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STARTING A NPO IN SOUTH AFRICA

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ABOUT NPO LEGAL ISSUES:

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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 NPO Act of 1997 is in essence aimed at providing an *environment in which nonprofit organisations can flourish*. For many NPOs in South Africa the reality is very different. Starting a NPO in South Africa has become a distressing journey and this article explores some of the *practical challenges* that you can expect if starting a NPO in South Africa in 2012.

There are in essence three kinds of legal entities available when starting a NPO, namely; voluntary association, non-profit trust and non-profit company.

Voluntary Association

The voluntary association is the most popular legal entity being used for setting up a NPO in South Africa because it is fairly quick, inexpensive and easy. The NPO Directorate has reported that voluntary associations represent 95% of the organisations that are registered in terms of the NPO Act. It is the ideal legal vehicle for community-based organisations.

A practical challenge is that a voluntary association will not be able to open a bank account unless it is registered in terms of the NPO Act. The NPO Directorate reports that the *Financial Intelligence Centre Act* had made NPO registration a condition for financial institutions to open a banking account in the name of such organisations. While a voluntary association waits on its NPO certificate, it will not be able to receive funds into its own bank account. Neither can it apply for approval as a public benefit organisation because it must reflect its banking particulars on the EI 1 application form.

Even though the director for NPOs is legally required to register compliant NPOs within two months after having received their applications, the waiting period is approximately 6 months, in some cases it can be longer. This means that those setting up a voluntary association in January 2012 should only expect to be registered during June 2012 (if lucky) after which a bank account can be opened.

Non-Profit Company

Setting up a non-profit company in 2012 can be an even more discouraging experience. The Companies and Intellectual Property Commission (the Commission) is responsible for the incorporation of non-profit companies. The Commission had a rather embarrassing start in 2011 and has, in my opinion, failed to live up to the noble objectives contained in the Companies Act of 2008. Swift registration of companies appears to be a foreign concept at the Commission as it is apparently battling with historical backlogs. The Commission and NPO Directorate are seemingly competing for the fashionable prize of *Slowest Processing Times*.

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. Seemingly, the only beneficiaries of this practice are the Pretoria-based correspondents. **RWA** was advised by the Commission that; *“the matter will be addressed in the next financial year (April 2012) due to resource implications that it has for Commission.”*

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During November 2011 **RWA** also discovered that the Companies Tribunal, which should assist with the resolution of disputes in terms of the Companies Act, has not yet been appointed by the Minister of Trade and Industry.

Non-Profit Trust

Non-profit trusts are registered in terms of the Trust Property Control Act and the Master of the High Court is responsible for the registration of trusts. There are fourteen regional offices throughout the country. Our experience has been predominantly with the Cape Town office and we have found the Cape Town office to be expedient and effective in registering non-profit trusts. In recent months it has taken on average two weeks to register a non-profit trust at the Cape Town office. A trust is able to open a bank account after being registered. The experience per region may however differ. For example, our interaction with the Master's office in *Thohoyandou* during 2011 has been less exciting. It took close to three months for that office to do absolutely nothing with an application to register a new trust. No acknowledgement of receipt of the application was received during the three-month period from that office.

Registration in terms of NPO Act

NPOs that want to apply for government funding must ordinarily be registered in terms of the NPO Act. The NPO Directorate reported that: *"During the 2010-2011 financial year, the Department [of Social Development] received 15 265 applications from organisations seeking registration status."* This represented a 14% increase from the previous year. As pointed out earlier, applications for registration in terms of the NPO Act are still significantly delayed.

Recently the NPO Directorate has returned an application to register a trust to a client organisation. The reason offered for refusing to register was because copies of the *Trust Deed* and the *Letters of Authority* were not included in the application. The client organisation confirmed that those documents were safely in the envelope which was returned to them. It took the NPO Directorate more than three months to return this application for the wrong reasons. On page 84 of the 2011 Annual report of the Department, it states that; *"the registration period [of NPOs] was reduced from five months to four weeks"*. This has definitely not been our experience and it is probably void of all truth.

It also appears that the Minister of Social Development has since April 2011 failed to appoint a panel of arbitrators of at least seven persons as required in terms of the NPO Act. It is not clear how disputes in terms of the NPO Act will be dealt with during 2012.

Conclusion

South Africa has, on paper, one of the most enabling legal environments for NPOs. However, the environment is not very enabling when starting a NPO. Sadly, community-based groupings are worst affected as the cheapest legal vehicle could also take the longest to become fully operational.

It begs the question whether the South African government has paid serious attention to section 3 of the NPO Act which provides that; *Within the limits prescribed by law, every organ of state must determine and co-ordinate the **implementation** of its policies and measures in a manner designed to promote, support and enhance the capacity of nonprofit organisations to perform their functions.* Effective *implementation* is clearly lacking in some instances. The Supreme Court of Appeal a short time ago stated that the National Lotteries Board does not appear to understand its mandate properly. Perhaps the same holds true for some other institutions dealing with NPOs. Many organisations are playing a significant role in taking care of the needs of destitute and marginalised South Africans. This in turn alleviates the burden on the state which should at least ensure that there is compliance with the legal obligation contained in section 3 of the NPO Act.

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