

Understanding a voluntary association of persons

12 August 2020 00:00 by [Delon Small](#)

Understanding a voluntary association of persons

A voluntary association of persons is an entity that is useful for those interested in conducting a business for a public-benefit purpose. Namely, because it is relatively straightforward and economical to use. This article informs readers about a voluntary association of persons by discussing its origins, the applicable law and why it is valuable for a group of persons aiming to achieve a common objective.

Written by Delon Small, *an admitted* Attorney of the High Court of South Africa, for LexisNexis South Africa.

Introduction

A voluntary association of persons is driven by the mutual agreement between its members and is an entity that is convenient to use for a recreational and/or public-benefit activity. This article informs readers of its origins, the applicable law and why it is useful for a group of persons aiming to achieve a common objective.

General

A voluntary association of persons (**Voluntary Association**) is found in common law but has since become recognised by legislation.

It is conceived by three or more persons^[1] entering an agreement to form an organisation to achieve a common (*usually non-profit*) objective. It may be *incorporated* through the common law or legislation and will subsequently be independent of its members.

In order for it to be incorporated in terms of the common law, the Voluntary Association must have a constitution which specifies amongst other things that: (I) there will be perpetual membership; and (II) the assets and liabilities of the organisation will be held separate from its members. In order for it to be incorporated through legislation it must comply with the criteria set out in the Companies Act, 71 of 2008 and/or Nonprofit Organisation Act, 71 of 1997. Each form of incorporation is discussed below.

The Common Law – a *universitas*

South African common law relating to a Voluntary Association is a blend of Roman-Dutch and English law and describes a Voluntary Association as a *universitas*. These two terms can be used interchangeably.

A *universitas* is incorporated when a contract is concluded between its members. The *universitas* will accordingly gain legal personality if its members have a **serious intention to associate**, and are in **agreement on the essential characteristics and objectives** of the *universitas*^[2].

A *universitas* – once incorporated – is distinguished from an association of individuals as it is an entity, *legally disjointed* from the members forming it; and it has the capacity to obtain its own rights or obligations^[3].

The main characteristics of a *universitas* is that it should be capable of owning property apart from its members and it should be capable of perpetual succession^[4]. When determining whether an

association of persons may be regarded as a *universitas* one should consider, the nature, constitution, objects, and activities of an association of persons. One should further scrutinise the object of the business of the association when determining whether an association of persons is of the same nature as a Voluntary Association[5].

Common law also provides that a juristic person may naturally acquire legal personality by conducting itself as such, granted it does not carry on business for the sole purpose of gain. A Voluntary Association can therefore gain legal personality without complying with legislation but *must ensure* the aforesaid common law requirements are met[6].

Notwithstanding this, it is prudent to consider the requirements for the incorporation of a Voluntary Association in terms of the Nonprofit Organisations Act, 71 of 1997 and the Companies Act, 71 of 2008. Namely, because the mentioned legislative framework recognises the use of an association of persons to achieve an objective.

Nonprofit Organisations Act 71 of 1997

Considering what has been discussed, a Voluntary Association seems identical to a Nonprofit Organisation. One may then ask: is there is a difference between the two?

The two *seem* undistinguishable because an association of persons can be regarded as a Nonprofit Organisation in terms of Section 1(1) of Act 71 of 1997[7], and can therefore carry on business for a public purpose as a Nonprofit Organisation.

The association of persons would, however, have to be incorporated through meeting the criteria set out in this Act. This would involve, amongst other things, complying with sections 12 and 13 of the Act, which prescribes for the association of persons to apply to a director[8] for registration and delineates the application process. Charities and organisations such as the South African Red Cross Society, and Lawyers for Human Rights are examples of Nonprofit Organisations.

However, a *universitas* is distinguishable from a Nonprofit Voluntary Association because the latter is an association of persons which is incorporated through legislation, as opposed to the former which is incorporated through common law. The two are accordingly distinguishable because the requirements for incorporation are different. Organisations such as the Black Lawyers Association, and sporting bodies are examples of Voluntary Associations.

Despite the similarity between the two, in my view, a *universitas* is better to use because it is more self-regulated and less costly to incorporate. However, it may be easier to obtain funding for your business if you use a registered Nonprofit Organisation.

Companies Act 71 of 2008 (the New Companies Act)

Section 8 (3) of the New Companies Act provides for when an association of persons may be regarded as an entity[9].

Section 8(3) of the New Companies Act is similar to section 30 and 31 of the old Companies Act[10]. This section mentions that a Voluntary Association can still be used as an entity for a group to conduct a business. However, the Voluntary Association must not carry on business for the (sole) **object of acquisition of gain**.

Acquisition of gain has been interpreted by the courts to mean a commercial or material benefit/advantage. Gain is not solely a pecuniary profit, but it would be difficult to associate it with a

benefit which is charitable, humanitarian, cultural, scientific, or political. As stated in the case of **Smith v Anderson (1880) 15 Ch 247 (CA)**:

“...the sections are concerned with commercial enterprises and ‘gain’ must be given a corresponding meaning.”

Therefore, if the business of an entity is cultural, societal, or likewise oriented, it would not be regarded as a business for acquisition of gain.

Closing thoughts

A Voluntary Association is an entity found in common law and is ordinarily used for the achievement of a common goal between its members. For those interested in conducting a business for a public-benefit purpose, it would be useful to consider doing this through a Voluntary Association given how relatively straightforward and economical it is to use.

[1] A Voluntary Association must have a minimum of 3 members, but there remains debate over the maximum number of members allowed. Whereas section 30 of the old Companies Act (61 of 1973) limited the number of members of an association or partnership to 20, section 8(3) of the New Companies Act (71 of 2008) does not. Notwithstanding this, legal authors still opine that there should be no more than 20 members of a Voluntary Association. Legislation and common law therefore still seem to be conflicted.

[2] *Collen v Rietfontein Engineering Works* 1948 1 All SA 414 (A)

[3] *Webb and Co Ltd v Northern Rifles* 1908 TS 462

[4] *Tilbrook v Higgins* 1932 WLD 147 at 153.

[5] *La Lucia Sands Share Block Ltd v Flexi Holiday Club and Others* [2012] 3 All SA 49 (SCA)

[6] *Leschin v Kovno Sick Benefit & Benevolent Society* 1936 WLD 9

[7] *“nonprofit organisation” means a trust, company or other **association of persons**...*

[8] Section 8 of the Act makes provision for the appointment of a director who would receive registration applications, it states as follows:

“The Minister must designate an employee of the national department as the Director of Nonprofit Organisations to be in charge of the Directorate and to perform the 15 other functions conferred on the director by or in terms of this Act or any other law.”

[9] *“(3) No association of persons formed after 31 December 1939 for the purpose of carrying on any business that has for its object the **acquisition of gain** by the association or its individual members is or may be a company or other form of body corporate unless it-*

(a) is registered as a company under this Act;

(b) is formed pursuant to another law; or

(c) was formed pursuant to Letters Patent or Royal Charter before 31 May 1962.” (own emphasis added)

[10] Act 61 of 1973

“...the sections are concerned with commercial enterprises and ‘gain’ must be given a corresponding meaning.”