

COMPANIES ACT, 71 OF 2008

NON-PROFIT COMPANIES

1. Definition

What to know:

The definition for a non-profit company as set out in section 1 of the Companies Act, Act No. 71 of 2008, as amended (hereinafter referred to as the "Act") stipulates that a non-profit company means a company incorporated for a public benefit object, or an object relating to one or more cultural or social activities, or communal or group interests and where the income and property are not distributable to its incorporators, members, directors, officers or related persons, except in regards to:

- reasonable remuneration;
- reimbursement for expenses incurred to advance the object of the company;
- payment in terms of a *bona fide* agreement;
- payment in respect of rights of a person, which rights are administered by the company; or
- legal obligations of the company.

2. Classification of a non-profit company

What to know:

In terms of section 8 of the Act the non-profit company now has a legal nature of its own, distinct from both the public and the private company and to a large extent is treated uniquely under the Act. The name of the non-profit company, irrespective of its form or language, must end with the abbreviation "NPC."

3. Provisions not applicable to non-profit companies

What to know:

3.1 The following provisions of the Act do not apply to non-profit companies and are specified in section 10:

- 3.1.1 Capitalisation of profit companies (Part D of Chapter 2) that deals with shares, securities and loans or other financial assistance to directors;
- 3.1.2 Securities registration and transfer (Part E of Chapter 2) that deals with the registration, transfer and interest in securities of a company;
- 3.1.3 Where a company may pay remuneration to its directors for their services as directors, which remuneration must be approved with a special resolution by the shareholders within the previous 2 (two) years (Section 66(8) and 66(9));
- 3.1.4 The requirements for the election of directors (Section 68);
- 3.1.5 The obligation to appoint a company secretary and audit committees (Part B and D of Chapter 3), except to the extent that an obligation to appoint a company secretary, auditor or audit committee arises in terms of
 - 3.1.5.1 A requirement in the company's Memorandum of Incorporation, to have its annual financial statements audited every year as set out in section 34(2); or
 - 3.1.5.2 The regulations contemplated in section 30(7) where the Minister may require certain non-profit companies to have its annual financial statements audited.
- 3.1.6 Public offerings of company securities (Chapter 4);
- 3.1.7 Fundamental transactions, takeovers and offers (Chapter 5);

- 3.1.8 Rights of shareholders to approve a business rescue plan, except to the extent that the non-profit company is itself a shareholder of a profit company that is engaged in business rescue proceedings (Section 146(d) and 152(3)(c));
- 3.1.9 Dissenting shareholders appraisal rights (Section 164).
- 3.2 Sections 58 to 65 in respect of shareholders' rights and shareholders' meetings only apply to a non-profit company if the company has voting members and when applied to a non-profit company, are subject to the provisions of item 4 of Schedule 1 which are discussed below.
- 3.3 References in the Act to 'a shareholder', 'the holder of a company's securities', 'holders of issued securities of that company' or 'a holder of voting rights entitled to be voted' will refer to the voting members of the non-profit company only where a non-profit company has voting members.

4 Provisions applicable to non-profit companies

The provisions that concern a non-profit company are contained in Schedule 1 of the Act.

4.1 Objects and policies

What to know:

- 4.1.1 The old Companies Act referred to an organisation's founding document as the Memorandum and Articles of Association. In terms of the new Companies Act, this is now termed the Memorandum of Incorporation. The Memorandum of Incorporation must contain the organisation's objective/s which should reflect the public benefit intention of the non-profit company or that should relate to either the communal or group interests or the cultural or social activities which it sets out to advance.
- 4.1.2 The contents of the Memorandum of Incorporation must comply with the following:
- 4.1.2.1 All the non-profit company's property and income, however obtained, must be used to further its objectives.
- 4.1.2.2 No part of the non-profit company's income may be paid to an incorporator, member or director. This is only permissible when circumstances as set out in the definition of a non-profit company mentioned in paragraph 1 above have been met.
- 4.1.3 Certain provisions have also been made upon the winding-up or dissolution of a non-profit company.
- 4.1.4 Each voting member has at least one vote and the vote of each member is of equal value to the vote of each other voting members, unless provided for otherwise.
- 4.1.5 If there are members, a membership register must be maintained as required by section 24(4) of the Act.

4.2 Fundamental transactions

What to know:

Item 2 of Schedule 1 prohibits a non-profit company to amalgamate or merge with or convert to a profit company or dispose any part of its assets, undertaking or business to a profit company, except to the extent that is in the course of ordinary activities of a non-profit company, unless, where there are members, they have followed the necessary procedure to do so.

4.3 Incorporators of non-profit companies

What to know:

The incorporators of a non-profit company as specified in Item 3 of Schedule 1 are its first directors and its first members, if the Memorandum of Incorporation provides for members. At least **three** incorporators are required for a non-profit company.

4.4 Members

What to know:

In terms of item 4 of Schedule 1 a non-profit company is not required to have members. This means that a non-profit company has the prerogative to choose whether it will have membership and a board of directors, or just a board of directors. However where a non-profit company does elect to have membership, its Memorandum of Incorporation must contain a provision that stipulates this.

4.5 Directors

What to do:

Ensure that the directors of the non-profit company are aware of criteria set out in respect of the eligibility and disqualification (section 69) as well as the standards of directors' conduct (section 76), liability of directors (section 77), amongst others and that it is adhered to.

What to know:

- 4.5.1 Section 66 of the Act stipulates that a non-profit company must have **at least 3 (three) directors**.
- 4.5.2 It is important to note that a director can also be an alternate director or other person occupying the position of a director by whatever name designated.
- 4.5.3 The business and affairs of a company must be managed by or under the direction of its board of directors and the criteria set out in respect of the eligibility and disqualification (section 69) as well as the standards of directors' conduct (section 76), liability of directors (section 77), amongst others are clearly stipulated by the Act and should be adhered to.
- 4.5.4 Item 5 of Schedule 1 contains certain criteria in respect of the directors of a non-profit company. If a non-profit company has members, the Memorandum of Incorporation must set out the basis on which the members elect the directors and if any directors are elected by the voting members it must provide for the election each year of a least one-third of those elected directors. Where there are no members, the Memorandum of Incorporation must specify on which basis directors are to be appointed on the board. No loan or financial assistance may be provided by a non-profit company to a director or related or inter-related company or person related to such a director, unless one of the exceptions contained in the Act is applicable.

5 Transitional arrangements

What to do:

The Memorandum of Incorporation will have to be amended before 30 April 2013 to comply with the provisions of the Act.

What to know:

According to Schedule 5 of the Act, all companies that existed at the time of its coming into operation shall continue to exist as if they have been incorporated in term of the 2008 Act. This means that even if a company is registered under the old Companies Act, it will continue to be in existence as before, but the provisions of the 2008 Act will now apply.

NEED ASSISTANCE WITH THE IMPLICATIONS OF THIS ACT?

CONTACT:



Monument Office Park, Block 5, Suite 102,
79 Steenbok Avenue, Monument Park
Tel: 086 111 1010
Fax: 086 604 1315
e-mail: avdm@ithembaonline.co.za
web: www.ithembaonline.co.za

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FORM CoR 15.1C
Non Profit Companies without Members

In this Memorandum of Incorporation –

- (a) a reference to a section by number refers to the corresponding section of the Companies Act, 2008;
- (b) words that are defined in the Companies Act, 2008, bear the same meaning in this Memorandum as in that Act.

Article 1 – Incorporation and Nature of the Company

1.1 Incorporation

- (1) The Company is incorporated as a Non-Profit company, as defined in the Companies Act, 2008.
- (2) The Company is incorporated in accordance with, and governed by -
 - (a) the provisions of the Companies Act, 2008 that are applicable to Non Profit companies, without any limitation, extension, variation or substitution; and
 - (b) the provisions of this Memorandum of Incorporation.

1.2 Objects and Powers of the Company

- (1) The objects of the Company are as set out on the cover sheet and, except to the extent necessarily implied by the stated objects, the purposes and powers of the Company are not subject to any restriction, limitation or qualification, as contemplated in section 19(1)(b)(ii).
- (2) The Company is not subject to any provision contemplated in section 15(2)(b) or (c).
- (3) Upon dissolution of the Company, its net assets must be distributed in the manner determined in accordance with Item 1(4)(b) of Schedule 2 of the Companies Act, 2008.

1.3 Memorandum of Incorporation and Company rules

- (1) The Memorandum of Incorporation of the Company may be altered or amended only in the manner set out in section 16, 17 or 152(6)(b).
- (2) The authority of the Company's Board of Directors to make rules for the Company, as contemplated in section 15(3) to (5), is not limited or restricted in any manner by this Memorandum of Incorporation.
- (3) The Board must publish any rules made in terms of section 15(3) to (5) by delivering a copy of those rules to each director by ordinary mail.
- (4) The Company must publish a notice of any alteration of the Memorandum of Incorporation or the Rules, made in terms of section 17(1), by delivering a copy of those rules to each director by ordinary mail.

1.4 **Optional provisions of Companies Act, 2008 do not apply**

The Company does not elect, in terms of section 34(2), to comply voluntarily with the provisions of Chapter 3 of the Companies Act, 2008.

1.5 **Company not to have members**

As contemplated in Item 4(1) of Schedule 2 of the Act, the Company has no members.

Article 2 – Directors and Officers

2.1 **Composition of the Board of Directors**

The Board of Directors of the Company comprises the number of directors, and alternate directors shown on the cover sheet, each of whom -

- (a) is to be appointed in the manner set out on the cover sheet; and
- (b) serves for an indefinite term until substituted by the person or entity that appointed the director.

2.2 **Authority of the Board of Directors and Committees**

- (1) This Memorandum of Incorporation does not limit or restrict the authority of the Company's Board of Directors to –
 - (a) manage and direct the business and affairs of the Company, as set out in section 66(1);
 - (b) consider a matter other than a meeting, as set out in section 74;
 - (c) conduct a meeting entirely by electronic communication, or to provide for participation in a meeting by electronic communication, as set out in section 73(3);
 - (d) determine the manner and form of providing notice of its meetings, as set out in section 73(4);
 - (e) proceed with a meeting despite a failure or defect in giving notice of the meeting, as set out in section 73(5);
 - (f) appoint committees of directors, and to delegate to any such committee any of the authority of the Board as set out in section 72(1), or to include in any such committee persons who are not directors, as set out in section 73(2)(a).
- (2) The right of the Company's Directors to requisition a meeting of the Board, as set out in section 73(1), may be exercised by at least 25% of the directors, as provided in that section.
- (3) The quorum requirement for a directors meeting to begin, the voting rights at such a meeting and the requirements for approval of a resolution at such a meeting, are as set out in section 73(5).

This Memorandum of Incorporation does not limit or restrict the authority of any committee appointed by the Company's Board of Directors, as set out in section 72(2)(b) and (c).

2.3 Indemnification of Directors

This Memorandum of Incorporation does not limit, restrict or extend the authority to the Company's Board of Directors to –

- (a) advance expenses to a director, or indemnify a director, in respect of the defence of legal proceedings, as set out in section 78(3);
- (b) indemnify a director in respect of liability, as set out in section 78(5);
or
- (c) purchase insurance to protect the Company, or a director, as set out in section 78(6).

2.4 Officers

The Board of Directors may appoint any officers it considers necessary to better achieve the objects of the Company.