



THE COMPANIES ACT OF 2008

By Ricardo Wyngaard

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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Article Five: The non-profit company and the non-profit trust

This fifth article compares key aspects of a non-profit trust under the Trust Property Control Act of 1988 (the Trust Act) and a non-profit company under the Companies Act of 2008.

The legislation:

These two acts differ significantly in size. The Trust Act consists of 27 sections which can easily fit into 6 pages. The Companies Act of 2008 has over 200 sections and, together with its regulations, cover well over 200 pages. Despite the difference in size, a number of court decisions have, over the years, given meaning and content to the Trust Act. The courts will also further interpret the Companies Act when it comes into operation.

Legal Status

The difference in legal status of these two entities has, at times, created some confusion. Unlike the nonprofit company, which is a juristic person, in terms of section 19 Of the Companies Act, a trust is a unique form of entity that does not have separate legal personality. The implication is that a separate juristic person created through a non-profit company, but a separate legal person is not created with the establishment of a non-profit trust. The Supreme Court of Appeal has found that it is incorrect to refer to a trust as a 'separate legal entity'. This means that the assets and liabilities in a trust vest in the trustees in their official capacity, but not in their personal capacity.

Duties of Directors and Trustees

The duties of directors are more clearly reflected in the Companies Act. The Trust Act is scant in reflecting the duties of trustees. Section 6 of the Trust Act provides that trustees must in the performance of their duties and the exercise of their powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another. The courts have provided additional clarity on what the duties of trustees are. For example, the courts have made it clear that trustees must avoid a clash of their own interest with that of the trust.

The Companies Act now codified a number of standards that directors must comply with. These standards are no doubt aimed at increasing the levels of accountability, transparency and corporate governance within companies.

Liability

Even though a non-profit trust is not a body corporate, the trustees are not automatically personally liable for the debts of the trust. In fact, trustees are not more liable in their personal capacity compared to directors of a company. Both directors and trustees may be held liable if they are in breach of their legal duties.



Risk Management: Legal Issues - Part 2

Non-profit Organisations generally enter into a wide range of contracts with different parties, including; employees, donors, volunteers and service-providers. In fact, the constitution of a voluntary association is actually a contract between its members (see *Vol. 2*). Some contracts are more complex than others, but all contracts will usually impose obligations on the organisation. These contracts may, if not properly managed, pose significant risks to the organisation's assets, income, reputation and human resources.

Clear procedures should be followed whenever an organisation enters into a contract with another party. Any person entering into a contract on behalf of the organisation must be properly authorised to do so. It is advisable to have a lawyer reviewing a contract before signing it.

Once a contract is in place, the board must ensure that the organisation complies with its contractual obligations. Boards should consequently develop clear procedures to manage organisational contracts, including, the preparation, negotiation, examination, authorisation, storage and monitoring thereof.

Some questions to keep in mind in this regard:

1. *Has the organisation got written policies for entering into contracts?*
2. *Does the board authorise all organisational contracts?*
3. *Are contracts reviewed by an attorney?*
4. *Has the board got access to a list of all the organisational contracts?*
5. *Are new board members informed of key contractual obligations of the organisation?*
6. *Are organisational contracts kept at a safe location?*
7. *Who is responsible to oversee compliance with organisational contracts?*

Comparing trust and company/

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The Companies Act is more explicit on the duties of directors and their potential for liability. A director of a non-profit company may be held liable for any loss, damages or costs sustained by the company in situations where there has been:

- a breach of fiduciary duty,
- failure by the director to deal with a personal financial interest, and
- failure by a director to act in good faith and for a proper purpose.

The Companies Act has also extended potential liability to committee members appointed by the board – even though such committee members are not members of the company.

Record-keeping, Reporting & Regulation

The Trust Act does not require trustees to submit audited financial statements to the Master of the High Court. This may however be required by the trust deed and it is common for non-profit trusts to appoint an auditor (or accounting officer) because the Master may require trustees to otherwise furnish security. The Master may request trustees to account for the trust property and to deliver any document relating to the trust property.

Companies, on the other side, are more comprehensively regulated. The Companies Act regulates the preparation and content of annual financial statements of non-profit companies (for more detail see *Vol. 5*). Non-profit companies may be audited, independently reviewed or neither. It is expected that the Companies Act regulations will compel certain non-profit companies to be audited.

Conclusion:

Groups that want to establish a non-profit organisation (other than a voluntary association) will have to carefully compare the legal and other differences between a non-profit trust and non-profit company.

Professional Fundraising Workshop for NPOs

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THE FINANCIAL INTELLIGENCE CENTRE AMENDMENT ACT, 2008

IMPLICATIONS FOR NON-PROFIT TRUSTS

By Ricardo Wyngaard

Non-profit trusts will in the future have to comply with additional registration and reporting requirements or trustees may have to face fines or imprisonment. This will be the case when the Financial Intelligence Centre Amendment Act of 2008 which has already been assented to by President, comes into operation in its current format.

Any person that invests, keeps in safe custody, controls or administers trust property within the meaning of the Trust Property Control Act of 1998 is considered an accountable institution in terms of the Financial Intelligence Centre Act of 2001 (FICA). This would include, in my view, all non-profit trusts with trust property (whether movable or immovable).

The new section 43B of FICA, as introduced by the Amendment Act of 2008, will require all accountable institutions to register with the Financial Intelligence Centre (Centre) within a prescribed manner and period. The Centre must also be notified of any changes to the registration details. The Centre would be able to issue directives to ensure monitoring and compliance with FICA.

The amendments, when coming into operation, will also allow inspectors to enter and inspect any premises at which the Centre reasonably believes the business of an accountable institution is conducted. Inspectors will, in certain instances, be able to direct persons to appear for questioning, produce documents and furnish information. Inspectors will also be able to open any strongroom or safe and use any computers system on the premises to access data. Accountable institutions will have to provide reasonable assistance to inspectors in performing their functions. The Centre may also recover expenses involved with the inspection from the accountable institution.

The Centre may, after having complied with procedural requirements, impose administrative sanctions if an accountable institution fails to comply with FICA or the Centre's directives. The administrative sanctions may include a reprimand, the suspension of certain specified business activities or a financial penalty of not more than R10million for any natural person and R50million for any legal person.

An accountable institution that fails to register with or provide information to the Centre is guilty of an offence and may, upon conviction, be liable to a fine of up to R100m or a maximum of 15 years' imprisonment.

It is not clear when these amendments will come into operation. It is however important to note that FICA imposes further obligations on accountable institutions and this article only highlights some of the changes that will be introduced when the Amendment Act comes into operation. Those who want to establish a new organisation will have to also take into account the implications of FICA when choosing a legal structure.

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