Corporate & Commercial

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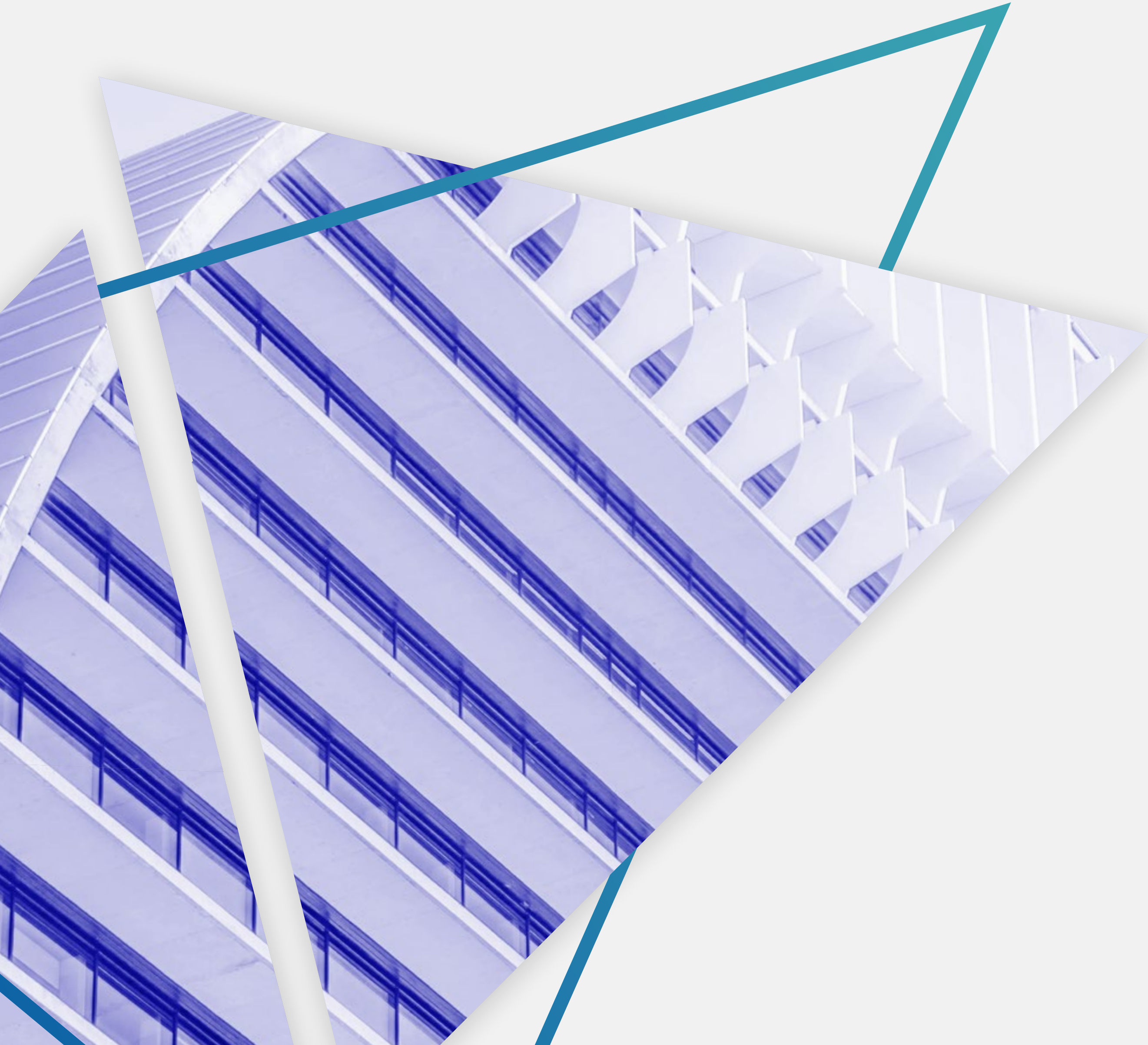

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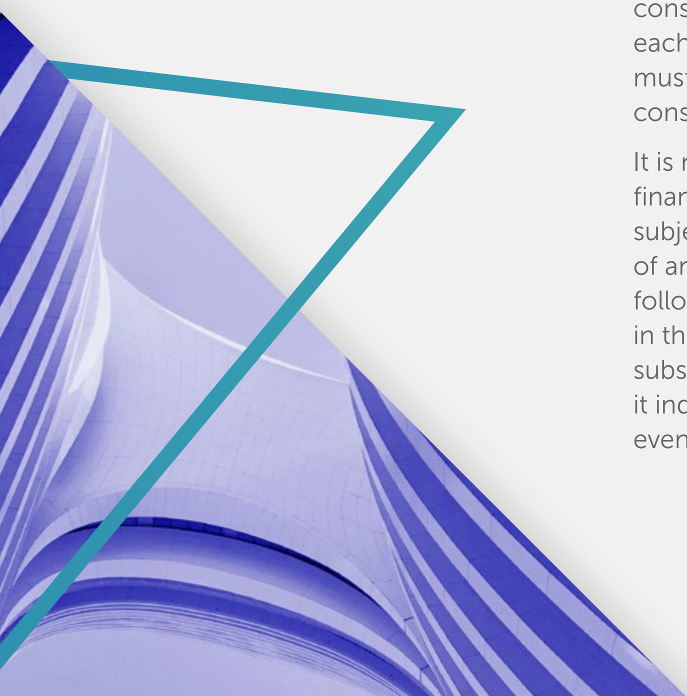

In *Constantia Insurance Company Limited v Master of the High Court, Johannesburg and Others* [2022] JOL 56548 (SCA), the Supreme Court of Appeal provided some much-needed clarity in confirming that the forms of financial assistance provided in terms of section 45 of the Companies Act 71 of 2008 (Act) constitutes an exhaustive list.

On the other hand, the construct of the definition of "*financial assistance*" set out in section 44 of the Act merely excludes certain forms of financial assistance, such as the lending of money done in the ordinary course of business by a company whose primary business is the lending of money.

Given the lack of a comprehensive definition, the position remains that "*financial assistance*" in section 44 does not constitute an exhaustive list, that the commercial realities of each transaction are to be examined, and that companies must apply their minds as to whether their actions constitute financial assistance.

It is not uncommon for companies to provide contingent financial assistance, possibly unknowingly, which is subject to the occurrence of a future event, in the form of an indemnity or a guarantee for example. Consider the following scenario: The Subscriber is subscribing for shares in the Target Company. In connection with the Subscriber's subscription of securities in the Target Company, it indemnifies the Subscriber for any loss suffered in the event that any of the warranties are found to be untrue.

This is a very common commercial construct and, although often overlooked, may arguably (albeit very conservatively) constitute the provision by the Target Company of financial assistance in terms of section 44 of the Act.

Financial assistance in terms of section 44 of the Act

Section 44(3)(a) provides, *inter alia*, that the board may not authorise any form of financial assistance unless the financial assistance has been approved by a special resolution of the shareholders adopted within the previous two years. The provision of financial assistance can therefore not be retrospectively approved/ratified by shareholders.

Subsection (b) then provides that no financial assistance may be authorised by a board unless:

- the board is satisfied that immediately after providing the financial assistance, the solvency and liquidity test will be satisfied; and
- that the terms under which the financial assistance is proposed to be given, are fair and reasonable to the company.

The solvency and liquidity test in the context of contingent financial assistance

In the context of contingent financial assistance, it raises the question: When must the aforementioned prescribed requirements be met? Is it (i) on signature date; (ii) upon the fulfilment of the conditions precedent contained in the transaction agreement; or (iii) the date a claim arises?

Back to the future: The provision of future/contingent financial assistance in terms of section 44 of the Companies Act

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Given that the provision of financial assistance cannot be ratified, the prevailing approach is that the prescribed formalities should be fulfilled before or on the signature date, failing which, the provision of financial assistance, and the transaction itself, would be void. However, given the contingent nature and the potential lapsing of time, it raises an interesting question regarding the validity, and accuracy, of the solvency and liquidity test.

Section 4 of the Act provides that a company will be deemed to have satisfied the solvency and liquidity test if:

- the assets of the company, fairly valued, equal or exceed the liabilities of the company; and
- if it appears that the company will be able to pay its debts as they become due, for a period of 12 months after the date on which the test was considered.

Section 4(2)(b) expressly requires the company to consider, among other things, any reasonably foreseeable contingent liabilities in applying the solvency and liquidity test, yet limits the forward-looking nature of the test to a 12-month period.

In the context of our earlier scenario, it is very common for warranty claims to be brought long after the signature date, in some cases a number of years thereafter. If the prescribed formalities were complied with at the signature date but a warranty claim only arose a number of years after the solvency and liquidity test was conducted, would the financial assistance or the solvency and liquidity test, which would then be a number of years old, still be valid?

Commercially, one would hope that the Target Company would continue to conduct its affairs in such a manner as to ensure that it remains solvent and liquid on an ongoing basis. However, the only legal requirement is that the requisite authorising board and shareholder approvals were obtained for the granting of the financial assistance by the time the financial assistance is *"provided"*, and the conventional approach in this regard is that this is on the signature date (although it is fair to argue that if there are suspensive conditions to the financial assistance agreement, the financial assistance is only given if and when those conditions are fulfilled). The contingent financial assistance will remain valid beyond the 12-month period, notwithstanding the deterioration of the financial position of the Target Company thereafter.

Accordingly, should a warranty claim arise at any point after the 12-month period, and the Target Company be unable to satisfy its obligations in terms of the indemnity provided to the Subscriber due to its financial position, the warranty claim is valid and the Subscriber's recourse would possibly be limited to applying for the liquidation of the Target Company.

Conclusion

Ultimately, the company relying on financial assistance in terms of section 44, particularly in the case of an indemnity or guarantee, must ensure that they are alive to the risks that they are assuming due to such reliance.

As is evident, the provisions of section 44 (and 45) of the Act are quite nuanced and companies must be sure to apply their minds as to whether the provision of an indemnity constitutes financial assistance, and ensure that the requisite approvals have been obtained, in advance, or risk the provision of financial assistance, and the transaction itself, being declared void.

Shameegh Allen and Nozinhle Mbuyane

The environmental (and other) legislative transitions to a low-carbon economy in South Africa

South Africa is currently enjoying a much welcomed and extended reprieve from the effects of load shedding. While there is speculation that this is merely a politically motivated state of affairs, experts suggest that the increase in solar installations at household and business levels has resulted in a significant decrease in Eskom-generated energy demand, as 2,1GW of solar has been installed in the last 12 months. Furthermore, Ember Energy estimates that solar energy contributed 10,4% to South Africa's electricity mix in February 2024. South Africa has committed to moving towards a low-carbon economy, and the recent expansion of renewable energy installations can be seen as a significant contribution towards this goal. The transition towards a low-carbon economy cannot be achieved without the reform of enabling legislation.

History: Environmental legislation and electrical infrastructure

Prior to the advent of the broad spectrum of environmental legislation that we have in South Africa today, the main selection criterion for the site of a new coal-fired power station was arguably the proximity of the site to coal-rich mining areas. Other than being under a possible legal obligation to apply for a water permit in terms of the repealed Water Act 54 of 1956 and a registration certificate in terms of the repealed Atmospheric Pollution Prevention Act 45 of 1965, the site selection of a new power station and the construction thereof was not too constrained by the need to obtain multiple environmental authorisations, licences and permits, and other environmental considerations. Similarly, electricity transmission lines were probably constructed on the basis of the cheapest and shortest possible route to transmit the electricity from the power stations to villages, towns, and cities for onward distribution to homes within those villages, towns and cities.

This lack of environmental legislative oversight afforded Eskom the ability, during a 20-year period between the mid-1960s and mid-1980s, to complete the construction of numerous coal-fired power stations such as Camden, Grootvlei, Arnot, Kriel (one of the largest coal-fired power stations in the southern hemisphere at the time), Hendrina and Duvha, and commence the construction of Matimba, Matla, Lethabo, and Kendal coal-fired power stations. During the same period, the construction of the Gariep hydro-power station, the Drakensberg Pumped Storage Scheme and two gas turbine stations in Cape Town and East London were completed, and construction of the Koeberg nuclear power station commenced. In order to reduce the costs associated with the transport of coal to the Western Cape and other non-coal-bearing provinces, work also commenced on the establishment of a national grid, including the construction of the transmission line to connect Mpumalanga and Cape Town, which was completed in less than two years. The final piece in the national grid puzzle was completed in 1973 when the Eastern Cape was connected to the country's main source of power generation and supply.

The environmental (and other) legislative transitions to a low-carbon economy in South Africa

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Low-carbon economy transition and enabling legislative reform

Until recently, it would have taken approximately the same amount of time to apply for and obtain environmental authorisation for the Mpumalanga to Cape Town transmission line as it took Eskom to complete the construction of the transmission line. However, considering South Africa's international commitment to achieve a fixed target for greenhouse gas emissions levels of 350–420 metric tonnes of carbon dioxide equivalent by 2030, as well as the load shedding crisis that has been (and may still) gripping the country, there was a realisation of the need to expedite the environmental authorisation, licence and permit application processes so as to significantly increase the available pool of renewable energy projects, which can be built relatively cheaply and quickly. It was further recognised that the available electricity transmission grid was fast becoming depleted, which realisation became a reality when 23 wind projects could not be considered for preferred bidder status during Bid Window 6 because the projects were located in areas with no available grid capacity.

Within the context of South Africa's transition to a low-carbon economy and the need to resolve the current energy crisis, the plethora of environmental and other legislative developments since 2019 to expedite the construction of renewable energy generation projects (both Renewable Energy Independent Power Producer Procurement Programme projects and private offtake projects) and increase grid capacity while at the same time striking a balance with the need to uphold the principle of sustainable development is to be welcomed. Some of the critical environmental legislative developments of the last few years are outlined below.

Generic and pre-approved environmental management programme

The confirmation that where applications for environmental authorisation relate to the development or expansion of substations and overhead electricity transmission and distribution infrastructure, then such application must utilise the generic and pre-approved environmental management programme (EMPr) that provides for the relevant measures to mitigate against the environmental impacts associated with the development or expansion of this infrastructure. The effect of this legislative development is threefold insofar as it reduces the time required for the actual environmental impact assessment process by eliminating the need to develop a standalone EMPr. Moreover, there is no longer a need for the competent authority to review every EMPr, thereby expediting the decision-making process. Finally, the existence of a generic and pre-approved EMPr removes the possibility for appeals to be submitted by interested and affected parties against the approval of the content of the EMPr.

DFFE Screening Tool

The Department of Forestry, Fisheries and the Environment (DFFE) introduced the National Web-based Environmental Screening Tool (DFFE Screening Tool), which is a geographically based web-enabled application that allows developers to screen their proposed site for any

The environmental (and other) legislative transitions to a low-carbon economy in South Africa

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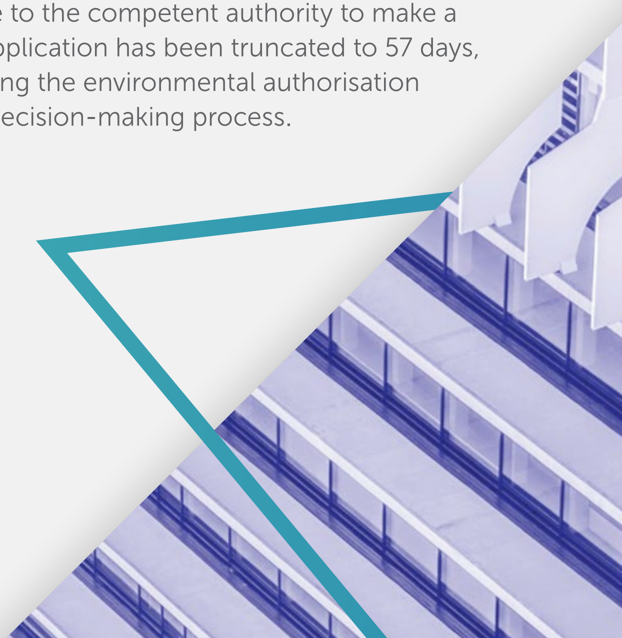
environmental sensitivities. The DFFE Screening Tool identifies related exclusions or specific requirements, including specialist studies applicable to the proposed site or development based on the national sector classification and the environmental sensitivity of the site. The Minister of the DFFE (Minister) published a notice on 5 July 2019 making it mandatory to include a DFFE Screening Tool report with all environmental authorisation applications. The introduction of the DFFE Screening Tool harmonises the environmental impact assessment process as the required specialist studies are identified and ensures that environmental authorisation applications address the necessary environmental aspects and streamline the application process.

Renewable energy development zones

Another development is the establishment of 11 renewable energy development zones (REDZs). Development of a large-scale wind or solar photovoltaic energy facility within one of the REDZs that also requires the development of electricity transmission and distribution infrastructure (inclusive of sub-station development) – the greater part of which falls within the REDZs and which trigger specified listed activities as well as any other listed and specified activities necessary for the realisation of such facility and infrastructure – can follow the shortened basic assessment environmental authorisation application process.
The transmission and distribution infrastructure component of the project can further utilise the generic and pre-approved EMPr as part of the application. Furthermore, the timeframe available to the competent authority to reach a decision on an application that falls within the above scope has also been reduced to 57 days. All of these measures have curtailed the entire environmental authorisation application and decision-making process.

Transmission and distribution corridors

Seven strategic transmission and distribution corridors for the development of large-scale electricity transmission and distribution infrastructure (inclusive of substation development) have been created. The effect of this is that if the development of the electricity and distribution infrastructure triggers the specified listed activities, as well as any other listed or specified activities relevant to such infrastructure, then any application for an environmental authorisation to undertake such listed activity within the greater part of one or more of the strategic transmission or distribution corridors must follow the basic assessment process. Moreover, any application must utilise the generic pre-approved EMPr as part of the application. In addition, the time available to the competent authority to make a decision on an application has been truncated to 57 days, further streamlining the environmental authorisation application and decision-making process.



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Standard for the Development and Expansion of Power Lines and Substations

Subsequent to the establishment of the seven corridors and the curtailment of the time periods associated with the environmental authorisation application and decision-making process, the DFFE published a further notice in July 2022 confirming that it had developed a Standard for the Development and Expansion of Power Lines and Substations within Identified Geographical Areas (Standard). The identified geographical areas set out in the Standard are the seven strategic transmission and distribution corridors. The Standard assists developers to achieve planning, routing, siting and remediation objectives that will ensure the acceptability of the effects of the development of overhead powerlines and substations on the environment, independently from the need for an assessment by the competent authority. This ensures that the environmental management and mitigation surrounding overhead powerlines and substations are harmonised and ensure best practice procedures are implemented.

Battery storage and solar PV exclusion norms

On 27 March 2024, the Minister adopted both the Norm for the Exclusion of Identified Activities Associated with the Development and Expansion of Battery Storage Facilities in Areas of Low or Medium Environmental Sensitivity and the Norm for the Exclusion of the Development and Expansion of Solar Photovoltaic Facilities in Areas of Low or Medium Environmental Sensitivity(Solar Exclusion Norm) (collectively the Exclusion Norms). The Exclusion Norms set out the specific listed activities that, if triggered, are entirely excluded from the requirement to obtain an environmental authorisation. The Exclusion Norms further provides that the exclusion extends to any associated listed activity necessary for the realisation of such facilities. Although the requirement to obtain an environmental authorisation is excluded, the developer is still required to register the battery storage facility or solar photovoltaic facility with the relevant competent authority, which in turn is required to process the registration within 10 days of receiving the registration and supporting documentation.

Amendments to the electricity generation licence requirements

Schedule 2 to the Electricity Regulation Act 4 of 2006 (ERA) sets out the requirements for an electricity generation licence. Previously, the ERA provided that a person did not require an electricity generation licence where the electricity generation capacity was below 1MW (Exemption Threshold). The Exemption Threshold was increased from 1MW to 100MW in 2021, was subsequently removed in its entirety in 2023, and now merely requires registration with the National Energy Regulator of South Africa and adherence to the Distribution Code and Transmission Grid Code.

The environmental (and other) legislative transitions to a low-carbon economy in South Africa

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Solar feed-in tariff

The South African Government published the Energy Action Plan in July 2022 (Energy Action Plan), which sets out the plan to end load shedding in South Africa. The Energy Action Plan outlines five specific actions to address the current electricity shortfall, with one of the actions being to *"unleash businesses and households to invest in rooftop solar"*. In order to encourage rooftop solar installations at business and household levels, Eskom developed a feed-in tariff for small-scale embedded generators. The solar-feed-in tariff is set to encourage the installation of rooftop solar as households and businesses can financially benefit from feeding electricity back into the grid.

Electricity Regulation Amendment Bill

The Electricity Regulation Amendment Bill (ERA Bill), which is set to amend the ERA and radically transform the structure of the electricity sector, was passed by the National Assembly on 14 March 2024. The ERA Bill is set to provide an open market platform that will allow for competitive electricity trading in South Africa and to establish the Transmission Systems Operator, also known as the National Transmission Company of South Africa (NTCSA). The NTCSA will be charged with procuring electricity from the various power producers in South Africa, thereby further opening the market for private electricity generators.

The Department of Mineral Resources and Energy estimates that load shedding will still persist until 2028; however, given the significant recent strides towards transitioning to a low-carbon economy and considering the above and ongoing legislative reform, it finally seems that there is indeed some light at the end of the load shedding tunnel.

Anton Ackermann and Alistair Young

Key insights into the Public Benefits Organizations Act, 2013

Delay is not denial. This famed phrase could not be truer for Kenyan civil society in light of the Government's gazetting of 14 May 2024 as the commencement date of the Public Benefit Organization Act, 2013 (PBO Act) after a decades-long wait, court battles, and defiant government administrations. The PBO Act repeals in its entirety the infamous Non-Governmental Organizations Co-ordination Act, 1990 (NGO Act).

There are needs in every society that governments are unable to meet. This gap is bridged by civil society, of which organisations such as public benefit organisations (PBOs) form part. Public benefit activities enhance economic, environmental, social or cultural development by advocating issues of public interest.

The PBO Act aims to support PBOs to meet the diverse needs of Kenyan people, protect internationally recognised freedoms, such as freedom of expression and association, promote compliance by PBOs, promote collaboration between PBOs and the Government, provide transparent registration procedures, strengthen civil society, and improve the conditions and quality of life for the people of Kenya.

Under the PBO Act the Government is obliged to provide an enabling environment for PBOs to be established and operate in. The guiding principles of collaboration between the Government and PBOs include dialogue and communication, managing diverse expectations, conflict management, learning and sharing, joint initiatives, institutionalisation, good governance, and promotion of trust and predictability, among other things.

Public Benefit Organizations Regulatory Authority

The PBO Act establishes the Public Benefit Organizations Regulatory Authority (Authority), which will be run by a board (and which replaces the infamous NGO Board) composed of the chairperson; three members who have rendered distinguished service in civil society; the principal secretaries in the respective ministries responsible for PBOs (finance and foreign affairs); the Attorney-General; the chairperson and two members of the governing board of the National Federation of Public Benefit Organizations (Federation); and one public officer representing the principal secretary responsible for such departments as determined by the Authority.

The Authority has powers to independently (i) register and deregister PBOs, (ii) maintain a register of PBOs, (iii) interpret national policy on PBOs, (iv) receive and review annual reports of PBOs, (v) advise the Government on PBOs' role in development, and (vi) advise and train PBOs.

Registration of PBOs

Every NGO registered under the repealed NGO Act will be deemed to be registered as a PBO under the PBO Act and is required within one year from the commencement date to be registered as a public benefit organisation under the PBO Act. NGOs that fail to comply with this requirement will cease to have PBO or similar status 30 days after the expiration of the notice period. For new NGOs, they have to register under the PBO Act.

Key insights into the Public Benefits Organizations Act, 2013

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Unlike its predecessor, the PBO Act clearly outlines the specific documents and information required for registration of a local an international PBO. Further, the PBO Act elaborates in great detail on what key information should be detailed in a PBO's constitution. This is a welcome change as it creates predictability and enables founders and advisors of PBOs to anticipate and pre-empt the expectations of the Authority on registration requirements.

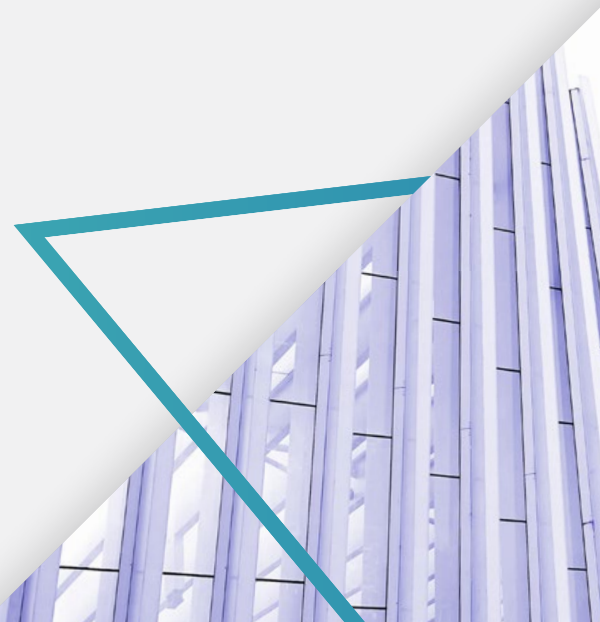
Entities carrying out public benefit activities but registered under other laws will now need to apply to be registered under the PBO Act or be conferred PBO status by the Authority for them to enjoy the benefits provided under the PBO Act.

International non-governmental organisations are required to apply and obtain a certificate from the Authority to operate in Kenya as PBOs by filing the following documentation with the Authority:

- an application form;
- proof that it is a legal entity in another country;
- the organisation's address in Kenya; and
- a written statement from a representative of the organisation at its headquarters with the authority to provide such statement stating: (i) the purposes of the international NGO, (ii) a description of the activities to be carried out by the organisation in Kenya, and (iii) the name and address of and contact information of the authorised agent.

Similar to the provisions in the repealed NGO Act, international organisations will need to have resident Kenyans forming at least one-third of the board and also maintain an office in Kenya.

An application to register a PBO will be considered by the Authority within 60 days and, if it is satisfied that the applicant meets the requirements, it will register the organisation. If the application is not compliant, the Authority will notify the applicant in writing, giving reasons and remediation requirements and the period (not exceeding 30 days) within which to comply with the requirements. The period within which to comply may be extended for a maximum period of 21 days upon showing good cause. Upon complying with the request, the authority will, within 14 days of receipt of the requested documents/information, register the PBO. Where the applicant does not comply with the Authority's request, the Authority will refuse to register the PBO and notify the applicant in writing of the refusal and the reasons therefor.



Key insights into the Public Benefits Organizations Act, 2013

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Upon registration, a PBO will be issued with a certificate of registration which will be the conclusive evidence of the organisation operating in Kenya. A PBO retains registration until the registration is cancelled, the organisation is voluntarily deregistered, or the PBO is wound up or dissolved.

Although the repealed NGO Act allowed for certain entities to be exempted from registration, such exempted entities must now apply for registration under the PBO Act within three months of the PBO Act commencing.

Benefits of registration

Registered PBOs will benefit from indirect government support (through tax exemptions), direct government financing (through partnerships), preferential treatment in public procurement procedures, accessibility to information, and access to training courses offered by government institutions. Some of the tax benefits include:

- exemptions from income tax on income received from membership subscriptions, donations, grants and any other income wholly used to support the entity's public benefit purpose;
- exemptions from tax on interest and dividends on investments and gains from the sale of assets;
- stamp duty and court fees exemptions;
- preferential treatment for value-added tax (VAT) and customs duties relating to imported goods or services used to further their public benefit purpose;
- incentives for donations; and
- employment tax preferences.

Some of these incentives, e.g. incentives for donations, are already captured under current legislation. Amendments may be necessary to operationalise the remaining incentives, such as employment tax preferences and preferential treatment for VAT and customs duties.

Self-regulation

The Federation is established under the PBO Act as the umbrella organisation for all PBOs. The objectives of the Federation are to provide leadership on matters of interest in the sector, promote self-regulation, co-ordinate self-regulation forums, monitor the performance of self-regulation forums, advise the Authority on the development of PBOs, advise donors and the Authority on matters concerning the sector, as well as capacity building for PBOs.

Public Benefit Organizations Regulatory Disputes Tribunal

In contrast to the NGO Act, which did not have an internal dispute resolution mechanism, the PBO Act establishes the Public Benefit Organizations Regulatory Disputes Tribunal (Tribunal), which has jurisdiction to hear and determine complaints arising out of breach of the PBO Act. The Tribunal has powers to hear and determine:

- appeals from the Cabinet Secretary or the Authority concerning the Federation and decisions of the Federation;
- disputes between members of the Federation;
- disputes between the Federation and the Authority; and
- disputes between any member of the Federation and the Federation.

Key insights into the Public Benefits Organizations Act, 2013

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Compliance requirements

PBOs are obligated to prepare and keep proper records as well as have financial statements prepared annually by an independent auditor and to the standard acceptable to non-profit organisations.

Further, within six months after the close of each financial year, each PBO is required to file with the Authority a statement of its audited accounts, a certified copy of financial statements, and a report detailing the activities of the PBO during the year.

PBOs are also required to provide the Authority with details (such as names and physical, business, and residential addresses) of governing body members within one month after any election or appointment.

Any amendments to a PBO's constitution, and basic information such as addresses, details of the founders, etc. must be notified to the Authority, within 60 days of occurrence.

Deregistration and dissolution

A PBO may be deregistered or wound up voluntarily. Where the entity is a membership organisation, a resolution by at least two-thirds of the members is signed by the chairperson. If the entity is a non-membership organisation, a voluntary decision is made by its governing body per the organisation's constitution. A PBO that desires to voluntarily dissolve will have the right to determine organisations to which it will distribute its assets on condition that such organisation(s) are certified by the Authority to be in good standing.

Involvement by the Government

The PBO Act makes it mandatory for the Government to involve PBOs in policy decision-making on issues affecting them, especially on local levels. Every ministry is required to designate officers to handle matters relating to PBOs and have close working relations with each other and the Authority.

Entry permits

PBOs that wish to employ non-citizens must demonstrate to the immigration department that the services of such employees are necessary for the proper functioning of the organisation; no persons with comparable skills are available locally; and the employees will train Kenyans to obtain scientific, technical and managerial skills. The repealed NGO Act required the NGO Board to receive applications for entry permits and thereafter make recommendations to the immigration department for issuance of the permit, whereas the PBO Act allows for direct entry permit applications to the principal immigration officer. This change may shorten the period for obtaining permits for PBO staff.

Key insights into the Public Benefits Organizations Act, 2013

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Offences and penalties

Under the PBO Act, it is an offence punishable on conviction by a fine not exceeding KES 300,000 or imprisonment not exceeding two years, or both, to fraudulently hold an organisation to be registered under the PBO Act or to forge documents to procure registration. Considering the crucial role of the PBOs in society, we are of the view that these penalties need to be stiffer in order to safeguard the public from unscrupulous individuals and deter such individuals from utilising the sector for unauthorised activities.

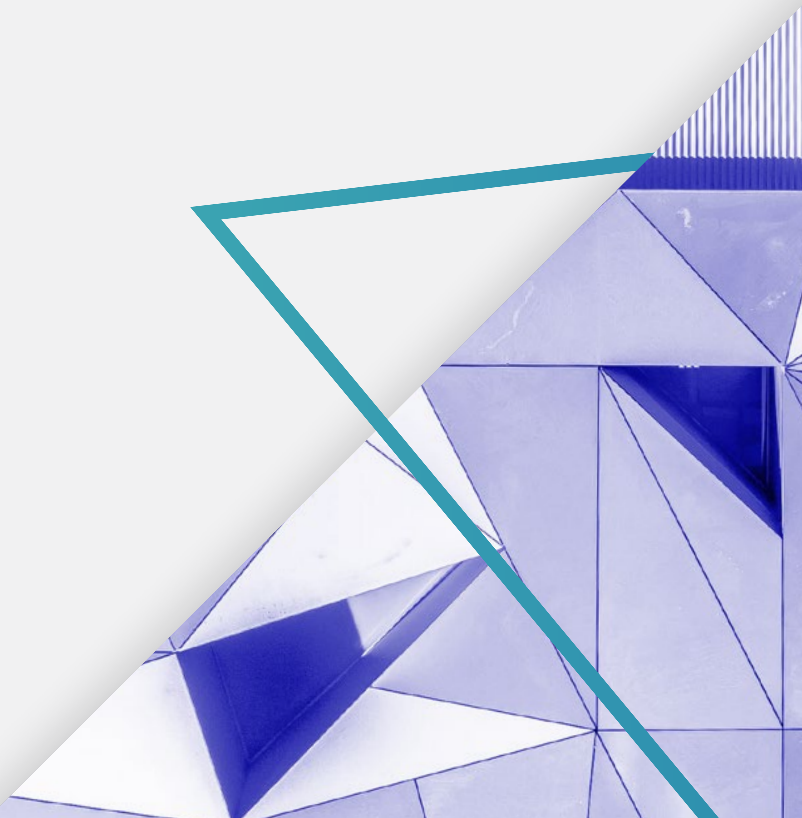
Regulations

The PBO Act is in force, however the regulations to the PBO Act are yet to be published. The regulations are to be made by the Cabinet Secretary on the recommendation of the Authority to guide the implementation of the PBO Act. The enactment of the regulations must be subject to public participation as enshrined in the Constitution.

Conclusion

With the robust regulatory framework governing non-profit entities in Kenya, PBOs now have certainty about the registration process, compliance issues and generally how to carry out their activities. The specific requirement for the Government to support civil society is plausible. The PBO Act will increase accountability for both the Authority and PBOs, improve governance of PBOs and provide an enabling environment for civil society to thrive.

Alex Kanyi and Abednego Mutie



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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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