



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.

IN THIS EDITION:

- **Article Seven:**
Companies Amendment Bill

FROM THE COURTS

- Judgment against National Lotteries Board – Phiroshaw Camay
- Judgment against Dept of Social Development Free State

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

SUBSCRIBE:

To subscribe free of charge send an email with NEWSLETTER typed in the subject-line to:
meagon@nonprofitlawyer.co.za

DETAILS:

Postal:

P.O. Box 214, Eerste River, 7103

Physical:

2137, Somerset Links, Reese Road, Somerset West, 7130

Tel: +27 21 852 7800

Fax: +27 86 538 8435

ricardo@nonprofitlawyer.co.za

www.nonprofitlawyer.co.za

Article Seven: The Companies Amendment Bill, 2010

This article focuses on relevant sections of the draft Companies Amendment Bill, 2010 (the Bill) which are intended to change some provisions of the Companies Act of 2008 (the Act).

The Bill proposes the following key changes relevant to the non-profit company:

Remuneration of Directors - Sections 66 (8) and (9) of the Act, dealing with the payment of remuneration to directors for their service as directors, will no longer apply to non-profit companies. The Act will continue to allow for non-profit companies to pay reasonable remuneration for services rendered to, or at the direction of the company. It appears as if the intention is to prohibit non-profit companies from remunerating directors for their service as directors.

Foreign Companies - A foreign non-profit company will only be required to register as an external company if it is party to one or more employment contracts in South Africa, or engaging in non-profit activities in South Africa for at least six months. Activities in South Africa which involve establishing or maintaining bank or other financial accounts, or conducting meetings of its members or directors, or acquiring any interest in property, will not compel a foreign non-profit company to register as an external company.

Domesticated Companies - A foreign non-profit company will be allowed to transfer its registration from a foreign jurisdiction to South Africa. To do so it is required that: the law where it is registered must allow for such transfer; the foreign company must comply with such legal requirements; the transfer must have been approved by the foreign company's members or through special resolution; most or all the company's assets must be within South Africa; the members must be resident in South Africa; and the majority of directors must be South African citizens.

FROM THE COURTS:

National Association of Welfare Organisations and Non-Governmental Organisations & Others vs MEC for Social Development, Free State & Others - Free State High Court

On 5 August 2010 the Free State High Court (the Court) delivered a judgment in which it found that the Free State 'Policy on Financial Awards to the Nonprofit Organisations in the Social Development Sector' is inconsistent with the constitutional and statutory obligations of the Department of Social Development. The Court found amongst other:

"... it is the constitutional and statutory obligation of the department [of social development] to care for children, older persons and vulnerable persons in need and to provide statutory services, albeit by reasonable measures to the maximum extent of available resources or within available resources. This should be recognised in the policy as a fundamental principle of funding."

For a more detailed analysis on this judgment, please visit the website of the **National Welfare Social Service & Development Forum: www.forum.org.za**



Summary of judgment in Cape High Court against the National Lotteries Board

By Phiroshaw Camay
Co-operative for Research and Education
Email: corejhb@mail.ngo.za

Introduction

The applicants in the matter were two NGOs: The South African Education and Environment Project (SAEP) and the Claremont Methodist Church, Social Impact Ministry Sikhula Sonke (Sikhula Sonke). Between 2003 and 2009 SAEP submitted seven applications to the National Lotteries Board (NLB). Sikhula Sonke submitted two applications, one in 2007 and another in 2008. All the applications were not successful. The applicants complained of administrative bungling and sought redress under the Administration Justice Act (PAJA) a reconsideration of their various funding applications. The original application was lodged as urgent. Judge Madima decided in March 2010 that it was not urgent. In May 2010 the matter went before Judge Gamble. The Advocate for the NGOs asked that consideration be given only to 5 of the 9 applications with instructions and directions on how to deal with the applications given the history of alleged "institutional chaos" at the NLB.

The Judgment

The Court reviewed the statutory framework of the NLB and the Distribution Agencies (DAs). The Court determined that the DAs are committees within the NLB and their members are appointed by the Minister. The Court accepted that the consideration of applications for funding by the NLB and the DA's constitutes "administrative action" as defined in Sect. 33 of PAJA and therefore the decisions are reviewable.

NLB's Justification of its Conduct

The NLB argued that it had the right to fix guidelines applicable to funding applications and if the applicants do not comply, that is the end of the application. The NLB also argued that in setting guidelines it –

- Required signed audited financial statements
- Required the same name throughout all the documents submitted: the registration certificate, Constitution, Articles and Memorandum of Association or Trust Deed ...

The NLB claimed that in the Sikhula Sonke applications, there was a lack of consistency in the use of the names, also a set of unsigned financial statements had been submitted in the ninth application.

Status of the DA's Guidelines

The Court decided to examine the stance adopted by the NLB that the applicants failed to comply with the criteria set out in the guidelines. The Court found that the DA had no statutory or regulatory power to make binding rules on applicants. The Court also then outlined several applicable principles or rules contained in the legislation which ensure that organisations applying for funds are credible and financially secure. The advocate for the NGOs argued that the guidelines cannot be interpreted as peremptory rules imposed by the DA's which have to be strictly obeyed. The advocate for the NLB argued that any decision made by the NLB would have to be rational and "that is the end of the matter". The Court was of the view that the guidelines issued by the DA are non-legislative "guiding policies" and therefore cannot override, amend or be in conflict with the relevant legislative provisions. The Court also expressed the view that such guidelines set a useful purpose to enable the DA's to apply some measure of uniformity when considering applications for funding. The Court also referred to the fact that the Minister as at that time had not published regulations dealing with the criteria. **[Note:** The Minister has done so subsequently in July 2010.]

● To page 3

Skills Development Workshops for NPOs

28 – 30 September in Somerset West

26 – 28 October 2010 in Johannesburg

For more information:

Visit www.nonprofitlawyer.co.za and click on *Announcements*



Cape High Court judgment/

● From page 2

CONSIDERATION OF THE UNSUCCESSFUL APPLICATIONS

Audited Financial Statements

The NLB had rejected the seventh application as it had not been “audited”. The financial statements had not been signed by an auditor but by a Fellow of the Institute of Management Accountants. The Court found that the NLB had applied this rule inconsistently.

Inconsistent Name

Even the Advocate of the NLB conceded that this refusal was reviewable and the Court found that the NLB had clearly failed to apply its mind to this application.

Memorandum and Articles of Association

The applicant did not submit its Memorandum and Articles of Association but its Certificate of Incorporation and argued that the NLB caused confusion by the inarticulate description of the requisite supporting documents. Both the applicant and its legal representative had however submitted the Articles of Association. The NLB wanted to satisfy itself that the organisation actually had charitable purposes.

The Court found that the applicant had supplied what was required and found that the NLB had committed three reviewable errors:

- a. an error of law
- b. it was swayed by irrelevant considerations
- c. it failed to consider other documentation filed.

Only one set of financials filed

The applicant claimed that two sets of financials had been submitted. The NLB claimed entirely different reasons for refusal that the financials were not signed by an independent accounting officer, that the name of the auditor was not specified and there was no proof of the accounting officer’s present registration. The Court quotes a judgment that these were second thoughts designed to remedy an otherwise factual error.

Institutional Disarray

The Court agreed with the Advocate for the NLB that there is not sufficient material before the court to conclude that institutional disarray exists at the NLB. The Court concluded however that it would fail in its duty if it did not express reservations about the functioning of the NLB. The Court further noted that organisations are being denied the opportunity to deliver social services, and it is unacceptable that they should wait long periods to access needy funds. The Court conceded that the NLB had to ensure that there were no fraudulent applications. But the Court failed to understand why in an era of transparency where fair and administrative action is entrenched why NGOs had to partake in a “game of administrative snakes and ladders”.

The Order

1. The Court set aside the NLB’s refusal to fund three of the applications made to it.
2. Ordered the NLB to reconsider the three applications and make decisions within 60 days of the order.
3. That if the NLB declines to grant any of the applications, it should provide the unsuccessful application(s) with reasons for the refusal in the communication of its decision.
4. The NLB should bear the costs of this suit.

© RICARDO WYNGAARD ATTORNEYS

Important Note: The information contained in this newsletter is general in nature and should not be interpreted or relied upon as legal advice. The information may not be applicable to specific circumstances. Professional assistance should be obtained before acting on any of the information provided in this newsletter.