NPO Legal Issues
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THE COMPANIES ACT OF 2008

By Ricardo Wyngaard

Article Three: Finances of the new non-profit company

This third article focuses on the financial reporting requirements for non-profit companies under the new Companies Act of 2008 (the new Act).

Financial Reporting requirements

Section 30 of the new Act requires all non-profit companies to each year prepare annual financial statements within six months after the end of its financial year.

All financial statements of the non-profit company (not only those prepared annually) must comply with the following conditions laid down in the new Act:

- The prescribed standards for financial reporting, if any,
- Present the state of affairs and business of the company fairly,
- Explain the transactions and financial position of the business of the company,
- Show the company's assets, liabilities and equity, income and expenditure,
- Set out the date of its production and the accounting period, and
- State on its first page:
  - Whether the reports have been audited, independently reviewed, or neither, and
  - The name and professional designation of the individual who prepared or supervised the preparation of the statements.

In addition, the *annual* financial statements of a company must include a report approved by the board and signed by an authorised director covering the company's state of affairs, the business and profit or loss of the company. Summaries of financial statements are allowed, but it must comply with the requirements stipulated in the new Act.

The Minister of Trade and Industry may make regulations prescribing financial reporting standards which may establish different standards for non-profit and profit companies.

Consequences of non-compliance

Companies must not prepare incomplete or materially false or misleading financial statements. Any *person* who participates in the preparation, approval, dissemination or publication of financial statements that are materially false or misleading or do not comply with the bullet points listed above – is guilty of an offence. A person convicted of such an offence may face up to ten years' imprisonment.

Under the Companies Act of 1973 only directors or officers of the company could be found guilty of this kind of offence and could only face up to two years' imprisonment. Compared to its predecessor, the new Act is wider in its application and it opened the door for harsher penalties.

● To page 2

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.

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

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Finances of the new non-profit company/…

- **From page 1**

Auditing of Reports

Non-profit companies are not required to prepare audited financial statements, but may choose to have their financial statements audited voluntarily or independently reviewed. The Minister of Trade and Industry is expected to make regulations that will prescribe the manner, form and procedures for conducting an independent review and professional qualifications required of a person who may conduct such a review.

Non-profit companies may, in terms of the new Act, either publish: (a) audited financial statements, (b) financial statements that are independently reviewed, or (c) financial statements that are neither audited nor independently reviewed.

The best option for each non-profit company will depend on its individual needs and requirements. For example, even though the NPO Act of 1997 only requires a written report compiled by an accounting officer (not an auditor) to be submitted annually, some NPOs (that are not s21 companies) still prefer audited financial statements. Having audited financial statements may also be a prerequisite for some donor funding.

It should also be kept in mind that the King Report on Governance (King III) recommends that all NPOs should voluntarily appoint an audit committee. The audit committee should consist of at least three members.

King III also provides that 'there should be a basic level of qualification and experience for audit committee membership'. The audit committee should have an understanding of a wide range of issues, namely: integrated reporting, internal financial controls, external audit process, corporate law, risk management, sustainability issues, and information technology governance. Time will tell whether this is realistic for all NPOs.

Report on Seminar:

On 21 November 2009 Ricardo Wyngaard from RWA and Ric Amansure from RA Consulting Services co-presented a Seminar entitled: **Accessing Corporate Funding** in association with CCFm (107.5) in Muizenberg, Cape Town. The seminar was supported by Metropolitan Health Group.

Topics covered included: organisational credibility, compliance, King III, board evaluation, harnessing influence, endorsements, relationship building, branding and proposal letters.

Fifty people attended the workshop and the feedback was remarkably positive. Thirty-six of the participants, who completed the forty-one evaluation forms, indicated that the content of the seminar was excellent.

Participants were provided with a CD containing relevant resource materials. Three participants also each received a copy of Frank Julie's book entitled: **The Art of Leadership and Management on the Ground** which the author donated in support of the seminar.

SEMINAR: Ric Amansure from RA Consulting presenting on Accessing Corporate Funding

CODE NAME: B-BBEE – EPISODE 2

By Ricardo Wyngaard

This is the second of a two-part article focusing on the relationship between NPOs and the Broad-Based Black Economic Empowerment Codes of Conduct (the Codes). This article explores how NPOs can position themselves to gain from the application of the Codes.

Brief Introduction:

The first four elements on the scorecard, namely; ownership, management control, employment equity and skills development are dealing with the internal structures of the enterprise being measured (internal elements). The remaining three elements; preferential procurement, enterprise development and socio-economic development are dealing with the measured enterprise's relationships with outside parties (external elements). NPOs can potentially gain from the last four elements on the generic scorecard.

Internal Elements:

The first three elements on the generic scorecard, namely: *ownership*, *management control* and *employment equity* are not relevant for purposes of this article.

Skills Development – Recognition is given to measured enterprises under this element for: firstly, skills development expenditure incurred for black employees on any programme specified in the Learning Programme Matrix (the Matrix), and secondly, for the participation of black employees in certain learnerships specified in the Matrix.
Seven categories of programmes are listed on the Matrix ranging from institutional instruction to informal training.

Suitable NPOs (especially those focused on ABET activities) may be appointed by measured enterprises to conduct work-based learning programmes reflected on the Matrix for their black employees. Increased recognition is generally given to learning programmes that are accredited, formally assessed and recognised as credits against registered unit standards. Occupationally directed conferences, seminars, short courses and workshops are also recognised programmes on the Matrix.

Enterprises will only receive points if they:

- ✓ comply with the Skills Development Act,
- ✓ comply with the Skills Development Levies Act,
- ✓ are registered with a SETA,
- ✓ have developed a Workplace Skills Plan, and
- ✓ have implemented programmes targeted at developing *Priority Skills* generally and specifically for black employees.

External elements:

Preferential Procurement – In essence, this element measures the services and goods being bought by measured enterprises from other entities that are BEE compliant. Measured enterprises should procure services from other BEE-compliant enterprises. The Codes provide incentives for procurement from Qualifying Small Enterprises (QSEs) and Exempted Micro Enterprises (EMEs) by allocating specific scorecard points for procurement from such entities.

- **To page 4**

Code Name: B-BBEE/...

- **From page 3**

BEE compliant NPOs carrying on trading activities may gain from the application of the Codes, through the procurement of their services and products by measured enterprises.

Enterprise Development – Measured enterprises would receive points on this element for initiatives that contribute towards 'qualifying' enterprise development. There are two foundational requirements for enterprises to receive points through this element.

- *Firstly*, the intention of such initiatives must be for '*assisting or accelerating the development, sustainability and ultimate financial and operational independence*' of the beneficiaries.
- *Secondly*, enterprise development contributions must be made to beneficiaries as defined in the Codes (which include EMEs and QSEs that are 50% black or black women owned).

NPOs fall outside of the definition of '*beneficiary entity*' because one of the required elements for this definition is ownership by black people. As pointed out in the first article, NPOs do not have owners.

Payments by measured enterprises to NPOs to perform enterprise development on their behalf are recognised by the Codes as enterprise development contributions. NPOs focusing on business development can therefore offer their services to enterprises to assist with enterprise development.

Socio-Economic Development – This element allows measured enterprises to receive points when making contributions in favour of beneficiaries with the aim of facilitating sustainable access to the economy for those beneficiaries. The beneficiaries can either be black individuals or communities or groups. In the case of communities and groups the full value of contributions is only recognised when at least 75% of the beneficiaries are black. If black people represent less than 75% of the beneficiaries, the value of the contribution is determined on a percentage based.

Payments by measured enterprises to NPOs to perform socio economic development on behalf of such enterprises are recognised by the Codes as socio-economic contributions. NPOs focusing on socio-economic development activities can therefore offer their services to enterprises to assist with socio-economic development.

Conclusion:

These two articles have only offered a glance at the obligations and opportunities that the Codes hold for NPOs in South Africa. The Codes are still in its infant stages (it only came into operation on 9 February 2007) and non-profits should look at innovative ways to partner with the corporate world to make the objectives underlying the Codes a reality for the majority of South Africans.