

Short notes on:

REGISTERING A NON-PROFIT ORGANISATION

Introduction

The process of registering as a Non-Profit Organisation (“NPO”) can prove challenging. The purpose of this article is to create awareness regarding the frustrations and challenges faced when registering a Non-Profit Organisation in South Africa.

The most prevalent challenges are the slow turnaround time and applications being misplaced or even lost. There are however, I am sorry to say, many additional challenges.

In South Africa, all non-profit organisations are governed by the the Non-Profit Organisations Act, No 71 of 1997 as amended from time to time (hereinafter “the Act”). The Act makes provision for either a trust, company, or other organisation or association of people established to serve a public purpose, to register as a non-profit organisation (“NPO”). Although the Act is designed to provide an environment in which NPOs in South Africa could flourish, the reality is unfortunately quite different. In order to discuss the various issues, one will have to look at the various structures which may be used to set up an NPO. In essence they are, a voluntary association (“VA”), non-profit trust, and non-profit company (“NPC” - formerly known as Section 21 companies¹).

The Voluntary Association

Being the least expensive and fastest way of setting up an NPO, the voluntary association is the most popular entity used in South Africa. Setting up a VA is easy because it is not controlled by legislation. You create a VA by entering into an agreement with three or more people to form an organisation so that you can work together to achieve a common non-profit objective. The agreement can be verbal; it does not have to be in writing. But putting it in writing can help to avoid disputes. Section 11 of the Act allows the Minister to prescribe benefits or allowances for registered NPOs. These will not apply to NPOs that do not register with the department. In fact, it is likely that NPOs who receive any money or other benefits from government, such as a tax benefit, will be required to register. In order to register the VA would need to have a written constitution. To receive these benefits is after a goal of a VA, therefor it’s advised to always have a written agreement and constitution.

¹ The Companies Act no 61 of 1973 (‘old act’)

In my view, these are helpful to start out as – in the same way as there are benefits to starting a profit business as a sole proprietor. In addition, these are mostly suitable for small community-based organisations that do not need to own or manage substantial amounts of money or valuable property and equipment in order to carry out their activities. However, the inherent risks should be carefully considered before a final decision is taken.

A practical challenge for a VA is, that it will not be able to open a bank account unless it is registered in terms of the Act. The FIC Act (or “FICA”)² has made registration in terms of the NPO Act a prerequisite for financial institutions to open a banking account in the name of such organisations. This means that a VA will not be able to receive funds into its own banking account while awaiting registration, and in addition, it will not be able to apply for approval as a Public Benefit Organisation (“PBO”) with SARS because for this, the organisation must reflect its banking particulars on the EL 1 form³.

As such, in my opinion these structures although fairly quick, easy and cost effective to set up make the running and operation following setup challenging and may even turn out to be more costly than its counter-parts.

The Non-profit company (“NPC”)

The NPC is a company incorporated for public benefit or other object relating to one or more cultural or social activities, or a communal or group interest⁴. This was previously known as the Section 21 company which was governed by the old Companies Act.⁵ Different to that a for-profit company, the income and property of a non-profit company is not distributable to its incorporators, members, directors, officers or persons relating to any of them (collectively we will refer to them as “members”) and must be used to advance the purpose for which it was created, as set out in its Memorandum of Incorporation (“MOI”). It is not compulsory for the NPC to have members, and the NPC can be comprised of participants to public benefit activities, such as church members for example.

The Companies Act⁶ makes provision for the extent to which income and property may be distributed to its members as follows:

² The Financial Intelligence Centre Act, 38 of 2001

³ <http://www.sars.gov.za/AllDocs/OpsDocs/SARSForms/EI1%20-Application%20for%20Exemption%20from%20Income%20Tax%20-%20External%20Form.pdf>

⁴ Schedule 1 to The Companies Act, No 71 of 2008 (as amended from time to time)

⁵ Act 61 of 1973

⁶ 71 of 2008

“(3) A non-profit company must not, directly or indirectly, pay any portion of its income or transfer any of its assets, regardless how the income or asset was derived, to any person who is or was an incorporator of the company, or who is a member or director, or person appointing a director, of the company, except:

(a) as reasonable:

(i) remuneration for goods delivered or services rendered to, or at the direction of, the company; or

(ii) payment of, or reimbursement for, expenses incurred to advance a stated object of the company;

(b) as a payment of an amount due and payable by the company in terms of a bona fide agreement between the company and that person or another;

(c) as a payment in respect of any rights of that person, to the extent that such rights are administered by the company in order to advance a stated object of the company; or

(d) in respect of any legal obligation binding on the company.”⁷

Furthermore, it is important that the NPC’s MOI meets the requirements of Section 30 of the Income Tax Act⁸ (the “ITA”), particularly if it wishes to be recognized as a PBO. The Tax Exemption Unit (TUE), will only approve a PBO if it complies with all of the conditions and requirements of section 30 of the ITA. It goes without saying, that any entity or structure complying with these requirements can register as PBO – thus it can be a NPC, a Trust, or an association (VA).

One can see from the above how the regulatory and legislative requirements differs from setting up a VA and setting up an NPC. The Companies and Intellectual Property Commission (“the CIPC”) is responsible for the incorporation of NPC’s as it is for all other types of companies. Although, registration may take longer and require more compliance measures at the outset it is the most credible of entities due to its separations of power and established regulatory framework. This structure is appealing to potential funders and would attract in my view a better caliber of managers – i.e. directors serving and managing the organization.

The Non-profit Trust

Often people choose to incorporate a trust as the structure for running the NPO. The trusts are registered in terms of the Trust Property Control Act No 57 of 1988 as amended from time to time, and the Master of the High Court is responsible for the registration of trusts. Although the service at the regional Master’s offices throughout South Africa may differ, it compares well to the time frames for registering a NPC.

⁷ Schedule 1, item 1(3) of Act 71 of 2008

⁸ The Income Tax Act, No 58 of 1962 (as amended)

A trust is also able to open a bank account after it is registered, and is therefore a very viable option for a structure of an NPO. Same as with the other structures though, the trust also needs to register in terms of the NPO at the NPO Directorate to be able to register as a PBO. It is very important that the trust deed is well drafted and as with the MOI for an NPC and complies with all the required regulations. The only challenge is updating details – unlike the CIPC the Master's office does not accept electronic submissions. So a manual system is still in place.

Conclusion

Registering or starting a NPO is not as simple as it may seem. It is crucial that the correct structure is elected from the outset and then correctly put together. We recommend you contact an experienced professional at SchoemanLaw Inc. to assist with the planning and registration of your NPO.