



**THE MEANING OF PUBLIC BENEFIT AS A REQUIRED OBJECT FOR  
INCORPORATION OF NON-PROFIT COMPANIES IN SOUTH AFRICA: A  
COMPARATIVE STUDY**

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## **DEDICATION**

This work is dedicated to my family, to my friends who supported me throughout my master's programme, and to my late grandmother who always believed in me and trusted that one day I will become a better person.

## ACKNOWLEDGEMENTS

I wish to acknowledge the work of God for making this research possible, for giving me strength and ability to complete and my family for being there for me. I would like to thank my supervisor for the proper guidance and supervision of this mini thesis.

I would also like to extend my heartfelt gratitude to my friends who have supported me in the journey of this work it was not easy.

Neither do people light a lamp and put it under a bowl. Instead, they put it on its stand, and it gives light to everyone in the house. In the same way, let your light shine before others, that they may see your good deeds and glorify your Father in heaven. (Matthew 5: 15-16)

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## CHAPTER ONE - INTRODUCTION AND BACKGROUND

### 1.1 Introduction

The term “public benefit” has not found its meaning both in Companies Act 61 of 1973<sup>1</sup> and Companies Act 71 of 2008.<sup>2</sup> Public benefit is one of the requirements for the incorporation of non-profit companies in South Africa and the latter is formed for the benefit of the public, cultural activity, social activity, communal and or group interest.<sup>3</sup> The first requirement in the incorporation of non-profit companies is a public benefit. Non-profit companies in South Africa were, under the 1973-Companies Act known as the section 21 companies, which were formed or were to be formed for any lawful purposes, with its main object of supporting religion, arts, sciences, education, charity, recreation or any other cultural or social activity or communal or group interest. Every non-profit company in terms of the 1973 Companies Act was deemed to be a public company and it was classified as a company limited by guarantee.<sup>4</sup>

The 2008-Companies Act inherited section 21 of the 1973 Companies Act, but created another division of company the “non-profit company (NPC)” and provided that all other companies which previously existed as associations not for gain which were regulated by section 21 of the 1973 Companies Act, as well as those that were formed under similar section of the act’s that existed before, automatically became NPC’s and their names at the end will automatically change to NPC instead of the associations incorporated under section 21 before.<sup>5</sup>

The 2008 Companies Act cater for two broad categories of companies that may be incorporated, namely: -

1. *“Profit companies and*
2. *Non-profit companies”.*

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<sup>1</sup> Hereafter, the 1973 Companies Act.

<sup>2</sup> Hereafter, the 2008 Companies Act. The later act came into effect in 2011.

<sup>3</sup> Schedule 1, item 1(1)(a) of the Companies Act 71 of 2008.

<sup>4</sup> Copley N, New Companies Act: does your section 21 / NPC have to adopt a new MOI,

<http://www.ngopulse.org/article/new-companies-act-does-your-section-21npc-have-adopt-new-moi> (accessed on 04 May 2019).

<sup>5</sup> *Ibid.*

A profit company means “a company incorporated for the purpose of financial gain for its shareholders”.<sup>6</sup> A non-profit company in opposition “must be formed for a public benefit object or an object relating to cultural or social activities or communal or group interests”,<sup>7</sup> however, it is not barred from making a profit to advance its stated object. The income and assets of a non-profit company are not allocated to its founders, members, directors, officers or persons and must be used to pursue its stated object as appears in the Memorandum of Incorporation.<sup>8</sup>

A profit company may be a state-owned company, a public company, a private company or a personal liability company, which is the current replacement for the formed or professional company incorporated under section 53(b) of the 1973 Companies Act.<sup>9</sup> A public company is not defined in the 2008 Companies Act. Section 1<sup>10</sup> simply states that “a public company is a profitable company that is not a state-owned company, nor a private company, nor a personal liability company”. A private company means “a profit company that is not public, nor a personal liability or a state-owned company and satisfies a criterion set out in section 8(2)(b)”.<sup>11</sup> A profit company “is a personal liability company if it satisfies the criteria for a private company and its Memorandum of Incorporation states that it is a personal liability”.<sup>12</sup> A personal liability company must fulfill the criteria for a private company and it may be regarded as a special type of private company. A state-owned company is defined as “an enterprise that is registered as a company in terms of the 2008 Companies Act and either is listed as a public entity in Schedule 2 or 3 of the Public Finance Management Act 1 of 1999 or is owned by a municipality”.<sup>13</sup>

Non-profit company in terms of Item 1(1) of schedule 1 of the 2008 Companies Act is just a recent replacement of section 21 of the 1973 Companies Act. The memorandum of incorporation of a non-profit company must outline an object of the company as either: -

- (i) “A public benefit object; or

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<sup>6</sup> Section 1 of the Companies Act 71 of 2008.

<sup>7</sup> Schedule 1, item 1(1)(a) of the Companies Act 71 of 2008.

<sup>8</sup> *Idem* item 2 (provisions concerning non-profit companies).

<sup>9</sup> Cassim *et al*, Contemporary company law (2012) 10.

<sup>10</sup> Of the Companies Act 71 of 2008.

<sup>11</sup> *Idem* s 1.

<sup>12</sup> *Idem* s 1 read with s 8(2)(c).

<sup>13</sup> In terms of the Local Government: Municipal Systems Act, 2000.



- (ii) *An object relating to one or more cultural or social activities or communal or group interests*.<sup>14</sup>

It comes from the above-stated legislation requirements, read together, that we have two important criteria that apply in the non-profit company in South African law, both of which must be adhered to.<sup>15</sup> The company must be incorporated for a suitable object (or proper purpose) as set out in its constitution: either a public benefit object or an object relating to one or more cultural or social activities, or communal or group interests.<sup>16</sup>

Public benefit is the main requirement for the incorporation of non-profit companies, but the 2008 Companies Act does not give its legal meaning. The 1973 Companies Act also failed to provide a legal definition for public benefit.

This study focuses on the meaning of public benefit in the incorporation of non-profit companies. This will be done through pieces of legislation, cases, textbooks, and articles that draw an inference to what is meant by “public benefit”. This will bring clarity on the meaning of “public benefit” in the context of non-profit companies.

We must understand that the term “public benefit” puts relief to poverty and impact to the betterment of the society. The term “public benefit” warrants to be taken seriously<sup>17</sup> and be given its legal meaning in the corporate sector.

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<sup>14</sup> Schedule 1, item 1(1)(a) of the Companies Act 71 of 2008.

<sup>15</sup> Cassim, the contours of profit-making activities of non-profit companies: analysis of the new South Africa, 2012, *Journal of African Law*, 56, 13.

<sup>16</sup> *Ibid.*

<sup>17</sup> Synge M. 2014 "a state of flux in the public benefits access, the UK, Ireland, and Europe, 10 [online] Available from [https://ore.exeter.ac.uk/bitstream/handle/Synge\\_CLPR\\_state\\_of\\_flux](https://ore.exeter.ac.uk/bitstream/handle/Synge_CLPR_state_of_flux) [accessed on 10 September 2019].

## 1.2 Literature review

Following the argument and the decision in the case of *Cuninghame v First Ready Development*<sup>18</sup> which dealt with the interpretational clarity on non-profit companies as defined by the 1973 Companies Act, some concerns were raised by the legal scholars being, “must a section 21 non-profit-company be concerned only with charitable, benevolent or philanthropic activities”<sup>19</sup> or “whether non-profit companies may embark on profit-making activities”.<sup>20</sup>

In the above-stated case, the appellants in their papers before the court emphasised the fact that it is clear from the definition of non-profit companies that such an association must be charitable, benevolent or philanthropic one but not for gain.<sup>21</sup> This view is supported by Mongalo in his article<sup>22</sup> when he quoted Brand JA saying “*It is clear from the section that such an association must be one not for gain and that its main object must be charitable, benevolent or philanthropic one. An association whose main objective is a purely commercial one or intended to achieve a purely commercial purpose and to make a profit is not in compliance with section 21 (1) (b) of the Companies Act*”. The court’s comprehension of section 21(1)(b) prohibits purely commercial enterprises.<sup>23</sup>

The court was tasked with an obligation to clarify whether non-profit companies may take the ship on commercial activities to promote its stated object, the question which is not answered by the 2008 Companies Act. The 2008 Companies Act further fails to provide a legal definition of public benefit which is the main requirement of incorporating non-profit companies.

The 1973 Companies Act on non-profit companies has been subject to interpretation by the court because of the confusion on the wording of section 21 and following the adoption of the 2008 Companies Act, we are still faced with another hurdle of not knowing the intended legal meaning of “public benefit”, as the legislator’s intention in respect of this term is not clearly defined under the 2008 Companies Act even though it is the main requirement for incorporating non-profit companies.

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<sup>18</sup> 2010 (5) SA 325 (SCA).

<sup>19</sup> Mongalo “Must a section 21 non-profit company be concerned only with charitable, benevolent or philanthropic activities? A closer look at the SCA judgment in *Cuninghame v First Ready Development* (2010) 127 South African Journal 195.

<sup>20</sup> *Idem* (footnote 15)

<sup>21</sup> *Ibid* at 17 (*Cuninghame v First Ready Development*).

<sup>22</sup> *Idem* (footnote 19).

<sup>23</sup> *Cuninghame v First Ready Development* 2010 (5) SA 325 (SCA) at 25.

The international courts have dealt with the term "public benefit" and its meaning through various case laws when defining charity. Public benefit is found at the centre of philanthropy, hence it is very paramount for this study to extrapolate principles from foreign case laws in discovering the meaning of public benefit and further relate it to the South African context, in particular, corporate sector. Public benefit has not been vigorously stressed by the South African Courts.

The Income Tax Act 58 of 1962 (as amended)<sup>24</sup> draws inference on what is meant by public benefit, hence it is necessary to explore the meaning of public benefit through pieces of legislation within the South African context and further find a legal meaning in different jurisdictions with a particular focus in the Ireland context. In other countries like in Ireland, Public benefit is regulated by the Charities Act 2009<sup>25</sup>. The Charities Act creates a new authority for charities that are operating in Ireland and such authority is to supervise the running of charities.<sup>26</sup> The Charities Act contains several features<sup>27</sup> that are significant or draw an inference to "public benefit" and which are going to assist in determining the meaning of public benefit as a required object for the incorporation of non-profit companies in South Africa.

### 1.3 Research problem

The 2008 Companies Act makes provision for two types of companies namely; the profit company and non-profit company. Profit Company means "a company incorporated for financial gain for its shareholders"<sup>28</sup> and different to profit company, the non-profit company means "a company incorporated for 'public benefit' or another object as required by item 1(1) of Schedule 1".<sup>29</sup>

Installed from these two definitions, the benefit in profit companies accrue to shareholders and the benefit in non-profit companies accrue to the public. The 2008 Companies Act further goes on to define shareholder as "a holder of a share issued by a company and is entered as such in the certificated or uncertificated securities register, as the case may be", and the 2008 Companies Act forsake to give the legal

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<sup>24</sup> Hereafter, the Income Tax Act.

<sup>25</sup> Hereafter referred to as Charities Act.

<sup>26</sup> Non-profit law in Ireland [online] available from <https://www.cof.org/content/nonprofit-law-ireland?cv=1> [accessed on 10 September 2019].

<sup>27</sup> *Ibid.*

<sup>28</sup> Section 1 of the Companies Act 71 of 2008.

<sup>29</sup> *Ibid.*

meaning of “public benefit”. Item 1(1)(a)(i) of schedule 1 of the 2008 Companies Act require a memorandum of incorporation of a non-profit company to set out a public benefit as an object of the company yet it does not define what public benefit is.

From the above, it is difficult to understand what is meant by public benefit, especially as the main requirement of incorporating a non-profit company. The 2008 Companies Act is silent on what a public benefit is and what constitutes a public benefit and it creates uncertainties within the non-profit sector on whether which object is for public benefit. A clear definition or understanding is needed to give clarity on the meaning of public benefit.

The most fundamental question which this research sought to address is: what is the legal meaning of public benefit? This question seeks to clarify the meaning of public benefit as the main object in the incorporation of a non-profit company. This question further seeks to clarify whether a benefit to the section or general public is enough to constitute a public benefit.

#### **1.4 Aims of the study**

This study aims to give clarity on what is a public benefit or what constitutes public benefit as the main requirement of incorporating non-profit companies. This study aims to help the incorporators of a non-profit company to better understand public benefit as a requirement for incorporating a non-profit company.

#### **1.5 The objectives of the study**

The Constitution of the Republic of South Africa, Act 108 of 1996 in its preamble assures to improve the standard of life for all citizens and further to free the potential of each individual, the mechanism being a corporate sector which holds the economy. The objectives of this research are to give an understanding of what public benefit is and to inform the incorporators about the significance of public benefit in a non-profit company and stress the need not to deviate from it as one of the objects listed in its definition.

## **1.6 Significance of the research**

We must understand that the term "public benefit" puts relief to poverty and impact on the betterment of society. Public benefit is a concept which warrants to be taken seriously and be given its legal meaning in the corporate sector. It is high time to thoroughly explain the legal meaning of public benefit and it is significant to understand objects of incorporating a non-profit company and what must be in the memorandum of incorporation, this will help in adhering to the memorandum of incorporation of a non-profit company.

This confusion on the meaning of public benefit must be addressed so that it will prevail when one individual or group of people wishes to embark on the incorporation of a non-profit company. Clarity on this will help to improve our non-profit sector in corporate law.

## **1.7 Research methodology**

The approach to this study is the focus on the analysis of pieces legislation, South African textbooks, various articles and the case law that draw inference on what is a public benefit. The primary sources which this study relies on are legislation and case law and South African textbooks by company law scholars. The secondary sources will include, journal articles, general public legal opinions extracted by way of informal interviews and other internet sources. A comparative approach will also be utilised wherein other jurisdictions' legislation which draws inference on what public benefit is will be compared to the South African context of public benefit.

## **1.8 Proposed structure of the dissertation**

**Chapter 1** – presents a basic overview of the dissertation through the introduction and historical backgrounds of the study. It also contains the research problem, research question, and the significance of the research.

**Chapter 2** – will discuss the legal meaning of “public benefit” as a required object for the incorporation of the non-profit company as provided in section 1(1) of the companies act and will further discuss the benefits of engaging in charitable, benevolent or philanthropic activities.

**Chapter 3** – will discuss the meaning of public benefit through the Charities Act of Ireland and case law principles and will further discuss public benefit on non-profit companies in the corporate sector, the analysis will be made on the provisions concerning non-profit companies.

**Chapter 4** - conclusive chapter with a final conclusive analysis of the issues dealt with under chapter 2 and 3.

### **1.9 Scope and limitation of the study**

The study will focus on the public benefit as a required object and sustainability of non-profit companies that affords benefit to the public, but this research will not address fully solutions to the problem but rather will come with recommendations that can be adhered to improve the non-profit sector in the corporate sphere.

## CHAPTER TWO: WHAT IS MEANT BY PUBLIC BENEFIT?

### 2.1 Introduction

Public benefit is not explained in the 2008 Companies Act and this chapter will discuss the legal meaning of “public benefit” as a required object for incorporating a non-profit company. This will be done through analysing pieces of legislation, cases, textbooks, and articles that draw inference on what public benefit is. This chapter also incorporates the language of King IV Report on corporate governance for South Africa, 2016<sup>30</sup> and focusing on two distinguishable factors being public aspect and benefits aspect.

### 2.2 Meaning of public benefit

The antiquity of charity is justified by the acknowledgment of the morality implicit in a discretionary redistribution of private wealth for public benefit.<sup>31</sup> It is not that all people in the community must benefit but that all must be eligible to benefit or have equal opportunity to do so.<sup>32</sup> This concept reclines at the heart of charity,<sup>33</sup> and the beneficiaries must be a general public of certain sections of the community hence the language of King IV<sup>34</sup> consider societal benefits.

The Income Tax Act<sup>35</sup> and the concept of public benefit organisation becomes important in this discussion. The Income Tax Act defines public benefit as “*an activity of a benevolent nature, having regard to the needs, interests, and well-being of the general public*”.<sup>36</sup> Section 30(1) of the Income Tax Act<sup>37</sup> defines public benefit organisation as either “a company formed and incorporated under schedule 1 of the 2008 Companies Act, or a trust or an association of persons”. The Income Tax Act<sup>38</sup> makes it necessary that the public benefit organisation conduct its activities in a manner that is not for gain and with an unselfish or philanthropic intent.

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<sup>30</sup> Hereafter, King IV.

<sup>31</sup> Kerry O'Hallon 'charities, the law, and public benefit: Ireland as a case study for the use of charity law to promote the development of social capital'(part one) [https://cdn.ymaws.com/resmgr/working\\_papers\\_dublin\\_ohalloran](https://cdn.ymaws.com/resmgr/working_papers_dublin_ohalloran) (accessed on 21 July 2019).

<sup>32</sup> Lord Wrenbury (*Verge v Somerville*) [1924] AC 496 (the class of persons which might benefit may be either section of the public).

<sup>33</sup> King IV report on corporate governance for South Africa.

<sup>34</sup> *Ibid.*

<sup>35</sup> 58 of 1962 (as amended).

<sup>36</sup> *Idem* s 30 (definition of public benefit activity' substituted by s 22 (a) of Act 30 of 2002).

<sup>37</sup> *Idem* (footnote 35 above).

<sup>38</sup> Income Tax Act 58 of 1962 (as amended).

The above explanation further makes it necessary that the activities of the public benefit organisation should be available at great length and for the advantage of the society at large or any sector thereof.<sup>39</sup> An organisation formed not for this purpose or to cater for services or needs of the individuals and which is not available at great length and for the advantage of the society at large would fall away.<sup>40</sup>

The public benefit organisation is required to carry a public benefit activity which is defined as any activity listed in part 1 of the Ninth Schedule of the Income Tax Act to qualify for recognition. Part 1 of the Ninth Schedule of the Income Tax Act comprises eleven main categories of activities with the particular types of activities listed in each category, namely:

- “Welfare and humanitarian;
- Healthcare;
- Land and housing;
- Education and development;
- Religion, belief or philosophy;
- Cultural;
- Conservation, environment and animal welfare;
- Research and consumer rights;
- Sport;
- Providing of funds, assets or other resources;
- General”.<sup>41</sup>

A non-profit company that complies with the Income Tax Act does not necessarily or automatically qualify for any tax benefits<sup>42</sup>. A non-profit company is formed for a public benefit or other object relating to one or more cultural or social activities, or a communal or group interest<sup>43</sup>. It is important to note that it is not a pre-requisite for a non-profit company to register or apply for the status of a public benefit organisation in terms of the Income Tax Act.<sup>44</sup>

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<sup>39</sup> *Idem* s 30(1)(c)(i) (the meaning of public benefit).

<sup>40</sup> Exempt income 1457. The current rules governing public benefit organisations, November 2006, issue 87.

<sup>41</sup> Part 1 of the Ninth Schedule (Income Tax Act 58 of 1992 as amended).

<sup>42</sup> Cassim, Contemporary company law, *et al* 2<sup>nd</sup> edition, page 91.

<sup>43</sup> Schedule 1, item 1(1)(a) of the Companies Act 71 of 2008.

<sup>44</sup> 58 of 1962.



To be able to register or apply for the public benefit status, the company must have one of the above-mentioned public benefit activities.

The public benefit can generally be regarded as philanthropy or public purpose which seeks to improve the society at large.<sup>45</sup> This is in line with <sup>46</sup> advocating that organisations perform and create value in the triple context of the financial system. It requires the balancing of priorities by the governing body to remain economically feasible as well as delivering on public or social objectives.<sup>47</sup> There are tax exemptions attached to the concept of public benefit.

### 2.3 Tax exemption

A non-profit company that complies with the Income Tax Act does not necessarily or automatically qualify for any tax advantages. It specifically does not qualify for any status, category, classification, treatment or advantage in terms of the Income Tax Act or any other legislation, except to the extent that the legislation provides otherwise. To obtain any tax exemption or tax advantage it must satisfy the requirements of the Income Tax Act.<sup>48</sup>

Section 10(1)(cN) of the Income Tax Act absolves income tax receipts and accruals of any public benefit organisations assented by the commissioner in terms of section 30(3) of the Income Tax Act. Section 30(3) of the Income Tax Act<sup>49</sup> prescribes that the commissioner shall approve a public benefit organisation which complies with various requirements. A public benefit organisation is defined in section 30(1) of the Income Tax Act as “*a company formed and incorporated under section 21 of the Companies Act, 1973 (Act 61 of 1973), or a trust or an association of persons*”

A public benefit organisation is prohibited from giving any of its funds to any person other than in the course of undertaking its activities. It must use its funds solely for the object which it has been established for. Furthermore, in the event that a public benefit organisation get to be closed down, it must hand over its assets to a homogenous organisation which has been authorised in terms of section 30 of the Income Tax Act

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<sup>45</sup> Cassim, the contours of profit-making activities of non-profit companies: analysis of the new South Africa, 2012, *Journal of African Law*, 56, 2.

<sup>46</sup> the King IV Report on corporate governance for South Africa, 2016.

<sup>47</sup> *Idem* chapter two: performance and reporting, principle 2.1.

<sup>48</sup> 58 of 1962 (as amended).

<sup>49</sup> *Ibid.*

or to whichever institution, body or board that is exempted from tax as stipulated in section 10(1)(cA)(i) of the Income Tax Act, with the main or principal object being the carrying on of any public benefit activity or to any department of state or administration.<sup>50</sup>

It is apparent from the above that a “public benefit” as a requirement of incorporating a non-profit company can be attached to the meaning of public benefit as elucidated in the Income Tax Act<sup>51</sup> especially to the meaning of public benefit organisation. One may define public benefit as a philanthropic purpose that intends to improve the conditions of the society at large and further that a public benefit object must consider the needs of the society. In this discussion, there are two distinguishable factors one being the benefit aspect and the other being the public aspect. In the formation of a non-profit company, both benefits and public aspects must be met.

## 2.4 Public aspect

The fundamental purpose of this part of the study is on the first essential criteria being the public aspect. It must be pointed out that there is insufficient case law in South Africa dealing with public aspect in this context and there is several cases in other jurisdictions internationally where the courts have had to deal with public aspect. It is important that the Constitution of the Republic of South Africa Act 108 of 1996<sup>52</sup> consider the views of the courts in other jurisdictions, as a South African Court can be called on to adjudicate on public aspect and will have regard to the foreign decision.

The word ‘public’ in most cases is associated with what is charitable. The court in *Re Pinion*<sup>53</sup> pointed out that the purpose of the non-profit company (charity) must benefit the general public or some sufficient section of that public. The purpose of the non-profit company must not lead to excessive incidental individual benefit. This principle or requirement calls for defining what the public is. It is, therefore, necessary to first identify the group or class of persons that the purpose principally benefits. There is the

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<sup>50</sup> Exempt income 1457. The current rules governing public benefit organisations, November 2006, issue 87. [online] available from

[https://www.saica.co.za/integritax/2006/1457\\_The\\_current\\_rules\\_governing\\_public\\_benefit\\_organisations.htm](https://www.saica.co.za/integritax/2006/1457_The_current_rules_governing_public_benefit_organisations.htm)

<sup>51</sup> 58 of 1962.

<sup>52</sup> Section 39(1)(c) (the Constitution of the Republic of South Africa, 1996).

<sup>53</sup> [1965] Ch. 85.

satisfaction of the 'public' rule if that non-profit company purpose benefits the general public primarily.

The purpose of the non-profit company will satisfy the 'public' element of the 'public interest' requirement if the purpose mainly benefits people of a specific description as if the likely recipients are an adequate section of that intended public. In the case of *Verge v Sormerville*,<sup>54</sup> Lord Wrenbury stresses the need for 'public' benefit by stating that in order for the court to ascertain if the gift amounted to a legal charitable trust and escape avoidance on the perpetuity ground, the first inquiry is if it is of some substantially significant class of the community or the public.<sup>55</sup>

The court in *Dingle v Turner*<sup>56</sup> states further that "*in truth, the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot, by itself, be decisive of the question whether the trust is a charity*". A lot depends on the actual purpose of such trust. Lord Simonds held in the case of *Oppenheim v Tobacco Securities Trust*<sup>57</sup> that the connotation 'section of the community' indicates firstly that the likely beneficiaries should never be negligible numerically. Secondly, the connotation 'section to the community' indicates that the quality distinguishing those people from the rest of the community members has to be the quality not dependent on their relation to a specific person. The group of individuals can be plentiful, however, where the connection between such people is a personal relationship to one single prepositus or several proposita then, such persons are not the 'section of the community' nor the community for purposes of the charity.<sup>58</sup>

The above discussion clarifies what constitutes the public, an object which is for public benefit must benefit the general public at large or a section of the community members. It further clarifies that a benefit that goes to individuals does not comply with the requirement of public benefit as required for the incorporation of non-profit companies.

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<sup>54</sup> 1924 A.C. 496 (1924).

<sup>55</sup> *Idem* at 624.

<sup>56</sup> [1972] UKHL 2, [1972] AC 601.

<sup>57</sup> [1951] 1 ALL ER 31..

<sup>58</sup> *Idem* (*Oppenheim v Tobacco Securities Trust*).

## 2.5 Benefit aspect

In the English case of *Re Hummeltenberg*<sup>59</sup> it was held that a purpose is “beneficial” if it aims at reaching the realization of the universal common good and is not detrimental to the public benefit.<sup>60</sup> Besides, any harm or detriment arising as a result of the non-profit purpose cannot overshadow the benefit, the benefit has to in principle, have the capacity of being verified by proof or evidence.<sup>61</sup> The court in the *National Anti-vivisection Society v IRC*<sup>62</sup> held that, “the question whether a gift is operative for the public benefit is a question to be answered by the court by forming an opinion upon the evidence before it”. Lord Wright believes that there is no problem that prevails in assessing the comparative value of the material benefits of the subject in issue as against the assumed or alleged moral benefit, to tell if the change pursued is beneficial to the community requires foreseeing or imagination of the entire and complex resulting situations.<sup>63</sup>

In the *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation*<sup>64</sup> it was held that acceptance of the non-profit company purpose as beneficial to the community requires an identifiable benefit with the capacity of being verified by proof or evidence. The courts must balance the disadvantage and the benefit in every case where the evidence supports and alleges the detriment, however, there must be a clear demonstration that before any supposed disadvantage is availed, and there is a great focus on the purpose that will be normally charitable.<sup>65</sup>

It flows from the above discussion that the purpose of a non-profit company must be beneficial for the betterment of society, any harm or detriment arising as a result of the non-profit purpose cannot overshadow the benefit. This study will further explore the benefit aspect of the South African context.

It is important before we discuss benefits to society to first understand what is meant by society and now King IV refers to societal benefits instead of public benefit. Jonathan Johannes in his thesis titled “*Corporate Social Responsibility in South*

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<sup>59</sup> [1923] 1 Ch 237.

<sup>60</sup> *Re Pinion*, [1965] Ch.85.

<sup>61</sup> *Idem* at 242.

<sup>62</sup> 1947 A.C. 31 (1947). P. 44.

<sup>63</sup> *Ibid.*

<sup>64</sup> 1968 A.C 138 (1968, P. 146E.

<sup>65</sup> *R (Independent Schools Council) v Charity Commission* [2012] Ch 2014, P 106.

*Africa: how corporate partnerships can advance the sustainability agenda* defines society as a “grouping of people having certain common interests, manner of life, activities, purpose, values, traditions, or goals and objectives”. A society can, therefore, be made up of individuals, small groups of people such as found in a local Home Owners Association, or larger organisations such as found in the local or provincial government, or the country as a whole.<sup>66</sup> The inability of the government to protect individuals from socio-economic issues has led to a renewed interest and public expectation that non-profit companies have public responsibility in furthering the public good.

Non-profit companies are enthusiastic parties, incorporated at the citizens' free will, related to mutual career and/or the rest of interests intended to realize shared economic, civil, cultural and social rights and not profits.<sup>67</sup> The mobility of non-profit companies mirrors the capacity of the community to react fast to their own needs. Non-profit companies' direct resources to the community the national government never possesses or cannot collect, and non-profit companies' lines of action analysis are relevant to problem-solving by public administrations. Non-profit companies are vital to highlight the problems that could go disregarded by public establishments. Such practice helps public authorities and non-profit companies solve issues through human resources, resident information and company capacity including the monitoring of activities.<sup>68</sup>

Non-profit companies offer concrete or more efficient solutions to community problems and involve fewer expenses than public administrations for areas like social work and/or social welfare institution management.<sup>69</sup> Non-profit companies have frequently demonstrated effectiveness in the solving and identification of social or community problems, enhancing and attracting financial and human resources value; estimating the degree of efficiency of public policies by raising the standard of quality in public services. Non-profit companies have more effective public assets management;

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<sup>66</sup> Johannes J (2016) *Corporate social responsibility in South Africa: how corporate partnerships can advance the sustainability agenda*, unpublished LLM thesis, the University of Western Cape at 20.

<sup>67</sup> Agyenim Boateng, Raphaël K. Akamavi and Girlie Ndoro, *Business Ethics: A European Review* 25, no. 1. (2015): 74.

<sup>68</sup> Lambert Engelbrecht et al., *Social Work/Maatskaplike Werk* 52, no. 4 (2016): 459.

<sup>69</sup> Chux Iwu et al., *Sustainability* 7, no. 7 (2015): 9573.

improved public services profits; healthier preservation of public properties and optimization of administrative costs.<sup>70</sup>

The non-profit company also counterweight the private sector as well as government power, like associations of consumer protection that protect and educate citizens in commercial entity relations.<sup>71</sup> Non-profit companies offer a framework for the participation of citizens in the life of the community regardless of the two key difficulties they face in increasing the participation of mass-authentic government policies like the decentralization of areas of decision at state levels, the lack of needed values and skills for community participation.<sup>72</sup>

Considering the above, society benefits a positive impact on the life and well-being of the community from non-profit companies and further benefits on poverty eradication, proper healthcare, skills and development, education, religion, sport, etc. The benefits aspect further extends in the South African context to non-profit companies that have a public benefit status.

## 2.6 Partial tax exemption

Partial tax exemption is the major benefit for non-profit companies that have acquired a public benefit organisation status. Partial tax exemption is where the income is exempt from tax but not the full amount but a certain portion of it. For a non-profit company to enjoy partial tax exemption for carrying out specified public benefit activities after incorporation, it must apply to SARS (South African Revenue Services) for approval of tax-exemption as a Public Benefit Organisation and establish that the non-profit companies Memorandum of Incorporation meets the requirements in Section 30 of the Income Tax Act.<sup>73</sup>

The public benefit activities that qualify for partial tax exemption are listed in Part I of the Ninth Schedule of the Income Tax Act.<sup>74</sup> With regard to Section 10(1) (cN) of South Africa's Income Tax Act, <sup>75</sup> there is an evident limitation to the tax exemption extent for economic activities of an NPC approved as a public benefit organisation. South

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<sup>70</sup> Hongjin Zhu, Pengji Wang, and Chris Bart, *Journal Of Business Ethics* 136, no. 2 (2014): 311.

<sup>71</sup> Thomas K. Karikari, Ansa E. Cobham and Iliya S. Ndams, *Metabolic Brain Disease* 31, no. 1 (2015): 3.

<sup>72</sup> Dinesh Rathi and Lisa M. Given, *Journal Of Knowledge Management* 21, no. 4 (2017): 718.

<sup>73</sup> South African Income Tax Act 58 of 1962.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Idem* (note 60 above); Canada's Income Tax Act (R.S.C., 1985, c. 1 (5th Supp.)).

Africa's Minister of Finance has the capacity to determine or alter the list for additional activities. The receipts and accruals from such undertakings or activities shall be exempt from normal tax only.

In the income tax perspective, it is of benefit for an association to be a public benefit organisation as its receipts and accruals will be absolved from income tax, on condition that such receipts and accruals comply with the requirements of section 10(1)(cN) of the Income Tax Act. In section 10(1)(cN) of the Income Tax Act, any receipts and accruals obtained other than conducting a business or trading activity will turn out to be absolved from Income Tax Act including any donations that have been awarded by an entity from its sponsors for the benefit of the public.<sup>76</sup>

This is confirmed by the Estate Duty Act 45 of 1995, in that any benefit or donation that will accrue to the public benefit organisation must be deducted/exempted when calculating the taxable amount.<sup>77</sup> Receipts and accruals obtained by a public benefit organisation while conducting its business activities will be absolved from the income tax if they comply with the requirements as set out in s10(1)(cN)(ii) of the Act.<sup>78</sup>

In the Tax Court case *ABC Company v Commissioner of the South African Revenue Services*,<sup>79</sup> the Tax Court was tasked with the duty to enunciate on whether ABC Company was a public benefit organisation and that its application for public benefit organisation status should have been endorsed. The ABC Company is a non-profit entity that leases modified apartments for residential accommodation to, amongst others, low- and medium-income households. The ABC Company's Memorandum of Incorporation (MOI) stipulates that one of its core objectives is "the development, holding, letting or another disposal of affordable residential accommodation to and for the benefit of low to medium households". Since 2012, the ABC Company has acted by the qualifying standard for accreditation set out by the Social Housing Regulator Authority (SHRA) and therefore qualifies as a "social housing institution" in terms of the Social Housing Act, No 16 of 2008 (SHA).<sup>80</sup> By qualifying as such, social housing

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<sup>76</sup> Tax and exchange control alert 31 May 2019 (tax exemption is not a formality – the tax court considers the public benefit organisation status of a non-profit company).[online] available from <https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Tax/tax-alert-31-may-Tax-exemption-is-not-a-formality-the-Tax-Court-considers-the-PBO-status-of-a-non-profit-company.html>.

<sup>77</sup> Section 4(h) of the Estate Duty Act.

<sup>78</sup> *Idem* (footnote 76).

<sup>79</sup> (Case No. 14106) (as yet unreported).

<sup>80</sup> *Idem ABC Company v Commissioner of the South African Revenue Services* para 6-7.

institutions benefit from public funds that subsidize the development costs of the apartments, thereby reducing the debt to be recouped by the ABC Company through rental receipts. The debatable issue, in this case, was whether the Taxpayer was qualified to be approved as public benefit organisation in terms of s30 (3) of the Income Tax Act, and whether accordingly, therefore, is qualified to be discharged from tax in terms of section 10 (1)(cN)(ii) of the Income Tax Act. The ABC Company contended, *inter alia*, that its status as a social housing institution in terms of the SHA, imply that it automatically qualified for public benefit status in terms of the Income Tax Act. The Tax Court carefully examined the ABC Company's argument that its status as a social housing institution means that it automatically qualifies for a public benefit status and found that there is no legal basis for such an interpretation of the Act and Schedules to the Income Tax Act.<sup>81</sup> The court held that the Income Tax Act empowers the Commissioner for SARS to decide the approval of an applicant as a public benefit organisation. If an accreditation by SHRA automatically gives public benefit organisation status to a company, it would confer an undue power pursuant to tax legislation on the SHRA, thereby divesting the Commissioner for SARS of its statutory powers. It was therefore held that an accredited social housing institution that complies with the SHA does not automatically qualify for public benefit organisation status in terms of the Act.<sup>82</sup>

Having heard the Tax Court, it was also important for it to determine whether the ABC Company met the requirements to qualify as a public benefit organisation as provided for in the Income Tax Act. According to the Tax Court, section 30 (1) asserts that where a taxpayer is a company, it must meet the following criteria to qualify as a public benefit organisation; the Taxpayer must:

1. *“Be a non-profit company as defined in the Companies Act, No 71 of 2008;*
2. *Be an entity which sole or principal object is to carry on one or more public benefit activities, as defined in Part 1 of the Ninth Schedule to the Act or by the Minister of Finance by notice in the Government Gazette; and*

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<sup>81</sup> *ABC Company v Commissioner of the South African Revenue Services* 12.

<sup>82</sup> *Idem* 76.



3. *Conducts its activities in a non-profit manner or with altruistic and philanthropic intent, which activities are not intended to promote the economic self-interest of any employee or fiduciary of the taxpayer*.<sup>83</sup>

It is crucial to highlight that from this judgment a non-profit company does not automatically become a public benefit organisation and does not automatically become entitled to be exempted from tax in terms of the Income Tax Act. Section 30(3) of the Income Tax Act directs that the Commissioner shall endorse a public benefit organisation which meets the requirements of the Income Tax Act. To qualify as a public benefit organisation the above-mentioned requirements must be met.<sup>84</sup>

## **2.7 Donor deductibility**

The second benefit for non-profit companies that have acquired the status of a public benefit organisation is donor deductibility on the contributions of public benefit organisations carrying out defined public benefit activities. With reference to section 18 of the Income Tax Act,<sup>85</sup> there is a deduction of donations to the non-profit companies from the tax liability of the donor upon registration as a public benefit organisation. As a result, public benefit organisations access the benefits on donation taxes, estate and transfer duties, and the skills development levy. The public benefit activities that qualify for donor deductible status are listed in Part II of Schedule 9, South Africa's Income Tax Act.<sup>86</sup> South Africa's Minister of Finance has the capacity to determine or alter the list for additional activities.

The Value Added Tax Act 89 of 1991<sup>87</sup> detail the other outcome of incorporating a non-profit company. Section 12 of South Africa's VAT Act<sup>88</sup> exempts non-profit company's provision of services or supply goods from the taxes imposed in section 7(1) of the Act; including financial services, donated services or goods, accommodation, leasehold land, transport, and state services. The other benefits of incorporating a non-profit company in South Africa are stated in object 1 (2) in

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<sup>83</sup> See s 30 of the Income Tax Act 58 of 1962.

<sup>84</sup> *idem* note 71 in the Tax Court of South Africa, held at Johannesburg (unreported Case No. 14106), (see also summary by Louise Kotze and Louis Botha in tax exemption is not a formality – the Tax Court considers the public benefit organisation status of a non-profit company).

<sup>85</sup> Hereinafter, VAT Act.

<sup>86</sup> *Ibid.*

<sup>87</sup> No. 89,1991.

<sup>88</sup> *Ibid.*

Schedule 1 of 2008 Companies Act.<sup>89</sup> Object 1(2) states that an NPC can “*acquire and hold securities issued by a profit company; or (ii) directly or indirectly, alone or with any other person, carry on any business, trade or undertaking consistent with or ancillary to its stated objects*”.<sup>90</sup> The non-profit company can use part of its assets or income to pay directors and members

Object 1(3) in Schedule 1 of the 2008 Companies Act<sup>91</sup> notes that upon incorporation, a non-profit company cannot indirectly or directly pay part of its revenue or income and/or even transfer its assets to any person be it the company incorporator, director, member or individual appointing a company director. However, Object 1(3) in Schedule 1 of 2008 Companies Act also gives the exception that a non-profit company can pay part of its revenue or income as fair remuneration for delivered services or goods at the company's direction or refund for the incurred expenses in promoting the objectives of the company. Upon incorporation, the non-profit company can also use its income to pay an owed amount or good faith (bona fide) contract between the company and person. The non-profit company can also use its income to pay as a right to that individual to the extent the non-profit company administers such right to advance an explicit object of the company. The non-profit company can also use its income as a legal obligation of the non-profit company. According to Object 2 (1), Schedule 1 of the 2008 Companies Act, a non-profit company cannot, upon incorporation, merge or amalgamate with or even convert to a profitable business or firm. Upon incorporation, a non-profit company cannot dispose-off any of its undertakings, business or assets to a profit firm except; a) for fair value; b) to such extent the asset disposition occurs in the normal course of the non-profit company activities.<sup>92</sup>

## 2.8 Conclusion

In conclusion, this chapter is of the view that public benefit is at the centre of philanthropy and that not everyone in the public should acquire a benefit from it only by being part of the public but anyone who benefits should do so because he or she

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<sup>89</sup> 71 of 2008 (Companies Act as amended).

<sup>90</sup> Memorandum of incorporation for a listed public company [online] available from [http://www.sabvest.com/pdf/Sabvest%20Limited%20MOI%20\\_clean\\_%2014%2011%202012.pdf](http://www.sabvest.com/pdf/Sabvest%20Limited%20MOI%20_clean_%2014%2011%202012.pdf) accessed on 06 August 2019.

<sup>91</sup> *Ibid.*

<sup>92</sup> See also Frederik Claeyé, *Social Enterprise Journal* 13, no. 4 (2017): 427.

is eligible for such a benefit. It is apparent from the above that public benefit is for the betterment of the society, not one individual and that it must have regard to the needs, interests, and well-being of the general public.

To better clarify the meaning of public benefit, this study will further do a comparative study with other jurisdictions that require non-profits to benefit the public, and the focus is also going to be placed on the principles that have been developed by the courts in defining what public benefit is.

## CHAPTER THREE: COMPARATIVE STUDY

### 3.1 Introduction

This chapter generally compares public benefit in the South African context and the public benefit in other jurisdictions internationally with a particular focus on Ireland. This will be done through the analysis of the Charities Act 2009.<sup>93</sup> The Charities Act introduces a new system for charities that are operating in Ireland and a new governmental authority which established for purposes of supervising the smooth running of the charities.<sup>94</sup> The Charities Act has several important features that draw an inference to public benefit, a) the definition of charity in Ireland; and b) the meaning of public benefit.<sup>95</sup> Before this study undertakes a comparative study, it is necessary to first outline the public benefit in the Ireland context or what draws inference to public benefit.

### 3.2 The meaning of public benefit in Ireland

To meet the requirements of being charitable, the purpose of the organisation must appear on the list of purposes mentioned under section 3 of the Charities Act and should also be for the benefit of the public.<sup>96</sup> The Charities Act lays out some guidance on what constitutes “public benefit” under the Ireland Law. The term referred to as a “gift” is also defined under the Charities Act and considers both the public nature and benefit. On a public perspective, a gift does not qualify as charitable unless it is intended to benefit the public or a section of the public, and in case where it confers a benefit on a person other than in his or her capacity as a member of the public or a section of the public, any such benefit is reasonable in all of the circumstances and is ancillary to, and necessary for, the furtherance of the public benefit.<sup>97</sup> The public requirement is not met if all of the intended beneficiaries of the gift or a significant number of the recipients have a personal connection with the donor of the gift.<sup>98</sup>

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<sup>93</sup> Hereafter, Charities Act.

<sup>94</sup> Non-profit law in Ireland [online] available from <https://www.cof.org/content/nonprofit-law-ireland?cv=1> [accessed on 10 September 2019].

<sup>95</sup> *Ibid.*

<sup>96</sup> *Idem* s 3(2).

<sup>97</sup> *Idem* s 3(3).

<sup>98</sup> *Idem* s 3(8).

From a benefit point of view, due consideration is taken towards any limit imposed by the sponsor of the gift in conjunction to the class of people who may benefit from that gift and whether such limitation can be justified and is reasonable, taking into account the relationship between the nature and the purpose of the gift. This consideration is prudent to determine whether it is likely to limit the number of people or classes of people who will benefit from the gift.<sup>99</sup>

Non-profit organisations in Ireland are not required to be established for the public benefit. Most non-profit organisations are established for the benefit of their members, including sporting, and credit unions. A non-profit organization must be established for the public benefit for it to be eligible for charitable status.

### **3.3 Charitable purpose in Ireland**

The Charities Act provides guidance as to what constitutes a charitable purpose in Ireland. According to the Charities Act, the following purposes shall be charitable:

- a) “The prevention or relief of poverty or economic hardship;
- b) The advancement of education;
- c) The advancement of religion; and
- d) Any other purpose that is of benefit to the community”.<sup>100</sup>

The final category “any other purpose that is of benefit to the community,” is broken down into 12 subcategories:

- “The advancement of community welfare, including the relief of those in need because of youth, age, ill-health, or disability;
- The advancement of community development, including rural or urban regeneration;
- The promotion of civic responsibility or voluntary work;
- The promotion of health, including the prevention or relief of sickness, disease or human suffering;
- The advancement of environmental sustainability;
- The advancement of the efficient and effective use of the property of charitable organisations;

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<sup>99</sup> Charities Act 2009, s 3(7).

<sup>100</sup> *Idem* s 3(1).

- The prevention or relief of suffering of animals;
- The advancement of the arts, culture, heritage, or sciences; and
- The integration of those who are disadvantaged, and the promotion of their full participation in the society”.<sup>101</sup>

### 3.4 Definition of public benefit – Comparative Study

Both in South Africa and Ireland, there's no clear definition provided for by the charities Act and Income Tax Act, which both draw an inference to what is a public benefit. The Income Tax Act defines public benefit as “*an activity of a benevolent nature, having regard to the needs, interests, and well-being of the general public*”.<sup>102</sup> The Income Tax Act on its definition provides for activity and that such activity must be for public benefit. The Income Tax Act further goes on and list activities<sup>103</sup> that are for public benefit. Now it is important to note that the concept of public benefit reclines at the center of charity and it is a voluntary redistribution of private wealth for public benefit.

Thus, the activity mentioned in the Income Tax Act is twofold, firstly it must both be public and beneficiary. The activity must require the benefit to be afforded on public beneficiaries rather than preferring a beneficiary based on a private, professional or any other relationship.<sup>104</sup> The definition requires that the public benefit organization conduct its activities in a manner that is available to everyone in the public, including any sector thereof. An organization incorporated to cater services or cater for the needs of a family would fall outside the scope of this requirement in that it does not represent the carrying on of activities for the benefit of the general public.<sup>105</sup>

In the Ireland context, the Charities Act requires the purpose to be of public benefit. The defining provisions further state that a gift shall not be of public benefit unless its primary intention is to benefit the public or section of the public and that any private benefit should be reasonable in all of the circumstances and ancillary to, and necessary for the furtherance of the public benefit. In determining whether purposes

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<sup>101</sup> Charities Act 2009 s 3(ii).

<sup>102</sup> Definition of public benefit by Income Tax Act 58 of 1962.

<sup>103</sup> *Idem* Part 1 of the Ninth Schedule.

<sup>104</sup> Exempt income 1457. The current rules governing public benefit organisations, November 2006, issue 87. [online] Available from

[https://www.saica.co.za/integritax/2006/1457\\_The\\_current\\_rules\\_governing\\_public\\_benefit\\_organisations.htm](https://www.saica.co.za/integritax/2006/1457_The_current_rules_governing_public_benefit_organisations.htm) [accessed on 04 July 2019].

<sup>105</sup> *Ibid.*

are of public benefit, we must consider limitations imposed by the sponsor on potential recipients and whether are they justified and reasonable having regard to the nature of the purpose of the gift.<sup>106</sup>

The meaning of public benefit in England and Wales is also not clear. The Charities Act 2006 simply states that "public benefit" is defined by case law and must be understood as such.<sup>107</sup> It becomes important to discover the meaning of public benefit through principles from case law, which can be expressed generally but used distinctively.<sup>108</sup>

In both South Africa and Ireland, public benefit organisations that have a public benefit status are partially exempted from paying tax. In the Income Tax point of view, it is of benefit for a company to acquire a public benefit organisation status because its receipts and accruals won't be taxable, but the same must comply with the requirements of section 10(1)(cN) of the Income Tax Act.<sup>109</sup>

Dr Mary Syngé<sup>110</sup> in her article titled "*a state of flux in public benefit across the UK, Ireland and Europe*" stated that public benefit is the term which warrants high recognition. She was outlining the meaning of public benefit through different jurisdictions.

### 3.5 Aspects of public benefit- Comparative Study

It is paramount to understand that the concept "public benefit" recognises the redistribution of private wealth for the benefit of the public. The Charities Act propels that the aim must benefit the public. In determining public benefit, the Charities Act further states that a "gift" will not be of public nature if it does not intend to benefit everyone in the society or a part thereof, and if there's any individual benefit, it must be consequential or reasonable in all circumstances and incumbent to the furtherance of public benefit.<sup>111</sup>

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<sup>106</sup> Non-profit law in Ireland [online] available from <https://www.cof.org/content/nonprofit-law-ireland?cv=1> [accessed on 10 September 2019].

<sup>107</sup> Dr M Syngé 'a state of an influx in public benefit across the UK, Ireland and Europe' 2014 charity law and practice review.

<sup>108</sup> Kerry O'Halloran 'Charities, the law, and public benefit: Ireland as a case study for the use of charity law to promote the development of social capital' (part one). [https://cdn.ymaws.com/resmgr/working\\_papers\\_dublin/ohalloran\\_\(accessed\\_on\\_21\\_July\\_2019\).](https://cdn.ymaws.com/resmgr/working_papers_dublin/ohalloran_(accessed_on_21_July_2019).)

<sup>109</sup> The South African Income Tax Act 58 of 1962.

<sup>110</sup> Lecture, Cardiff University.

<sup>111</sup> Charities Act 2009, s 3 (3).

In ascertaining if the aims or objects are of public nature regard must be taken into restrictions inflicted by the sponsor on possible recipients and if such restrictions are logical and understandable considering the aim of the gift.

The public benefit in Ireland is twofold, a) “it must both be of a public character and b) be of some benefit to the public generally”. This requires an opportunity to benefit to be afforded on public recipients rather than selecting a beneficiary based on a personal, professional or any other form of relationship. The requirement is not that all people in the community must benefit, but that all must be eligible to benefit or have equal opportunity to do so.

In the South African context, public benefit is defined as “an activity listed in part 1 of the Ninth Schedule of the Income Tax Act, and any other activity determined by the minister from time to time by notice in the government gazette to be benevolent, having regard to the needs and well-being of the general public”. This simply means that the public benefit organisation must conduct its activities for the benefit of everyone in a society and not be selective.

### **3.6 England and Wales – position on public benefit**

The Charities Act 2011 stipulates that it is a prerequisite of philanthropy that it stands to benefit the public. It outlines this prerequisite as the public benefit requirement, no definition is given beyond stipulating that public benefit is defined by courts and must be understood as such. The courts have developed a twofold approach of charitable status through the years, namely that “a purpose must be beneficial in a way the law regards as charitable, and for the benefit of the public or section of the public”.

### **3.7 Public benefit in case law**

The concept of public benefit has been discussed in a number of English cases as having a two limbed approach, namely that an institutions purpose must be a) “beneficial in a way the law regards as charitable and b) for the benefit of the public or a section of the public. It becomes necessary to discover the meaning of public benefit by using principles from case law which can be generally but applied specifically”.<sup>112</sup> On the number of cases, public benefit is understood as the law relating to charities.

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<sup>112</sup> *IR Falkirk Temperance Café Trust* 1927 SC 261 (CSIH) 267.



In *Income Tax Commissioners v Pemsel*<sup>113</sup> Lord MacNaghten adopted the following four-part classification of charitable purposes “*charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under the preceding heads*”. This is a good classification in the development of the law and the courts have established a presumption that gifts falling within any one of the first three *Pemsel* categories are for the public benefit.<sup>114</sup>

Lord MacNaghten had emphasised that he was discussing the legal meaning of charity, and he further remarked the distinction between the popular meaning and the legal of the word<sup>115</sup>, in that, it is not necessary to observe that not every object which is beneficial to the community can be regarded as charitable. The legal significance is narrower than the popular<sup>116</sup>

The second head of Lord MacNaghten was dealt with in the case of *Independent Schools Council v The Charity Commission*<sup>117</sup> where a question as to when an independent school would satisfy the requirement that it operate for the public benefit was dealt with. The court took the approach that an institution that wants charitable status has to clear two hurdles: (i) it has to show that it is pursuing purposes that are capable of benefiting the public, and (ii) it has to show that those purposes do benefit the public.<sup>118</sup>

It was held that an institution can only be said to be pursuing a charitable purpose within s 2(2) of the Charities Act 2006 if the education that it provides is beneficial, and is thus capable of being for the public benefit if it is provided to large enough number of people. The court went on to hold that the provision of education to students of school age and according to conventional curricula routinely taught in schools across the land is capable of being for the public benefit in the sense of public benefit.<sup>119</sup> What

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<sup>113</sup> [1891] AC 531 at 583.

<sup>114</sup> See, *National Anti-Vivisection Society v IRC* [1948] AC 31, 65, per Lord Simonds.

<sup>115</sup> Public benefit.

<sup>116</sup> *Idem* note 90 above 220.

<sup>117</sup> [2011] UKUT 421 (TCC).

<sup>118</sup> *The Independent Schools Council v The Charity Commission* [2011] UKUT 421 (TCC) at 44.

<sup>119</sup> *Idem* 69.

constitutes a sufficient section of the public as discussed herein cannot be considered separately from the particular of the charitable purposes.<sup>120</sup>

It is apparent from this case that an independent school that provides such an education will be able to argue that it exists for the advancement of education which is capable of benefiting the public and that it benefits the public, and hurdles, as stated above, will be cleared.

The public benefit was central to the validity of trust which fell into the fourth category in *Verge v Somerville* (1924) where the charitable status of trust depended on whether the benefit which they provide is available to the community at large.

It is an established principle of the law of charity that a trust is not charitable unless it is directed to the public benefit.<sup>121</sup> This is sometimes stated in the proposition that it must benefit the community or a section of the community. In the case of *Oppenheim v Tobacco Securities Trust Co Ltd and Others*<sup>122</sup> the question of whether a class of persons can be regarded as a section of the community to satisfy the test of public benefit was raised. The court went on to say the words “section to community” have no special goodness, but they appropriately specify (i) “that the possible beneficiaries must not be numerically negligible, and (ii) that the quality which distinguishes them from other members of the community”, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual.<sup>123</sup> This requires the benefit to be afforded to the general public than considering a beneficiary based on an individual or private relationship.

In the case of *National Anti-Vivisection Society v Inland Revenue Commissioners*<sup>124</sup> it was stated that not every object which is beneficial to the community can be regarded as charitable.<sup>125</sup> Healthy and manly sports are certainly, in fact, beneficial to the public, but that does not entitle them to qualify as charitable activities. The test of “public benefit” is found in the classification of Lord MacNaghten.<sup>126</sup>

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<sup>120</sup> *Independent schools council v charity commission for England and Wales* [2012] 1 ALL ER 127.

<sup>121</sup> *Oppenheim v Tobacco Securities Trust Co Ltd and Others* [1951] 1 ALL ER 31 at 33.

<sup>122</sup> [1951] 1 ALL ER 31.

<sup>123</sup> *Idem* note 97 above 34.

<sup>124</sup> [1947] 2 ALL ER 217.

<sup>125</sup> *Idem* (*Independent schools council v charity commission for England and Wales*)

<sup>126</sup> *Income Tax Commissioners v Pemsel* [1891] AC.

The Companies Act provides for incorporation of non-profit companies and one of the main requirements stated in Companies Act is a public benefit. A non-profit company is incorporated for a “public benefit” object or an object relating to a cultural or social activity or communal or group interest.<sup>127</sup>

Lord MacNaghten<sup>128</sup> in drawing inference on the meaning of public benefit he adopts four principal divisions being “the relief of poverty, the advancement of education, the advancement of religion and other purposes beneficial to the community”. In the South African context, the four principal divisions are for the improvement of the society, hence King IV is advocating that organisations must perform and create value within the triple context of the financial system. It requires the balancing of priorities by the governing body to remain economically feasible as well as delivering on public or social objectives.<sup>129</sup>

The term “public benefit” reclines at the heart of philanthropy because of the two limbed approach that has been adopted in English cases, one being a beneficial status in a way the law regards charitable and secondly that the benefit must be for the public or a section of the public.<sup>130</sup>

It is paramount to understand that public benefit is the redistribution of private wealth for the benefit of the public. The South African Income Tax Act<sup>131</sup>, its definition refers to an activity of a benevolent nature. Benevolence in the Cambridge English dictionary refers to an act of giving money or help to people or organisation that need it or the quality of being kind and helpful. Now in terms of the public benefit in the South African context and Ireland context, the act of kindness must understand “*needs, interests, and well-being of the general public*” and the benefit must be widely accessible and to any sector thereof.

Part 1 of the Ninth Schedule of the Income Tax Act<sup>132</sup> comprises eleven main categories of activities with the particular types of activities listed in each category. The list provided for in the Act<sup>133</sup> provides guidance in the South African context as to

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<sup>127</sup> Companies Act 71 of 2008, schedule 1, item 1(1)(a).

<sup>128</sup> See, *Income Tax Commissioners v Pemsel* 1891] AC 531 at 583.

<sup>129</sup> King IV report on corporate governance for South Africa, 2016 (Chapter two: performance and reporting, principle 2.1).

<sup>130</sup> *IR Falkirk Temperance Café Trust* 1927 SC 261 (CSIH) 267.

<sup>131</sup> 58 of 1962.

<sup>132</sup> The South African Income Tax Act 58 of 1962.

<sup>133</sup> *Ibid* (list of activities that qualifies an organisation or non-profit company for recognition as a public benefit organisation).

what constitutes a public benefit. The guidance in South Africa is similar to the one provided for in the Charities Act of Ireland and the final category in the Charities Act, 2009 is broken down into other 12 subcategories being the advancement of community welfare, advancement of community development including rural or urban generation and many other important subcategories not mentioned herein.<sup>134</sup>

The principles of English cases further provide guidance on what public benefit is. It becomes necessary to rely on these principles to ascertain and or discover the meaning of the concept. The South African courts have not had an opportunity to vigorously discuss and ascertain the meaning of public benefit. The legal principles that contribute towards ascertaining the meaning of public benefit are found from foreign cases when defining charity. Public benefit on non-profit companies is also found in the 2008 Companies Act.

### **3.8 Analysis of public benefit on non-profit companies as envisaged in the Companies Act 71 of 2008.**

This part of the study analysis the concept of public benefit in non-profit companies in South Africa. This will be done through the analysis of schedule 1, item 1 of the 2008 Companies Act, which provides provisions concerning non-profit companies from incorporation and up to the dissolution. It is important also to note that legal principles from foreign case law that have been discussed above will be used in support of this analysis.

### **3.9 Incorporation**

In South Africa non-profit company is incorporated for a public benefit object, even though the 2008 Companies Act is silent on the legal definition, but the objects provided for are accessible to the community and are beneficial as well.<sup>135</sup> The Memorandum of incorporation of a non-profit company must set out at least one object of the company, and each such object must be either a public benefit or an object relating to one or more cultural or social activities, or communal or group interests and be consistent with its principles.<sup>136</sup> The objects stated in the 2008 Companies Act are for the betterment of the society and are consistent with principle 2.1 of King IV report

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<sup>134</sup> Charities Act 2009 s 3 (ii).

<sup>135</sup> A public benefit test that has been relied upon in foreign cases.

<sup>136</sup> Schedule 1, item 1(1)(a).

advocating that organisations perform and create value within the triple context of the economy, society, and the environment and must deliver on public or social objectives.<sup>137</sup>

Objects provided for in schedule 1, item 1(1)(a)(ii) of the 2008 Companies Act<sup>138</sup> are similar to the classification adopted by Lord MacNaghten<sup>139</sup> in drawing inference on the meaning of public benefit. He adopted four principal divisions being “*the relief of poverty, the advancement of education, the advancement of religion and other purposes beneficial to the community*”. Focusing on the fourth classification being any other purposes beneficial to the community, one can safely assume that he was referring on any cultural activities, any social activities, any communal activities and or any group interests activities because as stated in the Companies Act all these objects are beneficial to the community.

Public benefit is popularly associated with alleviating poverty, but there is no legal requirement stating that the public benefit must be accessible to the poor or even that opportunities to benefit are extended to the poor<sup>140</sup> in the Companies Act, hence it was argued in the case of *Independent Schools Council v The Charity Commission*<sup>141</sup> where the Independent Schools Council made an application for judicial review in that they were operating for the public benefit. It was further stated that once the provision is made for the poor, we see no reason why an identified wider benefit should not be considered in deciding whether the way the school is being operated is for the public benefit. But that's a foreign principle, the 2008 Companies Act is clear on its objects for the incorporation of non-profit companies.<sup>142</sup>

The first requirement is a public benefit, which may broadly be regarded as a public or charitable purpose which is for the betterment of society as a whole.<sup>143</sup> The South African Income Tax Act in its definition refers to "activities" of benevolent nature, having regard to the needs, interests, and well-being of the general public, and not to

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<sup>137</sup> King IV report on corporate governance for South Africa, 2016 (Chapter two: performance and reporting, principle 2.1).

<sup>138</sup> 71 of 2008.

<sup>139</sup> See, *Income Tax Commissioners v Pemsel* 1891] AC 531 at 583.

<sup>140</sup> See, Syngé, Poverty: an essential element in charity after all? [2011] 70 CLJ 649

<sup>141</sup> [2011] UKUT 421 (TCC).

<sup>142</sup> *Idem* (*The independent Schools Council v The Charity Commission*) at [230]

<sup>143</sup> See, Cassim, The Contours of profit-making Activities of the New South African Companies Act [2012] 56, 2 SALJ.

the poor. It includes in its list of public benefit activities<sup>144</sup> matters related to welfare and humanitarian activities, health care, land and housing, education and development, religion, belief or philosophy, cultural activities, conservation, environment and animal welfare, research and consumer rights and non-professional sport as a pastime, but the primary purpose is that an activity must be accessible to the community and must be beneficial to the community as well.

The second requirement of non-profit companies with objects “relating to one or more cultural or social activities, or communal or group interests” would have a collection of activities. It may include, for instance, social or recreational clubs which may amongst others be incorporated as non-profit companies, provided that their stated objects include the provision of social and recreational amenities or facilities for their members,<sup>145</sup> and again there is no inference being drawn to the poor by this requirement.

### **3.10 Dissolution**

Notwithstanding any clause in any law or agreement to the contrary, in the event that a public benefit organisation gets to be closed down, no previous or current member or director of that company is entitled to any part of the net value of the company after its obligations and liabilities have been satisfied. The entire net value of the company must be handed over to one or more non-profit companies, registered external non-profit companies carrying on activities within the Republic, voluntary associations or a non-profit trust having objects similar to its main object. This must be determined in terms of the company’s Memorandum of Incorporation by its members if any, or its directors at or immediately before the time of dissolution or by the court if the Memorandum of Incorporation or members or directors fail to make such a determination.<sup>146</sup>

The above shows the primary intention of non-profit companies was not to benefit individual members either during incorporation or upon its dissolution. The non-profit company is incorporated for a public benefit and upon its dissolution, the entire net value of the non-profit company must be distributed to other non-profit companies that

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<sup>144</sup> South African Income Tax Act 58 of 1962, sec 30(1) and 9<sup>th</sup> sched, which sets out a list of public benefit activities for the purposes of that Act.

<sup>145</sup> See, Cassim MFC, the contours of profit-making activities of non-profit companies: analysis of the new South Africa, 2012, *Journal of African Law*, 56, 2.

<sup>146</sup> Item 1 (4) of Schedule 1 of the Companies Act.

will continue to benefit the public. For a non-profit to benefit the proceeds of the other it must show in its memorandum of incorporation that 1) it is for a public benefit and 2) or its object relates to one or more cultural or social activities, or communal or group interests and its consistent with its principles.

The net proceeds need to be distributed to the non-profit company that confers its benefit to the public beneficiaries rather than favouring a recipient based on a private, professional or any other relationship. We understand that not all persons in the relevant class of the public should derive a benefit, but only they should all be eligible to do so hence the requirement in Schedule 1, item 1(1)(a)(ii) is that an object must relate the one or more cultural or social activities, or communal or group interests.

The public benefit requirement is that an object shall not be of public benefit unless it is intended to benefit the public or section of the public and that any private benefit should be reasonable in all of the circumstances and ancillary to, and necessary for the furtherance of the public benefit.<sup>147</sup> Further the Income Tax Act<sup>148</sup> defines public benefit as an activity of a benevolent nature, having regard to the needs, interests, and well-being of the general public,<sup>149</sup> meaning the benefit must be accessible to the community at large. The definition provided for in the Income Tax Act in most cases it's for recognition as a public benefit organisation, and we have non-profit companies that have not been provided with a public benefit status by the commissioner.

### **3.11 Conclusion**

In conclusion, the lack of legal meaning of public benefit in the 2008 Companies Act does not take away the nature of non-profit companies, which is for public benefit. However, it is important to know the legal meaning of public benefit. Public benefit in its popular meaning refers to alleviating poverty, but in the corporate, the need is required for a distinction between the popular meaning and legal meaning of the concept.

This study recognises the contribution of foreign courts discussions on the concept of public benefit and the potential development of public benefit meaning in other jurisdictions through the principles that are found in their cases.

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<sup>147</sup> Requirement provided for in the Ireland context through the Charities Act, 2009.

<sup>148</sup> 58 of 1962.

<sup>149</sup> Definition of public benefit by Income Tax Act 58 of 1962.

This study further seeks to recommend the meaning of public benefit and what constitutes a public benefit in the corporate sector, in particular, non-profit companies as provided for in schedule 1, item 1(1)(a) of the Companies Act<sup>150</sup> through the above discussions and further recommendations will be provided for hereunder.

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<sup>150</sup> 71 of 2008.



## CHAPTER FOUR - CONCLUSION AND RECOMMENDATIONS

It is apparent from the discussion of this study that the term “public benefit” is a term of great significance or value, therefore it deserves to be taken seriously. The lack of legal meaning of public benefit in the 2008 Companies Act<sup>151</sup> does not take away the nature of non-profit companies, which is “public benefit”. This concept has found its popular meaning in public benefit organisations. Section 30(1) of the Income Tax Act<sup>152</sup> defines a public benefit organisation. Internationally, the concept of public benefit has found its popular meaning in the legal meaning of charity. “Public benefit” is understood as something charitable in the sense that it is beneficiary to a section of the public or general public at large.

It’s very important to note that public benefit in the Ireland context has two important principles “nature” and “benefit”.<sup>153</sup> An object must show its public nature and its intention to be beneficiary to the general public or a section thereof for it to be considered as a public benefit object. The same principles must be considered in South African non-profit companies as they easily describe what a public benefit object is. This will clear the confusion of public benefit in the corporate sector, even though the 2008 Companies Act is silent on the meaning of this concept.

It is very significant to understand that “public benefit” is not met if all the intended beneficiaries have a personal connection with the non-profit company.<sup>154</sup> This is very important in the sense that the benefit or an opportunity to benefit must be afforded to everyone in the public, including any sector thereof<sup>155</sup>

Philanthropy is closely associated with what is charitable and public benefit has been vigorously discussed by foreign courts when determining the meaning of charity, hence we say “public benefit” found at the centre of charity.<sup>156</sup> It is very necessary to extrapolate principles that draw an inference to the meaning of public benefit, and those principles are found in discussions of the courts when discovering the meaning

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<sup>151</sup> 71 of 2008.

<sup>152</sup> Income Tax Act 58 of 1962.

<sup>153</sup> Charities Act 2009 s 3(3).

<sup>154</sup> *Idem* s 3(8).

<sup>155</sup> *Idem* note 138 above s (30)(1)(c)(i) (the meaning of public benefit).

<sup>156</sup> *Idem* note 23 above.

of charity. Where public benefit was a central issue of discussion, the courts concluded that such benefit must be available to the community at large.

This calls for analysis in that for an object to be public beneficial, certain requirements must be met. There are no requirements for public benefit in the 2008 Companies Act because its meaning is not provided, we only rely on the nature of non-profit companies which is subject to different views. Various case laws in other jurisdictions seem to adopt two principal aspects to ascertain what public benefit is.

Firstly, “the public benefit must be beneficial and any detriment or harm that results from the purpose must not outweigh the benefit”. Secondly, “it must benefit the public in general or a sufficient section of the public”.<sup>157</sup> It is important to understand whether a class of persons can be regarded as a section of the community to satisfy the above-stated requirements.

The words section to public have no special goodness and it indicates that the possible beneficiaries must not be numerically negligible and the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual.<sup>158</sup> The recipient of an opportunity to benefit must be a section of the community or the general public at large.<sup>159</sup>

Requirements for incorporation of non-profit companies are two-fold and they tend to prove the above-articulated discussion in that, the first requirement is for the general public at large and the second requirement is for a section of the community.<sup>160</sup> The object relating to culture, benefits a section of the public and group interests, social activities and others also benefit a section of the public in that social or recreational clubs may be formed as non-profit companies if they comply with the requirements and they benefit a certain section in the community. The main requirement that can be extracted in this discussion is that not everyone in the community must benefit, but all must have an equal opportunity to benefit.

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<sup>157</sup> *Idem* note 104 above.

<sup>158</sup> *Idem* note 108 above.

<sup>159</sup> Lord Wrenbury (*Verge v Somerville*) [1924] AC 496 (the class of persons which might benefit may be either section of the public, read with the principles that were discussed in the case of (*Oppenheim v Tobacco Securities Trust* [1951] 1 ALL ER 31).

<sup>160</sup> *Ibid* (*Oppenheim V Tobacco Securities Trust*).

Notwithstanding the lack of clarity of the concept “public benefit” in non-profit companies, it is stated with confidence that “public benefit” found its meaning in the legal definition of charity and it connects the private sector with the public sector.<sup>161</sup> It confers an opportunity to benefit the general public at large or a section thereof, but not everyone in the community must benefit but they must all have an equal opportunity to benefit. This meaning does not limit the public benefit to the poor. We know that the concept is popularly associated with alleviating poverty, but there is no legal requirement stating that the public benefit must be accessible to the vulnerable or even that the benefit must be afforded to them. The poor will benefit because they form part of the public and non-profit companies must advocate, perform and create value in the triple context of the financial system. It requires the balancing of priorities by the governing body to remain economically feasible as well as delivering on public or social objectives.<sup>162</sup> Public benefit is for the betterment of society at large.

This study recommends that when determining whether an object is for public benefit or not must look on whether the object is favourable and any wrong or impairment that derives from an object is not stronger than the benefit. Secondly, the benefit must accrue to part of the society or the society at large. It is well acknowledged that this recommendation might not be popular with everyone in the corporate sector, but the nature of non-profit companies is public beneficial. The Companies Act is silent on the meaning of “public benefit”. The insertion of this requirement<sup>163</sup> the incorporation of non-profit companies was to prove its public nature.

Although this study focuses on public benefit as the main requirement in the formation of non-profit companies, the concept is common to other sectors as well. At the beginning of this study, we referred to the South African Income Tax Act and the concept of public benefit organisation which is of importance in this discussion because they draw inference on what is a public benefit. The Income Tax Act further provides a legal meaning of “public benefit” as “*an activity of a benevolent nature, having regard to the needs, interests, and well-being of the general public*”.<sup>164</sup> Section

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<sup>161</sup> Charities, the law, and public benefit: Ireland as a case study for the use of charity law to promote the development of social capital by Kerry O'Halloran (part one).

<sup>162</sup> King IV report on corporate governance for South Africa, 2016 (Chapter two: performance and reporting, principle 2.1).

<sup>163</sup> See, schedule 1, item 1(1) of the Companies Act on provisions concerning non-profit companies.

<sup>164</sup> *Ibid* section 30 (definition of public benefit activity' substituted by s 22 (a) of Act 30 of 2002).

30(1) of the Act<sup>165</sup> provides the legal meaning of public benefit organisation as “*either a company formed and incorporated under schedule 1 of the Companies Act, or a trust or an association of persons*”. The Income Tax Act<sup>166</sup> requires that the public benefit organisation must act in a non-profit way and with an unselfish or charitable purpose. It is important to understand the general meaning of public benefit first before the focus can be drawn into it as a requirement for the incorporation of non-profit companies.

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<sup>165</sup> Income Tax Act 58 of 1962 (as amended).

<sup>166</sup> *Ibid.*

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