

OUR REFERENCE  
B S Jennings/lv/D.508

YOUR REFERENCE

25 May 2018

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To: The Trustees of the DHS Foundation Trust

Attention: Rob Mutch

Email: [rmutch@dhsfoundation.co.za](mailto:rmutch@dhsfoundation.co.za)

Dear Sirs

### **PROTECTOR'S REPORT**

The following is my report, as Protector, which is given at the request of the Trustees of the Durban High School Foundation Trust.

I have been given copies of the following: –

1. the Agenda for the Trust's Annual General Meeting which is due to be held at 17h30 on 25 May 2018 (today);
2. the Compliance Questionnaire for the Trust's financial year ended 31 December 2017, signed off by BDO South Africa Incorporated and dated 23 May 2018;
3. a Compliance Certificate, dated 23 May 2018, signed by Shepstone & Wylie, the Trust's "Compliance Attorneys";
4. the Trust's Annual Financial Statements for the year ended 31 December 2017;
5. Minutes of the four meetings of the Trustees held during the 2017 calendar year;
6. Minutes of the Annual General Meeting of the Trust held on 17 November 2017.

I have considered all of the above documents and now report as follows: -

1. I have noted that no irregularities are reported or otherwise apparent from the Compliance Questionnaire and the Compliance Certificate save that, in the Compliance Certificate, the Compliance Attorneys have assessed the report of the Trust's auditors as specified on the Trust Compliance Questionnaire, and they note that the 2017 AGM was held on 8 August

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DIRECTORS B Mgaga (Chief Executive Officer) BS Jennings (Chairman) YL Boden AS De Lange IAE Esat PL Forbes AW Liebenberg PP Magwaza  
SM Maphumulo VJ McDonald RGJ Meneses SM Nyasulu GC Palmer S Pather GF Phillips DH Ramsay BA Rist CJ Seger HJ Stephenson  
EXECUTIVE CONSULTANTS TS Mjoli NR Pistorius AH Trikamjee CONSULTANTS MG Hands D Pistorius  
SENIOR ASSOCIATES CJ Martin C Vabaza JN Will FINANCIAL MANAGER R Mun-Gavin

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2017 “*which was not within 6 months of the year end as required by the Trust Deed*”. This echoes the comment made on the questionnaire itself by the auditors and is much the same as what occurred in respect of the 2016 AGM. However, I am not sure where the 6-month deadline to which the auditors refer appears in the Deed of Trust and it occurs to me that this deadline, which applies in respect of those companies which are obliged to hold an Annual General Meeting, might not be applicable in respect of the Trust. It is nevertheless in line with good governance to hold the AGM within 6 months of the end of the financial year and it is notable that the AGM scheduled for 25 May 2018 falls within the 6-month period.

It has also become apparent, from my discussions with representatives of the Trust, that it was not understood that the AGM constitutes “*one of the meetings of the Trustees*” (see clause 14.2 of the Trust Deed). The practice has been to hold four Trustees’ meetings and a separate AGM as though the AGM was some other type of meeting. As is clear from clause 14.2 of the Trust Deed, the AGM is a Trustees’ meeting but with special features and requirements attaching to it. The general provisions in regard to a Trust (for example, the requirement of a quorum of five Trustees – clause 14.8) and the requirements of keeping Minutes (clause 14.12) apply equally to the AGM but there are special provisions regarding the notice required for the AGM, which are dealt with in clause 22 of the Trust Deed. It follows that, in future, the Trustees may decide to hold only those “*ordinary*” Trustee meetings plus the Annual General Meeting.

The requirements for the AGM are set out in clause 22 of the Trust Deed. It is important that these be complied with and, in particular, compliance with the notice requirements is essential because, if proper notice is not given then, as would be the case if there is not a quorum of Trustees present, the meeting has no status and any resolutions taken at the meeting would be of no effect. The minutes of the AGM held on 17 November 2017 do not confirm that proper notice was given and it is suggested that, in future, the Agenda for each Annual General Meeting should have, as an initial item (after “*welcome*”), confirmation of proper notice having been given and a quorum being present (although the minutes do record the names of the Trustees present). As indicated above, if either of those is not in compliance with the requirements of the Trust Deed, the meeting is effectively invalid. It is notable that there is no such “*checklist item*” on the “*Compliance Questionnaire*” which is completed by BDO and again it is suggested that this item be included in future compliance questionnaires so that the auditors can confirm that the proper notice of the relevant AGM was given.

The minutes of the four “*ordinary*” Trustees’ meetings held during 2017 appear to comply with the requirements of the Trust Deed but again, as with the AGM, it would be advisable for the future minutes of all such “*ordinary*” meetings of the Trustees to include a provision dealing with “*notice of meeting*” so that the ordinary meeting requirement of 14 days’ notice (see clause 14.6 of the Trust Deed) can be confirmed as having been given or, if an “*urgent meeting*” (as contemplated in clause 14.6 of the Trust Deed) is held, the minutes can record why the “*lesser notice*” was given (in which case such lesser notice “*must be condoned by all the Trustees*”).

I have dealt with the special notice requirements for an AGM in the Protector’s Report of 2 August 2017. Those comments remain applicable and as such I will not repeat them. As an observation, I think it is fair to say that the notice requirements for an AGM of the Trust are stringent and, to the extent that such are peremptory rather than “*aspirational*”, a relaxation of the formal requirements, which does not compromise the integrity of the governance characteristics of the Trust, might be in order. This is something which I suggest

be given consideration by the Trustees. It should be pointed out that if an amendment is agreed upon, it would ordinarily be easier to pass the resolution of amendment by way of a 75% majority vote of all of the Trustees, at a quorate meeting of the Trustees than providing for the variation by way of a round robin resolution requiring the signature of all of the Trustees. A certified copy of a Resolution of Variation to the Trust Deed, certified by the chairman as having been passed in terms of clause 23 of the Trust Deed, should suffice for the purposes of the Master's Office.

2. In passing, I note that the Agenda for the 2018 AGM complies with the requirements as to the matters which must be dealt with, as provided for in clause 22.2 of the Deed of Trust. One of the requirements (clause 22.2.2) in the Trust Deed is that the Agenda must include *"an explanation of any changes to the Trust Deed"*. This would appear to refer to changes which have been passed rather than *"proposed"* and, in this respect, it is apparent that the Deed of Variation which was intended to have been passed some time ago, and which provides for the variation of the Trust Deed in a number of different respects, has not yet been passed. As all of the current Trustees have apparently agreed to the proposed variations, it remains only for the formalities to be completed (by way of the signing of the Deed of Variation by all of the Trustees) and the acceptance thereof by the Master, for the situation to arise when, at the next AGM of the Trust, the Agenda must contain a provision for reporting on the changes to the Trust Deed.
3. In terms of clause 26.4.2 of the Deed of Trust, the Trustees are obliged to ensure that the Annual Financial Statements of the Trust, the Annual Compliance Certificate and the Notice of the AGM are made available to the Protector within 6 months of each financial year end. This requirement has been complied with although, despite an early start this year in the supply of the initial documents, the preparation of the Compliance Questionnaire, the Compliance Certificate and finally the Protector's Report have had to be dealt with on a very urgent basis.
4. The Compliance Certificate from the Compliance Attorneys indicates, as it did for the 2016 and 2015 years, that they were unable to assess or comment on the compliance issues which are listed in the Compliance Questionnaire under the headings *"Accounting"* and *"Taxation"*. Technically this is a problem because, in terms of clause 22.2.5 of the Foundation's Deed of Trust, the agenda for the AGM, which must be included in the notice of the meeting, must include various matters, one of which is *"an Annual Compliance Certificate from the Compliance Attorneys prepared as part of the year end audit confirming that all of the provisions of the Trust Deed have been complied with in that year or detailing any non-compliance with the Trust Deed and which Trustees, were, in their opinion, responsible for such non-compliance, if possible."*

In effect, the Compliance Attorneys are required to check on all peremptory obligations of the Trustees and to report on whether or not there has been compliance. The practice, at this early stage, is for the Compliance Attorneys to report on the Auditor's Report. On reflection, this appears to be a matter of simply highlighting what the auditors themselves have reported on by completing their questionnaire. In turn, the Auditor's Questionnaire does not cover all of the obligations placed on the Trustees. For example, the Trustees are obliged to procure that monthly management accounts are circulated to all Trustees (clause 9.2) and that a monthly investment report is prepared and circulated amongst the Trustees (clause 17.4) the Trustees are also prohibited from holding or acquiring shares or loans or participations of any nature in any private companies, trusts, partnerships or similar on behalf

of the Trust (clause 17.3). These items, as with the obligations in respect of the notice of the AGM (as referred to above), do not appear to be considered in determining whether there has been compliance.

Returning to the issue of accounting and taxation, I have previously suggested, in correspondence, that those items be excluded from the mandate of the Compliance Attorneys and that reliance be placed on the auditors to deal with them. This issue was reported on in the Protector's Report of 2 August 2017 and one of the proposed amendments to the Trust Deed, which is currently being provided for in a Deed of Variation, is to amend the Deed of Trust, in terms of the requirements set out in clause 23 thereof, to limit the mandate of the Compliance Attorneys so that they are not required to report on the accounting and tax issue. In fact, because the Compliance Certificate is effectively a report on the Compliance Questionnaire completed by the auditors, the Board of Trustees might well give consideration to doing away with the requirement of a separate compliance report from the Compliance Attorneys with the object of streamlining the process.

Subject to the above observations, there are, in my opinion, no further issues to be brought to your attention. I can, in this respect, confirm that it is apparent from the agenda relating to the AGM for 2018 that none of the matters contemplated in clause 26.1 of the Trust Deed (namely, amendment of Trust Deed, dissolution of Trust, change of compliance attorneys, change of auditors and making income or capital awards or loans to secondary or optional beneficiaries) are to be dealt with at the AGM. As such, the prior written consent of the Protector will not be required in respect of any resolutions to be proposed for consideration at the AGM and I can confirm that I approve of the Deed of Variation which will be signed separately and not approved as such at the AGM.

Sincerely

A handwritten signature in black ink, appearing to be 'B. Jennings', with a long horizontal flourish extending to the right.

**BRIAN JENNINGS**  
**GARLICHE & BOUSFIELD INC**

cc: Erika Petersen-Holmes