



**LEGAL OBLIGATIONS
OF MEMBERS OF
NON-PROFIT
ORGANISATION (NPO)
GOVERNING BODIES**

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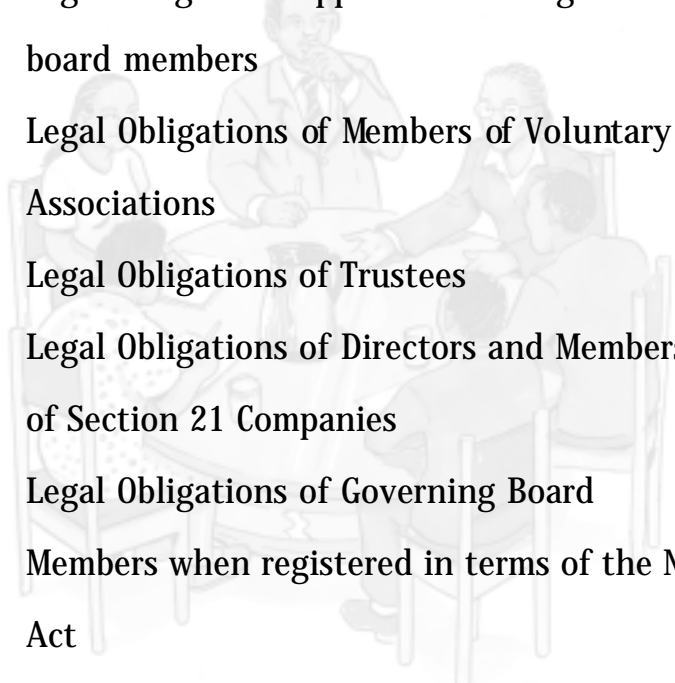
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We hope this booklet will help those persons involved in nonprofit organisations to understand some of the main legal obligations of members of NPO governing boards. Kindly note that the provisions of these Acts and the regulations promulgated in terms thereof may change from time to time. We therefore advise you to check with the Acts & regulations and consult your own advisors for further advice.

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LEGAL OBLIGATIONS OF NON-PROFIT ORGANISATION (NPO) GOVERNING BODIES

1. Introduction

Members of governing boards of non-profit organisations (NPOs) must adhere to the legal obligations imposed on them by the founding documents of the NPO, the common law and the legislation governing the NPO. For each kind of NPO (*Voluntary Association /Trust/Section 21 Company*) these legal obligations may differ. It is important that NPO governing board members are aware of and comply with these legal obligations in order for the NPO to govern itself effectively.

2. Purpose of this information handout

The purpose of this information handout is to set out some of the important legal obligations that members of NPO governing bodies must adhere to. Some of these obligations are similar and applicable to all NPOs whereas others are different and applicable only to a particular kind of NPO.

When considering the legal obligations of NPO governing board members, it is important to bear in mind the principle of limited liability. Therefore, when the NPO is liquidated, the creditors are not allowed to hold the members personally liable for any outstanding debts of the NPO. There are however exceptions to this principle and we shall set out the circumstances when members can become personally liable for the debts of the NPO.



3. Legal obligations applicable to all NPO governing board members

All board members must exercise the following legal obligations when acting for the NPO they serve:

- Act in good faith and in the best interests of the NPO,
- Not allow personal interests to conflict with the interests of the NPO,
- Not act beyond the powers of the NPO/Board or the limitations placed on such powers in terms of the founding documents,
- Exercise the degree of skill that may be reasonably expected from such a person of his/her knowledge. It is however important to note that members are not required to have exceptional intelligence and will not be liable for mere errors of judgement,
- Apply her/his mind to decisions & exercise an independent discretion, and
- Are, not required to give continuous attention to the affairs of the NPO.



4. Legal Obligations of Members of Voluntary Associations

There is no particular Act setting out the legal obligations of members of governing bodies of voluntary associations. The legal obligations of these members are to a large extent contained within the constitution of the voluntary association. The Common Law provides us with further principles applicable to voluntary associations.

Legal Obligations

In addition to the general principles mentioned in point 3 above, the following legal obligations apply to members of governing boards of Voluntary Associations:

- The members must familiarised themselves with the contents of the Constitution and give effect to the provisions thereof insofar as they are lawful and effective,
- Members are not allowed to act beyond the powers laid down in the constitution,
- Standard Legal Obligations contained in the constitution of a voluntary association **may** be the following:
 - ♦ Preparing annual financial statements for the annual general meeting of the association,
 - ♦ Preparing a Chairperson's report for the annual general meeting of the association,
 - ♦ Convening Annual General Meetings within specified time periods,
 - ♦ Opening a bank account in the name of the NPO, and
 - ♦ Depositing money within account of NPO within specified time period.
- The members have a duty to act in good faith towards one another¹,
- The members have a duty of care to the association and other members as they accept the responsibility of managing the affairs of the association², and
- In matters where there is a conflict of interest between the association and one of its members, the interests of the association must be protected³.

Personal Liability

- As in the case of contractual law, members can become personally liable in the event that they have acted beyond the scope and limits of the constitution, and
- Members will also become personally liable when they conduct the affairs of the association in a reckless or fraudulent manner.

5. Legal Obligations of Trustees

The **Trust Property Control Act, No. 57 of 1988**¹ together with the Common Law regulate the operation of trusts and sets out the most of the legal obligations of trustees.

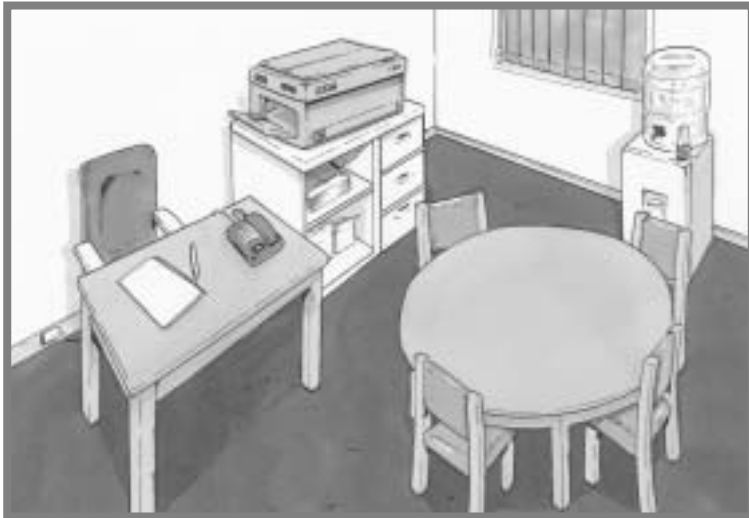


Legal Obligations in relation to the *Trust Deed*

- The first trustees must lodge the Trust Deed with the High of the High Court (*section 4*),
- Trustees must become familiarised with the contents of the Trust Deed and give effect to the provisions thereof insofar as it is lawful and effective, and
- Trustees must lodge amendments to the Trust Deed with the Master of the High Court (*section 4*).

Legal Obligations in relation to the *Trustees*

- Trustees can only act in their capacity as trustees once authorized thereto in writing by the Master of the High Court (*section 6*),
- Trustees shall furnish the Master of the High Court with security if they are not exempted from the payment thereof (*section 6*),
- Trustees must act with **care, diligence and skill** which can be reasonably expected of a person who manages the affairs of another (*section 9*),
- Trustees must exercise an independent discretion⁵,
- Trustees must provide the Master with a physical address for the service of any notice or court process and must advise the Master by registered post within fourteen (14) days of any change in that address (*section 5*),
- Trustees must, at the written request of the Master do the following:
 - ♦ Account to the Master for their administration and disposal of trust property,
 - ♦ Deliver to the Master any book, record, account or document relating to their administration or disposal of the trust property, and
 - ♦ Answer honestly and truthfully (to the best of their ability) any question put to them by the Master in connection with the administration and disposal of the trust property (*section 16*).
- Resigning Trustees must notify the Master of the High Court and the ascertained beneficiaries (or their tutors or curators) of such resignation (*section 21*).



Legal Obligations in relation to the *Trust Property*

- Trustees must:
 - ♦ In terms of common law, immediately upon taking of office, ascertain the nature of the trust property,
 - ♦ Register and identify of each of trust assets and indicate that the property is held in their capacity as trustee (*section 11*),
 - ♦ Where applicable, register trust property or keep it registered in such a manner as to make it clear from the registration that it is trust property (*section 11*),
 - ♦ Take control of the property of the Trust, and if lost, recover such lost assets,
 - ♦ Diligently collect the debts owed to them in respect of the trust property⁶, and
 - ♦ Not without the written consent of the Master destroy any document which serves as proof of the investment, safe custody, control, administration, alienation or distribution of trust property before the expiry of a period of five years from the termination of a trust (*section 17*).



Legal Obligations in relation the *Finances of the Trust*

- The trustee deposit money received in his/her capacity as trustees in a separate trust account at a banking institution or building society (section 10),
- Trustees should invest money that accrues to the Trust Fund, which is not required for immediate payment, without delay. It is improper for a trustee to borrow trust money⁷,
- Duty of trustee to ensure that reasonable return is obtained on the Trust Capital⁸,
- Indicate clearly in the bookkeeping which property is hold in his/her capacity as trustee (section 11), and
- Make any account of investment at a financial institution identifiable as a trust account or trust investment (section 11),

Failure to perform Legal Obligations

- If any trustee fails to comply with a written request by the Master of the High Court as provided for in terms of law or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty (*section 19*).
- Beneficiaries who have suffered a loss as a result of breach of trust are entitled to bring a damages claim against the trustees for breach of trust.

6. Legal Obligations of Directors and Members of Section 21 Companies

Section 21 Companies are governed by the provisions of the **Companies Act No. of 1973**⁹. A Section 21 Company is deemed to be a public company in terms of the Companies and must accordingly comply with the requirements for a public company, unless otherwise provided for by the Act. Both members and directors of a Section 21 company stand in a fiduciary relationship towards it. The Companies Act sets out various obligations that must be complied with and it is submitted that these obligations, unless specifically provided otherwise, are the obligations of both the members and the directors.

Legal Obligations in relation to the *Displaying the Name of the Company*

- The phrase “*Association incorporated under section 21*” must be included in and be subjoined to the name of the Company (*section 49*),
- The Company’s name must be displayed on the outside of its registered office and everywhere else where it is doing business (*section 50*),
- The name of the Company must be engraved in legible characters on its seal (if any) (*section 50*),
- The Company must also display its name and registration number on all official documents of the Company as referred to in the Act (*section 58*), and
- The business letters, trade catalogues and trade circulars of the Company must bear the company’s name and in respect of every director his/her present forenames, or the initials thereof, and present surname (*section 171*).

Legal Obligations in relation to the *Memorandum and Articles*

- The company must send to every member at his/her request and on payment of the prescribed fee, a copy of its memorandum and of its articles, or shall, if so requested, afford to a member or his duly authorized agent adequate facilities for making a copy of such

memorandum and articles (these copies must include all the amendments made thereto) (*section 68*), and

- The Company must, on written request from the Registrar, submit a copy of its amended memorandum after it has made a special resolution altering its memorandum (*section 67*).

Legal Obligations in relation to the *Register of Members*

- Every company must keep in one of the official languages of the Republic a register of its members, and shall enter therein:
 - ♦ The names and addresses of the members,
 - ♦ The date on which his/her name was entered in the register as a member, and
 - ♦ The date on which he/she ceased to be a member (*section 105*),

The register of members may be kept either by making entries in bound books or by recording the particulars required in any other manner allowed by the Act (*section 105*), and

The register of members of a company shall be open to inspection by any member or any other person (*section 113*).



Legal Obligations in relation to the *Register of Directors*

Every company shall keep in one of the official languages of the Republic a register of directors of the company and cause to be entered therein in respect of every director:

- ♦ His/her full forenames and surname and any former forenames and surname,
- ♦ His/her identity number or, if he/she has no such number, his/her date of birth,
- ♦ His/her nationality if not South African,
- ♦ His/her occupation, his/her residential, business and postal addresses,
- ♦ The date of his/her appointment, and
- ♦ The name and registration number of every other company of which such director is a director and particulars of change (*section 215*).

The name and date of the appointment of the auditor of the company and the date and particulars of any change of such name and date of appointment must also be included in the register (*section 215*),

Directors shall furnish the particulars to be entered into the register in writing to the company within the required time limits (*section 216*), and

A return, in the prescribed form reflecting the contents of such register, must be submitted to the Registrar within the required time limits (*section 216*).

Legal Obligations in relation to the *General Meetings of the Company*

Every company shall hold annual general meetings as prescribed in terms of the Companies Act and the Memorandum and Articles of Association (*section 179*),

The directors must convene a general meeting in accordance with the Act after the lodgment of a requisition by the members (*section 181*),

Members must also be provided, if requisitioned by them, with copies of resolutions that are to be moved at next general meetings (*section 186*), and

The annual general meeting or a general meeting called for the purpose of passing a special resolution must be called on not less than twenty-one clear days' notice in writing and any other general meeting must be called by not less than fourteen clear days' notice in writing (*section 186*).

Legal Obligations in relation to the *Special Resolutions*

Any special resolutions to be adopted by a company must comply with the requirements as provided for in section 199 of the Act, and

The Company must within one month from the passing of a special resolution lodge a copy of the resolution and a copy of the notice convening the meeting concerned with the Registrar, who shall, subject to the provisions of the Act, and upon payment of the prescribed fee, register such resolution (*section 200*).

A copy of every special resolution must be embodied in or annexed to every copy of the articles issued after the registration of the resolution (*section 200*).



Legal Obligations in relation to the *Keeping of Minutes of Meetings*

Every company shall keep minutes of the proceedings at any meeting of the company and enter it, in one of the official languages of the Republic, in one or more minute books kept for the purpose, within one month after the date on which the meeting was held (*section 204*), and

The minute book must be kept at the registered office of the company or at the office where such minute book is made up and shall be open for inspection to members in accordance with the provisions of the Act (*section 204*).

Legal Obligations in relation to the *Declaration of Interests*

A director of a company who is in any way, whether directly or indirectly, materially interested in a contract or proposed contract as provided for in the Act, which has been or is to be entered into by the company or who so becomes interested in any such contract after it has been entered into, shall declare his/her interest and full particulars thereof as *provided in this Act (section 234)*,

The Company must record in the minutes every declaration of interest made by any director in terms of the Act (*section 239*),

Every company must keep at its registered office or at the office where it is made up a register of interests in contracts in one of the official languages of the Republic, and shall enter therein the particulars of any declarations of interest made by directors as provided for in the Act (*section 239*),

The directors of a company must, in one of the official languages, keep minutes of all meetings of directors or managers which must be entered into a book kept for that purpose at the registered office of the company (*section 242*), and

Every director of a company present at any meeting of directors, and every manager thereof present at any meeting of managers, shall at the meeting sign his/her name under the date of the meeting in a book complying with the provisions of *section 242 (3)* to be kept for that purpose (*section 245*).

Legal Obligations in relation to the *Finances of the Company*

Every company must keep in one of the official languages of the Republic such accounting records as are necessary to fairly present the state of affairs and business of the company and to explain the transactions and financial position of the trade or business of the company, including:

- ♦ Records showing the assets and liabilities of the company,
- ♦ A register of fixed assets setting out the detail as required by the Act,
- ♦ Records containing entries from day to day in sufficient detail of all cash received and paid out and of the matters in respect of which receipts and payments take place,
- ♦ Where the trade or business of the company has involved dealings in goods, records of all goods sold and purchased and other detail as required by the Act, and
- ♦ Statements of the annual stocktaking, where applicable (*section 284*).

The accounting records must be kept at the registered office of the company or at such other place as the directors think fit and shall at all times be open to inspection by the directors (*section 284*),

The directors of a company shall lay the annual financial statements in one of the official languages before the annual general meeting of the company. The statements shall consist of:

- ♦ A balance sheet, including any notes thereon or document annexed thereto providing information required by this Act,
- ♦ An income statement as required in terms of the Act,
- ♦ A cash flow statement,
- ♦ A directors' report complying with the requirements of this Act, and
- ♦ An auditor's report as required in terms of the Act (*section 286*).

The annual financial statements of a company shall contain particulars showing:

- ♦ The amount of the emoluments received by directors,
- ♦ The amount of the pensions paid or receivable by directors and past directors,
- ♦ The amount of any compensation paid to directors and past directors in respect of loss of office, and
- ♦ Details of directors' service contracts (*section 297*).

The annual financial statements of a company other than the auditor's report, must be approved by its directors and signed on their behalf by two of the directors (*section 298*), and

A copy of the annual financial statements of a company must be sent to members of the company as required in terms of the Act (*section 302*).



Legal Obligations in relation to the *Auditors for the Company*

A written consent by the auditor of the company to be formed must be lodged in the prescribed form with the lodgment of the memorandum and articles of association at the Registrar (*section 269*),

A company must at every annual general meeting appoint an auditor or auditors to hold office from the conclusion of that meeting until the conclusion of the next annual general meeting of the company (*section 270*), and

Directors must provide the auditor of the company with the information and explanations as necessary for the performance of his/her duties as auditor (*section 281*).

Legal Obligations in relation to the *Winding up of the Company*

In any winding-up of a company unable to pay its debts, every director and officer of the company shall attend the meetings of creditors as provided for in the Act (*section 414*),

Where it is intended to pass a resolution for a creditors' voluntary winding-up of a company, the directors of that company shall make out or cause to be made out, in the prescribed form, a statement as to the affairs of the company and lay it before the meeting convened for the purpose of passing such a resolution (*section 363*), and

Directors whose address's change during the winding up process, must notify the liquidator of the company by registered post (*section 363A*).

Personal Liability Of Directors

When the business of the company is carried on recklessly or with intent to defraud creditors the Court may declare that any person who was knowingly a party to such behaviour, be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct (*section 424*), and

Directors or members who have misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any breach of faith or trust in relation to the company may be ordered by the Court to repay or restore the money or property or any part thereof, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retention, breach of faith or trust as the Court thinks just (*section 423*).

7. Legal Obligations of Governing Board Members when registered in terms of the NPO Act

Registration in terms of the **Nonprofit Organisations Act, No. of 1997¹⁰** is voluntary and organisations may choose whether they want to register. If NPOs do register in terms of the Act, then they must comply with certain requirements as stipulated in the Act. The main requirements are set out below.

Legal Obligations in relation to *the Documentation of the NPO*

The registered status and registration number of the nonprofit organisation must be reflected on all of its documents (*section 16*).

The organisation must comply with the provisions of its founding document which relates to financial matters (*section 17*),

Legal Obligations in relation to *the Finances of the NPO*

The NPO must keep, accounting records of its income, expenditure, assets and liabilities to the standards of generally accepted accounting practice. (*section 17*),

Draw up financial statements, within six months after the end of its financial year, which must include at least:

- ♦ A statement of income and expenditure for that financial year, and
- ♦ A balance sheet showing its assets, liabilities and financial position as at the end of that financial year (*section 17*).

Arrange for a written report, within two months after drawing up its financial statements, to be compiled by an accounting officer and submitted to the organisation stating whether or not:

- ♦ The financial statements of the organisation are consistent with its accounting records,
- ♦ The accounting policies of the organisation are appropriate and have been appropriately applied in the preparation of the financial statements, and
- ♦ The organisation has complied with the provisions of this Act and of its constitution which relate to financial matters (*section 17*).

The books of account, supporting vouchers, records of subscriptions or levies paid by its members, income and expenditure statements, balance sheets and accounting officer's reports, in an original or reproduced form, must be preserved for the prescribed period (*the time period is not defined in terms of the Act*) (*section 17*).

Legal Obligations in relation to the *Information to be submitted to the Director of NPOs*

The Director of Nonprofit Organisations must be provided, in writing, with the following:

- ♦ A narrative report of its activities in the prescribed form together with its financial statements and the accounting officer's report as required in terms of the Act, within nine months after the end of its financial year,
- ♦ The names and physical, business and residential addresses of its office-bearers within one month after any appointment or election of its office-bearers even if their appointment or election did not result in any changes to its office-bearers,
- ♦ A physical address in the Republic for the service of documents to be received from the Directorate of Nonprofit Organisations,
- ♦ Notice of any change of address within one month before a new address for service of documents will take effect, and
- ♦ Such other information that may be required by the Director in terms of the Act (*section 18*).

Legal Obligations in relation to the *Changes to the Founding Document*

When the organisation changes its constitution or name, it must send to the director:

- ♦ A copy of the resolution and a certificate signed by a duly authorised office-bearer confirming that the resolution complies with its constitution and all relevant laws, and
- ♦ Where the organisation has resolved to change its name, the original of its current certificate of registration (*section 19*).

Legal Obligations in relation to the *Winding-up or Dissolution of the Organisation*

When the organisation resolves to wind-up or dissolve it must, within one month after completion of the winding up or dissolution process or the relevant order of court, send to the Director of Nonprofit Organisations a written notice:

- ♦ Stating that the organisations resolved to wind-up,
- ♦ Containing certified copies of all relevant documents confirming the winding up or dissolution, and
- ♦ A copy of the narrative report, financial statements and the accounting officer's report for the period from its previous financial year up to the date of the written notice (*section 23*).

READING LIST

1. Bamford on the Law of Partnership and Voluntary Association in South Africa, Brian Bamford, Third Edition, Third Edition, Published by Juta & Co, Ltd 1982,
2. Guide to the Companies Act and Regulations, *Originally Compiled and Edited by T. Schoeman, Revising Editor* Walter D Geach, Published by Juta & Co, Ltd, 1992,
3. Honorè's South African Law of Trusts, Tony Honorè & Edwin Cameron, Fourth Edition, Published by Juta & Co., Ltd,
4. Corporate Law, Cilliers & Benadie, Third Edition, Butterworths, 2000
5. Memorandum prepared for the Legal Resources Centre: Guidelines to Section 21 companies, Trusts and Voluntary Associations, by Richard Rosenthal and Matthew Walton, February 1998,
6. Memorandum on Personal Liability of Directors of a Section 21 Company, by Matthew Walton, August 1999,
7. Some of the ongoing Regulatory Requirements of the Company Act, June 2000.

ACTS

Trust Property Control Act, No. 57 of 1988,
 The Companies Act, No. 61 of 1973, and
 The Non-Profit Organisation Act, No. 71 of 1997.

FOOTNOTES

- 1 Rowles v Jockey Club of SA & Others 1954 (1) SA 363 (AD) at 365
- 2 Mkhando & Others v Mangwende NO 1977 (1) SA 851 (RAD) at 854
- 3 ECA (SA) & another v BIFSA (1) 1980 (2) SA 506 (W) at 509
- 4 All reference to sections in this paragraph are sections from the Trust Property Control Act.
- 5 Estate Gouws & Registrar of Deed 1947 (4) SA 403 (T).
- 6 Boyce NO v Bloem 1960 (3) SA 855 (T) at 860 A-B, 864-5, 868-9
- 7 Est Loock v Graaff-Reinet Board of Executors 1935 CPD 117.
- 8 Boyce NO v Bloem 1960 (3) SA 855 (T) at 876.
- 9 All reference to sections in this paragraph are sections from the Companies Act.
- 10 All reference to sections in this paragraph are from the Nonprofit Organisations Act, No. of 1997.

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