entitled to recover from the consumer, and under what circumstances.



Panellists: Stephen Klingenhofer, Ricardo Wyngaard, Edmond Tubanambazi and Jorge Estrella at the Global Forum for Civil Society Law 2011

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