South Africa

Expert: Ricardo Wyngaard
Institutional Affiliation: Ricardo Wyngaard Attorneys
With contributions from staff at the Indiana University Lilly Family School of Philanthropy

QUICK FACTS

Legal forms of philanthropic organizations included in the law: Association, Company Limited by Guarantee, Trust

Five main social issues addressed by these organizations: Primary and High School Education, Health and Medical Research, Basic Needs, Housing and Economic Development, Religion

Average time established by law to register a philanthropic organization: 61-90 days

Average cost for registering a philanthropic organization: US $18

The South African legal system, in essence, has a choice between one of three legal structures, namely: a voluntary association, a nonprofit trust, and a nonprofit company. A voluntary association, which is the most popular option, can be set up without any costs involved. The cost of registration for nonprofit trusts is about US $7. The nonprofit company can be set up for about US $18.

Government levels primarily regulating the incorporation of philanthropic organizations: Central/Federal Government

Philanthropic Environment Scores:

<table>
<thead>
<tr>
<th>Year</th>
<th>Ease of Operating</th>
<th>Tax Incentives</th>
<th>Cross-Border Flows</th>
<th>Political Environment</th>
<th>Socio-Cultural Environment</th>
<th>OVERALL SCORE</th>
</tr>
</thead>
<tbody>
<tr>
<td>2018</td>
<td>4.0</td>
<td>4.0</td>
<td>3.0</td>
<td>4.0</td>
<td>4.0</td>
<td>3.80</td>
</tr>
</tbody>
</table>
I. Formation/Registration, Operations, Dissolution of a Philanthropic Organization (PO)

The three questions in this section pertain to the laws and regulations governing philanthropic organizations (POs). The scoring questions for this category cover three aspects of regulations: (A) formation and registration, (B) operations, and (C) dissolution.

Question 1: To what extent can individuals form and incorporate the organizations defined?

**Score: 4.0**

South Africa has adopted and abides by the major treaties that protect the freedom of association, including, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples’ Rights, and the right is also enshrined in Clause 18 of the country’s Constitution. Practically, there are three forms of legal entities for nonprofit organisations operating in South Africa, namely voluntary associations, nonprofit trusts, and nonprofit companies. Of these entities, voluntary associations are the most popular because their establishment is quick, inexpensive, and easy. A voluntary association is established in terms of common law and basically entails the finalization of the organization’s constitution by its members. The South African courts have accepted the following three requirements for recognition as a universitas personarum: the association exists separate from the members who comprise it; the association must have perpetual succession; and the constitution must provide that it may own property apart from its members. This form of association does not have to register in order to be recognized as a legal person.

One of the practical shortfalls with the voluntary association is that you may experience difficulties when opening a bank account for a voluntary association because of anti-money laundering legislation, especially if it is not registered with the Nonprofit Organisations Act. The Directorate of Nonprofit Organisations (the Directorate) has indicated: “Of now late as well, the Financial Intelligent Centre Act (FICA) had made the nonprofit organization registration a condition for financial institutions to open a banking account in the name of the organisation. The nonprofit organization registration therefore sets a much-needed basis for organisations to run their affairs effectively and accountably.”

The time to register a nonprofit trust depends on the local office where registration takes place, and ranges from 2 weeks to 2 months. Incorporation of a nonprofit company takes 25 business day officially, but in reality can take between 3 to 4 months. Any of these three entities can register in terms of the Nonprofit Organisations Act, and the process takes about two months.

Seeking to cultivate a welcoming environment for nonprofit organizations, in 1997, South Africa adopted the Nonprofit Organisations Act of 1997, which established the basic requirements for CSO registration in the country. These requirements are not especially onerous, and South African law does not prohibit the formation and operation of unregistered groups. Groups are also generally not subjected to frustrating legal impediments when setting up nonprofit organizations. The law neither restricts who can be a founder nor demands a certain amount of minimum capital or assets. The law generally makes provision for applicants to appeal the decisions of the departments responsible for registrations. The Directorate has, however, resisted foreign involvement by refusing to register a nonprofit organization if the majority of its board members are non-South Africans. After some exchange of correspondence, the Directorate did, however, register an organization in October 2014 that consisted of mostly non-South Africans and only required one South African board member. The government bodies tasked with processing nonprofit organization applications usually carry out their duties in a professional, consistent, independent, and apolitical manner.
Question 2: To what extent are POs free to operate without excessive government interference?

POs are generally allowed to decide on their internal governance structures and government actors only rarely interfere with the internal governance structures of nonprofit organizations. The requirements that are legally imposed upon POs are usually aimed at ensuring that the organization is an authentic nonprofit organization that is not used for private gain and that the activities of the organization are lawful. The Nonprofit Organizations Act, for example, lays down a number of requirements that must be adhered to in order for a nonprofit organization to be registered and be in compliance with the terms of the Nonprofit Organizations Act. The founding document of a PO registered under the Nonprofit Organizations Act must provide, inter alia; that the organization's incomes and assets are not distributable to its members or officers, that these individuals have no claims to these incomes or properties, the organization’s structure and governance protocols, procedures for dissolution, and procedures for distributing assets in cases of dissolution.

POs registered under the Nonprofit Organizations Act must annually submit prescribed narrative reports and financial reports certified by an accounting officer. The Nonprofit Organizations Act does not require registered POs to submit audited financial statements. An unpublished research report has indicated that the majority of organizations on the database of the Directorate are non-compliant.

Similar registration and reporting requirements are applicable to tax-exempt organizations and are provided for in South Africa’s Income Tax Act. Tax-exempt organizations must annually submit prescribed tax returns. The Income Tax Act does not generally require such organizations to submit audited financial statements, except in such circumstances as set out in the Income Tax Act.

POs are not prohibited from participating in networks, using the Internet, or from employing other forms of social media. Reporting requirements for POs are freely available and equally applicable to all organizations.

Question 3: To what extent is there government discretion in shutting down POs?

In terms of the common law, the Trust Property Control Act, and the Companies Act, the governing body of an organization is allowed to voluntarily dissolve the PO, and South African law does not generally allow the government much discretion in shutting down the activities of an organization. The South African Courts have confirmed that the members of a voluntary association are banded together by a contract based on a consensus and are bound only by the terms to which they have agreed. Given the nature of voluntary associations, i.e. contractual of nature, the governing body must comply with the provisions of the constitution upon dissolution.

In the event that a government department intends to close down an organization, it would be required to first approach a court of law to obtain an order for that purpose. Involuntary termination is usually only provided for in circumstances where an organization may be insolvent and would then become subject to the statutes contained in the Insolvency Act. This law, originally passed in 1936, is applied relatively equally to all organizations.
POs registered under the Nonprofit Organizations Act must, upon dissolution, transfer assets to another nonprofit organization with similar objectives. The other nonprofit organization need not be registered under the Nonprofit Organizations Act.

POs may, in certain instances, also be de-registered when there has been non-compliance with relevant legislation. For example, the Nonprofit Organizations Act empowers to the Director of nonprofit organizations to cancel the registration of a PO that has not complied with a material provision of its constitution; a condition or term of any benefit or allowance conferred on it in terms of the Nonprofit Organizations Act; or its reporting requirements as contained in the Nonprofit Organizations Act. Before cancelling the registration status of a PO, the Director must first issue a compliance notice to the PO in which it is given the opportunity to comply with the relevant provisions. A PO that has had its registration cancelled can also lodge an appeal against the decision of the Director to an arbitration panel appointed by the Minister of Social Development.

II. Domestic Tax and Fiscal Issues

The two questions in this section pertain to laws and regulations governing the fiscal constraints of giving and receiving donations domestically.

Question 4: To what extent is the tax system favorable to making charitable donations?

Score: 4.0

Nonprofit organizations can access a number of tax benefits provided for in the terms of the Income Tax Act. This Act – along with various other rulings and statutes – confers upon eligible South African POs a number of advantages. First, they ensure that South African POs are fully exempt from paying income tax if they engage in limited trading activities. This also means that POs are partially exempt from paying income tax in situations where its trading income exceeds the limitations contained in Section 10 (1) (cN) of the Income Tax Act. Second, POs are able to receive donor deductible contributions. Only approved public benefit organisations (PBOs) whose status complies with the terms of section 18A of the Income Tax Act can issue receipts to their donors for donations received – either in cash or in-kind, which will allow the donors to make deductions from their taxable income – up to ten percent for both individuals and corporations. Third, South African CSOs are able to access other tax benefits that are reliant on the PO’s PBO status. These include exemptions from transfer duties, estate duties, capital gains taxes, donations taxes, skills development levies, and dividend taxes. Also, South African law allows organizations to apply for rebates on property rate taxes which are usually accessed at the local government level.

To access these main tax benefits, most POs must be approved PBOs. Applications to be approved as a PBO are submitted to the Tax Exemption Unit of the South African Revenue Service. Application is made by completing a prescribed form and providing supporting information on the activities of the PO. The process should take about two months, in theory, but applicants have waited much longer in practice, sometimes up to four months. PBOs must carry on one or more public benefit activities as defined in the Income Tax Act and must submit annual income tax returns to qualify. Only in exceptional instances are PBOs required to submit audited financial statements.

The Income Tax Act also grants tax exemption to other forms of POs. For example, section (1)(cQ) of the Income Tax Act grants tax exemption to a small business funding entity, which must be set up for the
sole or principal object of providing funding for small, medium, and micro-sized enterprises. Such funding must be for the benefit of, or be widely accessible to small, medium, and micro-sized enterprises.

It is also possible for a foreign PO to register as an external company in South Africa pursuant to the Companies Act. In this situation, no new entity comes into existence, the foreign company is simply registered locally. It may be able to access income tax exemption if it has tax exemption in the country where it is incorporated. It will, however, not be able to obtain donor deductibility status. There are also some differences with the tax treatment in the event of the external company dissolving compared to an organization that has been established locally. The external company, if tax-exempt, may, subject to limitations, be allowed to withdraw its remaining assets from South Africa.

**Question 5: To what extent is the tax system favorable to POs in receiving charitable donations?**

As indicated in previous responses, South African POs are able to receive contributions that are donor deductible. Only approved public benefit organisations (PBOs) whose status complies with the terms of section 18A of the Income Tax Act, however, can issue receipts to their donors for donations received, either in cash or in-kind, which will allow the donors to make deductions from their taxable income – up to ten percent of their taxable income for both individuals and corporations. Section 18A of the Income Tax Act allows taxpayers to make a deduction from their taxable income when they make donations to certain organizations.

The process to receive these deductible donations is clearly articulated in section 18A of the Income Tax Act, which stipulates that a donation will only qualify for a deduction if; the donation is made to an approved PBO, the PBO receiving the donation uses the funds to carry out public benefit activities, the donation is not made in payment for services rendered to the taxpayer, the donation is not made in the form of a service, and the donation does not exceed ten percent of the taxpayer’s taxable income.

Not all PBOs, however, can receive tax deductible donations. Some organizations, for example, focusing on activities such as the advancement, promotion, or preservation of the arts, culture, or customs and the provision of youth leadership or development programs do not qualify for donor deductible status. Donations in-kind are also eligible for deduction, but donations in the form of service are not eligible for deduction.

The list of PBOs that can access tax deductible donations has increased over the years, but a few POs are not eligible for tax deductible donations, including those focusing on religion, arts, and sports.
III. Cross-Border Philanthropic Flows

The two questions in this section concern laws and regulations governing the fiscal constraints of giving and receiving cross-border donations. The scoring for these questions pertains to the donor and receiving entities.

Question 6: To what extent is the legal regulatory environment favorable to sending cross-border donations?

Score: 3.0

South Africa’s Customs and Excise Act of 1964 does make a provision for the general rebate of custom duties on imported goods for nonprofit organizations. This rebate is, however, made in accordance with the terms and definitions provided in Schedule No. 4 of the Act, and it provides a refund – partial or full – of customs duties on certain specified imported goods, subject to various conditions.

Schedule 4 consists of six parts providing for rebate (partial or full) of customs duties on the importation of specific goods. Parts 1 to 4 are largely relevant to POs and include the following:

a) Goods for the advancement of journalism directed toward cultural, educational, charitable, welfare or youth organizations or purposes receive a full rebate. The institutions or bodies must be approved and their main purpose must be the advancement of journalism and the goods must have been forwarded unsolicited and free;

b) Also, goods for disabled persons or the upliftment of indigent persons – such as goods designed for persons with physical or cognitive disabilities – are eligible for a full rebate, provided that the recipient can produce a certificate from a specified organization, such as the South African National Council for the Blind, the South African National Council for the Deaf, or the South African National Council for Mental Health. These certificates must, in turn, be endorsed by the International Trade Administration Commission (ITAC). and applicants must demonstrate that the imported goods are for the exclusive use of persons with disabilities. The requirement for an endorsement by the Commission is not, however, solely limited to goods for persons with disabilities, and all goods seeking a rebate must demonstrate that they are for the exclusive use of their recipients and must be distributed free of charge;

c) Goods (excluding clothing) donated to welfare organizations receive a full rebate, provided the goods are forwarded unsolicited and distributed free of charge by the welfare organization, or used by such an organization, and a specific permit from the ITAC is required; and

d) Goods (excluding foodstuffs, clothing) donated to any educational, welfare, religious, or sporting organization, hospital, or clinic, subject to conditions determined by ITAC.

Goods that either fail to or are ineligible to receive a rebate are subject to normal customs duties, which are ordinarily calculated as a percentage on the value of the goods and can range from five to 20 percent.

Question 7: To what extent is the legal regulatory environment favorable to receiving cross-border donations?

Score: 3.0

South Africa’s tax laws are not restrictive for PBOs operating outside of the borders of South Africa. The Income Tax Act used to require PBOs to conduct at least 85 percent of their public benefit activities – whether calculated by time or money – within the borders of South Africa. This requirement was, however,
abandoned in 2006, and PBOs are now generally free to conduct their activities outside the country’s borders. Nonetheless, a PBO can only obtain donor deductible status if it conducts its public benefit activities in South Africa.

Even though the tax laws have seemingly been relaxed, South Africa still enforces prohibitory exchange controls, and all residents are subject to exchange control requirements. And, although the controls have generally been relaxed in recent years, they, nonetheless, still stipulate that applications by official or recognized charitable, religious, or educational bodies seeking to transfer funds to groups in countries outside the Common Monetary Area – Namibia, Lesotho, South Africa and Swaziland – must be submitted to the Financial Surveillance Department with full particulars of the underlying request for approval. Organizations are not, however, required to obtain government consent in order to receive off-shore donations or to channel such donations via a government department.

IV. Political and Governance Environment

The three indicator questions in the next two sections concern the political and governance context, socio-cultural characteristics, and economic conditions that influence the environment for philanthropy.

Question 8: To what extent is the political and governance environment favorable for philanthropy?

The political environment in South Africa can generally be considered as favorable for philanthropic freedom in South Africa. The South African government has generally been supportive of the PO sector. South Africa’s National Development Plan provides on page 337 thereof that: “In social welfare services, the State has adopted a partnership model of service provision and relies mainly on nongovernmental welfare organisations to provide professional social services. However, the funding of these organisations has declined steadily since 1994, reducing the range and compromising the quality of services at the same time as demand for such services has increased.” The President also stated during 2012: “In the past four years the world economy has experienced the worst economic crisis and global political turmoil that the world has ever seen. Unfortunately, the (economic) crisis has led to a shrinking of financial support to many nonprofit organizations locally. This situation threatens the viability of many nonprofit organizations that play an important role in meeting social service needs and in promoting development.”

Tensions between the government and the NGO sector seem to have grown during 2016 and 2017. During April 2016, the State Security Minister David Mahlobo, said that there are South Africans and NGOs who are collaborating with foreign forces to destabilize South Africa. He reportedly said in Parliament that: "Not everybody is our friend. The forces that are opposed to us are hard at work. Our NGOs play an important part in South Africa, but there are those who work to destabilise the state." A few days later, the President’s son, Edward Zuma, reportedly described NGOs ‘as devils in a sheep skin’ and said, "As a country, we are facing a situation where the youth and people in general are being told and fed lies and misinformation by all NGOs that are used by agents of the West to start a revolution in our country." Despite this, the climate is still conducive to the development of philanthropy.
Question 9: To what extent are public policies and practices favorable for philanthropy?

The South African government generally promotes philanthropic values and facilitates equal access to national and international resources and opportunities. Donors are generally free to support any philanthropic cause without government pressure. Government agencies demonstrate enough capacity to support and oversee POs. South Africa’s legislation and policies pertaining to nonprofit organizations generally provide a supportive environment for philanthropic giving. To this extent, the South African government has introduced various legislative measures aimed at promoting philanthropy to the PO sector, including: The Nonprofit Organisations Act, the amendments to the Income Tax Act during 2001, the introduction of the National Lotteries Act of 1997, the National Development Agency Act of 1998, and the Revised Broad-Based Black Economic Empowerment Codes.

POs are perceived as an integral part of South African society, and, given the high levels of poverty in South Africa, POs have played a significant role in rendering much needed services to marginalized communities. In addition to rendering services, POs are also playing an important role in advocating for policy changes to support South African society. During its repressive past, the nonprofit sector – which has historically consisted mostly of small community-based organizations – played a significant role in bringing about democracy and ending apartheid in South Africa. Regrettably, the resources to support the effective implementation of such laws have been lacking. The Department of Social Development, during 2012, published its Policy Framework on Nonprofit Organisations Law (the Policy Document), which captures the foundational principles of the government’s intended review of the legislative framework affecting the nonprofit sector. Proposed amendments to the Bill remain to be published.

V. Socio-Cultural Environment

Question 10: To what extent are socio-cultural values and practices favorable for philanthropy?

National research in South Africa has described South Africa as a ‘Nation of Givers’ and has concluded that the overwhelming majority of those that participated in the study – over 90 percent – gave time, money, and in-kind donations. Although South Africa does not rank highly in the most recent edition of the World Giving Index, philanthropic activity is growing.

South Africa has long benefited from a rich charitable culture, one that has given rise to a vibrant civil society and nonprofit sector. South Africans have generally aspired to the spirit of Ubuntu. The principle embraces the duty to care for others and can be roughly translated as 'I am what I am because of who we all are.' The spirit of Ubuntu has been present in South African communities and has laid the platform for philanthropic activity on both individual and organizational levels. CSOs are perceived as an integral part of South African society, and given the high levels of poverty in South Africa, CSOs have played a significant role in rendering much needed services to marginalized communities. In addition to rendering services, CSOs are also playing an important role in advocating for policy changes to support South African society. During its repressive past, the nonprofit sector – which has historically consisted mostly of small community-based organizations – played a significant role in bringing about democracy and ending apartheid in South Africa.
VI. Future of Philanthropy

These questions are used to provide a general picture of the future of philanthropy in this country as well as recommendations to improve the philanthropic environment.

Current state of the philanthropic sector

The South African philanthropic sector consists of two significant sectors, namely: the smaller community-based organizations and the larger nongovernmental organizations. The former are commonly poorly resourced, but widespread through South Africa and often cater to the basic social needs of communities in South Africa. The latter are more diverse in their focus areas, often professionalized with increased institutional capacity, but less likely to be based in rural areas. A number of larger organizations are providing support and funding to smaller organizations, but most smaller organizations do not have access to such practical support.

South Africa has, despite several interventions, not been in a position to effectively deal with the challenges of the the smaller community-based organizations. Although legislation has expressed a commitment and desire to support and enhance the capacity of smaller community-based organizations, this has not been successfully implemented. Any legislative and policy developments must, therefore, take into account the realities of smaller organizations.

It is also common cause that the Directorate has not been adequately resourced to fulfill its functions toward the nonprofit organizations. Philanthropic interventions should accordingly take this into account and provide appropriate capacity building and support to smaller organizations.

Three major recent events affecting the philanthropic landscape between January 2014 and December 2016

- The Department of Social Development is in the process of reviewing the Nonprofit Organisations Act. Although the proposed bill has not been published, it is evident that an amended bill will have a significant impact on the philanthropic landscape;

- The Financial Intelligence Centre Amendment Bill (FICA) was published during 2015 for public comment and is meant to bolster the fight against global financial crime by making it easier to identify ultimate owners of companies and accounts—including those of “domestic prominent influential persons.” Although it is a law of general application, it is expected that many POs will be affected by the new requirements.

One of the key implications for nonprofit organizations will be to ensure that their board members are properly verified with accounting institutions, especially banks. Merely producing certified copies of identity documents and proof of residence will seemingly not suffice for verification purposes under the new law. Also, banks will require additional information to identify beneficial ownership of board members. POs that do not comply with the new requirements, once effective, may not be able to access their bank accounts. Some banks have already commenced the process of requiring additional information in relation to board members; and

- The Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities (the Commission) published its Investigative Study of the Commercialization of Religion in South Africa for public comment during November 2017, after having conducted a pilot study in one of the provinces in South Africa. The study focused on the
concept of ‘commercialization of religion’ in South Africa, and recommends, among other things, that: “It should be mandatory for all religious institutions to register with the (the Commission) and sign the document at registration.”

Future development trends in the philanthropic landscape

It is evident that entrepreneurial philanthropy is becoming increasingly popular in the South African context. A low number of start-ups, especially in South Africa, make it beyond the founding stage of the business. Any democracy needs a thriving economy to function optimally. The demand for social enterprises has increased in South Africa, and the need to promote economic development at a community level is expected to increase.

In addition, an increased focus on governance requirements may result in the larger organizations becoming more institutionalized and shifting toward commercial objectives. This may further alienate smaller organizations given their limited resources to implement sound governance systems.

Three key recommendations to improve the environment for philanthropy

- Rural communities remain, for the most part, the orphans of development on the continent. This is partly because a focus on rural development requires an extraordinary commitment in time, effort, and resources. It also requires a significant level of collaboration between stakeholders operating in this field to maximize potential. There accordingly remains a need for increased rural development, and this should result in the development and support of more community foundations in South Africa;

- Increased collaboration between state departments and bigger POs aimed at enhancing the capacity of smaller organizations to fulfill their functions; and

- Amendment to the Income Tax Act to enable smaller organizations to access tax benefits more easily. The Income Tax Act should be amended to allow for a simplified registration process (similar to that of the Directorate) for smaller organizations with an annual turnover of less than the current prescribed amount. This could include the signing of a simplified written undertaking confirming that the organization will comply with the additional requirements if the income exceeds the prescribed amount.