

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



Case number: 63115/2020

(1) (2) (3)	REPORTABLE: NO OF INTEREST TO OTHER JUDGES: NO REVISED.
<u>1 FEBRUARY 2022</u> DATE	<div style="background-color: black; width: 200px; height: 40px; margin: 0 auto;"></div> SIGNATURE

In the matter between:

NATIONAL LOTTERIES COMMISSION

Applicant

and

**THE MINISTER OF TRADE, INDUSTRY AND
COMPETITION**

Respondent

JUDGMENT

NEUKIRCHER J

[1] In 2018 serious allegations of corruption, fraud and other forms of maladministration had been levelled against the National Lottery Board (*the*

Board) and the National Lotteries Commission (NLC)¹ in regard to their administration of pro-active or discretionary funding under Section 2A² of the Lotteries Act no 57 of 1997 (*the Act*).

- [2] The allegations that had originally surfaced in several newspaper articles, were in regard to the disbursement of funds to Denzhe Primary Care (*Denzhe*).³ According to the allegations, when funds were allocated a few years later, they were actually disbursed to a drug rehabilitation centre (the Centre) bearing the name “Denzhe”, and the particular allegation was that family members of a senior employee of the NLC had received monies from the Centre.
- [3] On 27 November 2018 the NLC appeared before the Portfolio Committee of Trade & Industry (*the Portfolio Committee*) for a briefing on its Second Quarterly Report for that year. Amongst the concerns raised by the members were the

¹ The applicant in this matter

² **Functions of Commission**

(1) *The Commission shall, applying the principles of openness and transparency, exercise the functions assigned to it in terms of this Act by the Minister, board or any other law.*

(2) *The Commission must ensure that—*

(a) *the National Lottery and sports pools are conducted with all due propriety and strictly in accordance with the Constitution, this Act, all other applicable law and the licence for the National Lottery, together with any agreement pertaining to that licence; and*

(b) *the interests of every participant in the National Lottery are adequately protected.*

(3) *The Commission may, upon request by the Minister, board or on its own initiative in consultation with the board, conduct research on worthy good causes that may be funded without lodging an application prescribed in terms of this Act.*

(4) *The Commission may, upon request by the Minister, board or on its own initiative in consultation with the board, invite applications for grants from worthy good causes in the prescribed manner.*

(5) *The Commission shall—*

(a) *promote public knowledge and awareness by, amongst others—*

(i) *developing and implementing educational and informational measures to educate the public about the lotteries and provisions of this Act; and*

(ii) *educating the public by explaining the process, requirements and qualifications relating to the application for grants in terms of this Act;*

(b) *manage the staff, and its financial, administrative and clerical functions; and*

(c) *exercise any other function as delegated or directed by the Minister or the board.*

³ The objective of Denzhe was to assist persons living with HIV

reports in the media about the NLC's work and its disbursement of funds and, in particular, the issue of the above disbursement of funds to Denzhe.

- [4] In this regard the Portfolio Committee posed the following questions:

"Members were asked about the conflict of interest and how the Commission could pay the wrong centre. Why, when the media had made an application for information under the Promotion of Access to Information Act, had that information been denied? Was it a cover up? ...How had it happened under the noses of the Commission that such a scheme operated under the noses of the Commission? Was the proactive funding a slush fund?" ⁴

- [5] Interestingly enough, the NLC Commissioner's response was that the NLC had commissioned its own investigation into the Denzhe matter, and that the outcome thereof was that the NLC had "*absolved*" itself from any responsibility in the matter as:

"...the relationship between Denzhe and House Generation or any other entity employed by the beneficiary remains independent from the relationship of the NLC and the funded organisation."

- [6] This response did not satisfy the previous Minister of Trade, Industry and Competition (Minister Davies) who informed the NLC on 5 December 2018 that given the concerns of the Portfolio Committee, he had requested that the Department conduct an investigation into the National Lottery Fund "*to ensure*

⁴ Emphasis provided

that resources are optimally employed and that good governance is not compromised." That report was received by him on 5 March 2019.

- [7] Then, on 19 March 2019 GroundUp published another article relating to projects funded by the NLC. This article reported that three different applicants had used the same attorney's firms physical and postal addresses in their respective applications for funding lodged with the NLC. The article went on to state that a fourth applicant, who also had a link with the same attorney, also received funding from the NLC. The latter was an entity registered as Dinosys. The GroundUp article then went on to state the following:
- "Dinosys signed a R10-million contract with the Lottery in November 2018 for the 'construction of sanitation facilities' at 15 schools. Both the Lotteries Commission and Liesl Moses, the 'chairperson' and a director of the company and an employee of Ramulifho, refused to say where the schools were, whether Dinosys had any experience in construction projects, or who would build the facilities."*
- [8] According to GroundUp, all three directors of Dinosys were employed by the attorney in question. Furthermore, Dinosys had stated that its physical address was in Beaconsfield, East London. But when the GroundUP journalist attended the address, the office could not be located and none of the residents knew of Dinosys when asked.
- [9] The article then reported on *Denzhe* and a project known as "I AM MADE FOR GOD'S GLORY". The article reported that at the time that *Denzhe* received the

allocated R28,5 million from the NLC it was, in fact, dormant and the funds allocated for the second project were actually used for the purchase of two Ocean Basket franchises in Gauteng.

- [10] In March 2019, the NLC then wrote to Minister Davies in an attempt to rebut these allegations and undertook to *“take ownership of [their] responsibilities, to work effectively, efficiently and professionally in ensuring a positive and sustainable impact on communities we serve, the NLC’s Monitoring & Evaluation team continues to ensure due compliance with NLC Grant Agreement pending finalization of the project.”* The allegations as regards Dinosys were not addressed.
- [11] As a result of these very worrisome facts, and others that had in the meantime reared their head as regards to alleged irregular disbursements to other grant recipients, Minister Davies subsequently extended the scope of the investigation to include an investigation into misappropriation of funds in relation to the re-building of the Vhafamadi High School, and an investigation into alleged fraudulent activities in relation to funding disbursed to the Buyelekhaya Annual Music Festival. The NLC agreed to extend the investigators’ mandate into the Vhafamadi High School issue, however considered the Music Festival issue closed pursuant to the receipt of their own commissioned report.
- [12] On 29 May 2019, Minister Patel assumed office and on 14 August 2019 he then wrote to the Chairperson of the NLC, *inter alia* as regards his concerns regarding the investigation conducted by the NLC’s forensic investigators into

the shortcomings identified by the Department⁵ regarding the administration of monies under the NLC's administration. Part of this related to money paid to Denzhe for the completion of the drug rehabilitation centre as the investigation had yielded no proof that the drug rehabilitation centre was ever completed.

- [13] As a result, Minister Patel recommended that the funds paid to Denzhe be recovered in terms of Section 76(1)(f)⁶ of the Public Finance Management Act No 1 of 1999 (PFMA), and a criminal case be pursued.
- [14] Minister Patel also recommended *inter alia* that the NLC provide the Departments Internal Audit Unit with a list of all approved Pro-active Funding Projects from 2016 to 2018. According to him, the rationale behind this was to provide public confidence in the pro-active funding model provided for in the Act.
- [15] The NLC refused to comply with the latter request. It appears that one of the reasons given was that the NLC felt it had an obligation to protect applicant and beneficiary information under the Act and felt that to disclose this information would lead to contraventions of not only the Act, but also the Protection of Personal Information Act ⁷ (POPI) and Promotion of Access to Information Act (PAIA)⁸.

⁵ The Department of Trade, Industry and Competition

⁶ "76 (1) The National Treasury must make regulations or issue instructions applicable to departments, concerning –

(f) liability of losses and damages and procedures for recovery;..."

⁷ No 4 of 2013

⁸ No 2 of 2000

- [16] The impasse between Minister Patel and the NLC continued for several months until, eventually, on 4 March 2020, he wrote to the Chairperson of the NLC stating:

“..... the restoration of public confidence and credibility of the NLC’s Board with respect to addressing the NLC pro-active funding allegations is extremely urgent.

.....the most effective way of restoring confidence in the Board in regards of these issues is to appoint independent forensic investigation of these matters... and any matters related to pro-active funding”

- [17] In the same letter, Minister Patel indicated that the investigation would be commissioned by the Department and that he had instructed the Director-General of the Department to procure the services of forensic investigators for this purpose. He further instructed that the Chief Operating Officer of the NLC was to remain on special leave pending the finalisation of the investigation.

- [18] It is common cause that Nexia SAB & T (Nexia) were appointed to conduct the forensic investigation into the alleged corruption, including the reported alleged impropriety and fraud in respect of the pro-active funding by the NLC.

- [19] In May 2020 Minister Patel was approached by the Special Investigating Unit to support a request to the President which would see a further investigation by the SIU into allegations of maladministration at the NLC - he agreed to do so.

[20] It is common cause that Nexia's investigation has commenced and that it has released a preliminary report which Minister Patel has refused to provide to the NLC.

[21] It is also common cause that Minister Patel's views on this issue are set out in his letter to the NLC, dated 7 December 2020, which states *inter alia* ⁹:

".... the investigation has not been completed, and [that] a final report is awaited. As the investigation is pending, there is a real danger in the dissemination of the preliminary report, as no conclusive findings have been made. I am also aware that as a matter of fact, the investigators made contact with officials from the NLC for purposes of the investigation. Instead of co-operating with the investigators, the matter was referred to the Commission's legal representatives, who in turn sent a letter to the investigators recording that the commission may not have any obligation to co-operate with them, as the matter is "sub judice".

[22] The letter referred to in the third last sentence of the above quotation is in fact also dated 7 December 2020, and the relevant portions read:

"3. We have advised our client to co-operate with all and any lawful investigations that it may be subjected to by any authority.

4. However, in order to determine if this investigation is indeed lawful and whether our client is obliged to afford you its co-operation, we are instructed by our client to request the following information from you:

4.1 A copy of your letter of appointment;

⁹ In paragraph 7 of the letter

4.2 *A copy of your terms of reference (scope and extent of your investigation)*

5 ...

6 *Upon receipt of the requested information, we should advise our client how to deal with you going forward...*"

[23] However, this application had been launched 6 days earlier and so the letter sent to Nexis was simply an obfuscation as the NLC quite clearly had absolutely no intention of co-operating with Nexis given the relief to set aside its appointment.

THE RELIEF

[24] There are 2 main issues in this matter:

24.1 does the Minister have the authority to commission an investigation into the affairs of the NLC? and

24.2 irrespective of the outcome of 24.1, the NLC wants a copy of Nexia's preliminary report and, insofar as PAIA may be applicable, it asks to be exempted from its provisions.

THE INVESTIGATION

[25] There are 3 documents that found the basis of the Minister's oversight and powers:

25.1 the Lotteries Act;

25.2 the PFMA; and

25.3 the Shareholders Compact.

The Lotteries Act

[26] The Minister is responsible for the administration of the Lotteries Act and, as a result he:

26.1 appoints members of the Board¹⁰ and may terminate or suspend their membership¹¹,

26.2 may attend meetings of the board or its executive committee and speak, although he has no right to vote¹²,

26.3 issue the license to conduct the National Lottery¹³,

26.4 appoint Distributing Agencies in terms of Section 22(3) as read with Section 26B(2)¹⁴,

26.5 prohibit, withdraw or reduce any grant under certain circumstances set out in Section 33 of the Act.¹⁵

[27] It is interesting to note that the Minister is entitled to act in terms of Section 33 not only after receiving a recommendation from the Board, but also on information "from any other person".

¹⁰ S3(1) of the Act

¹¹ S3(5) of the Act

¹² S4(5) of the Act

¹³ S10 of the Act

¹⁴ A Distributing Agency is responsible for the adjudication of applications for grants or recommendations for funding of worthy good causes received from the NLC XXX S26B(4) which includes pro-active discretionary funding

¹⁵ **"Power of Minister to prohibit certain grants"**

33. The Minister may within seven days after a distributing agency has made a grant to a juristic person under this Chapter, prohibit that distributing agency from paying out 40 such grant if such grant is likely to be utilised for any unlawful purpose or fails to comply with the conditions the Minister has imposed in terms of section 32: Provided that the Minister shall—

(a) consult with the board and that distributing agency before any such prohibition is imposed; and - 45 (b) disclose to the board and that distributing agency any information at his or her disposal which may indicate that any such grant is likely to be utilised for any unlawful or improper purposes."

The PFMA

[28] Schedule 3¹⁶ of the PFMA lists the NLC as a public entity. As such, the NLC is bound to comply with the provisions of the Act, its regulations and the Treasury Regulations. According to the PFMA, the NLC is therefore accountable to its executive authority which is defined by the PFMA as

“(c) in relation to a national public entity, means the Cabinet member who is

[29] As a result, it is therefore subject to the Minister's powers of ownership and control under section 63(2) of the PFMA which states:

“63(2) The executive authority responsible for a public entity under the ownership control of the national or provincial executive must exercise that executive's ownership control powers to ensure that that public entity complies with this Act and the financial policies of that executive.”

[30] Section 50 of the PFMA sets out the fiduciary duties of accounting authorities. These include:

“50. (1) The accounting authority for a public entity must—

(a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;

(b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;

(c) on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in my

¹⁶ Under Part A

way may influence the decisions or actions of the executive authority or that legislature; and

(d) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.”

[31] The purpose for which Section 50 of the PFMA has been enacted has been described as

“[39]...includ[ing] [the] duties to: exercise the utmost care to ensure reasonable protection of the assets and records of the public entity; act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity; and seek within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.”

[32] In my view the interrelationship between the Lotteries Act and the PFMA is the following: under the PFMA, the Minister is the executive authority responsible for ensuring that the NLC complies with all its financial obligations under both the Lotteries Act and the PFMA. The Lotteries Act provides that the Minister may suspend or terminate the membership of any member of the National Lotteries Board on grounds of serious misconduct or where criminal proceedings are pending against that member for theft or fraud.

[33] Where the Board itself refuses to account for its actions, it is difficult to imagine how, bearing in mind his obligations under the Lotteries Act and PFMA, and his oversight functions as afforded to him in terms of both, the Minister has no

obligation, or would have no teeth to act. Furthermore, any action without an investigation has its own inherent issues.

The Shareholder's Compact

[34] But there is one more incisive document and this is the Shareholder's Performance Compact entered into between the Government and the NLC. It is dated 5 April 2019 (the 2019/2020 Compact). The 2019/2020 Compact was valid from 1 April 2019 until 31 March 2020 and this was in essence the period of the time that the particular complaints arose.

[35] According to Minister Patel the new 2020/2021 Compact was signed by the Chairperson of the NLC board and was provided to him, but as at the date of the application he had yet to sign it *"as there have been significant amendments to the Compact, in regards of which I still require clarity from the Board. Nevertheless, the NLC has agreed to all the terms of the Compact, including the provisions that deal with dispute resolution."*

[36] It is important to note that the Compact specifically provides that one of the roles and responsibilities of the Department is to monitor adherence by the NLC to the PFMA¹⁷. According to Minister Patel, his decision to commission an investigation into the allegations of impropriety, fraud and irregularities in the pro-active finding by the NLC, fell within his powers under clause 6.1.10 of the 2019/2020 Compact which provides that one of the Department's roles and responsibilities is to:

¹⁷ See clause 6.1.1

“6.1.10 intervene in line with legislature and corporate governance principles adapted in [the Compact]”.

- [37] There are two important notes on this: the first is that clause 6.1.10 supra does not prescribe the method of intervention to be adopted. The second is that it is clear that the intervention is to ensure that the NLC complies with Lotteries Act, the PFMA and general good governance principles.
- [38] It bears emphasis that the instruction is dated 4 March 2019, and the 2019/2020 Compact term ended on 31 March 2020 – thus it appears that the investigation was indeed authorised by the 2019/2020 Compact.
- [39] In any event, the Minister is the executive authority of the Department and, for purposes of the PFMA, the Director-General is the Head of Department and the accounting authority. He is thus authorised to procure the services of the firm who is to conduct the investigation into the NLC. As such, in my view, he has acted within the bounds of the PFMA. Furthermore, as executive authority, Minister Patel was acting within his powers under the PFMA when he authorised the investigation for the reasons set out supra.
- [40] In my view, the investigation into the NLC was well-founded and Prayer 1 of the Notice of Motion must therefore be dismissed.

THE REPORT

- [41] The question now was whether the NLC is entitled to a copy of the preliminary report received on 5 March 2019.¹⁸
- [42] The NLC's argument is that "it is entitled to be provided with the investigation report once the investigation has been concluded....".
- [43] The argument is that Minister Patel is obliged to release the report to the NLC whether or not he intends to use it or act on it, that the NLC is not obliged to act in terms of PAIA to obtain the report, and that as a matter of law Minister Patel is obliged to make the report available to the NLC.
- [44] It is Minister Patel's position that the report is a preliminary one and has yet to be finalised, largely due to the complete lack of co-operation by the members of the NLC as evidenced by their attorney's letter of 7 December 2020.¹⁹
- [45] Given the *Plascon-Evans* rule²⁰, Minister Patel's version must prevail and as the NLC's asks for the report "*once the investigation is concluded*", it is not entitled to it at this stage.
- [46] I am also of the view that, in any event, the NLC cannot circumvent the provisions of PAIA as

¹⁸ Par 6 supra

¹⁹ Par 22 Supra

²⁰ *Plascon-Evans Paints (TVL) Ltd. v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (SCA)

"...where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution".²¹

[47] The NLC argues that it is exempt from complying with the provisions of PAIA but fails to set out any real grounds to found this contention.²² In failing to do so it ignores the following:

"[10] One of the things which stand out in section 11 is that compliance with the procedural requirements of PAIA is not optional. If any of the procedural requirements is not complied with, the requester is not entitled to the record. The court is similarly not at liberty to waive the peremptory provisions of section 11(1). On a proper construction of section 11(1) it is clear that both the requestor's entitlement to be given access to a record of a public body and the obligation imposed on the requestor to comply with all the procedural requirements of PAIA are couched in peremptory terms. In the absence of full compliance with the procedural requirements of PAIA the information officer is entitled to refuse access and to not provide the record. The court may also not order the provision of the record to the requestor unless it is satisfied that there has been full compliance with all the procedural requirements. In President of the Republic of South Africa v M & G Media Ltd, the Constitutional Court explained the provisions of section 11 in the following terms:

"[9] As is evident from its long title, PAIA was enacted "[t]o give effect to the constitutional right of access to any information held by the state. And the formulation

²¹ Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC) para 73

²² For exceptional circumstances see MV Ais Mamas: Seatrans Maritime v Owners, MV Ais Mamas and Another 2002 (6) SA 50(C) as discussed in Ntlemenza v Helen Suzman Foundation 2017 (5) SA 402 (SCA) para 37

of section 11 casts the exercise of this right in peremptory terms – the requestor “must” be given access to the report so long as the request complies with the procedures outlined in the Act and the record requested is not protected from disclosure by one of the exemptions set forth therein. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception”.²³

- [48] On its own version, the NLC has made no attempt to comply with PAIA. Furthermore, on its own version, the NLC has asked for the report once the investigation is completed. As neither of these conditions has been fulfilled, I am of the view that the further relief sought should be refused.

THE ORDER

- [49] The order I therefore make is the following:

The application is dismissed with costs.



B NEUKIRCHER

JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 1 FEBRUARY 2022.

Appearances:

For the Applicant:	:	Adv WR Mokhare SC, with him Adv C Lithole
Instructed by	:	Maluleke Inc
For the 1 st and 2 nd Respondents	:	Adv N Maenetje SC
Instructed by	:	Cheadle Thompson & Haysom Inc

²³ Paul v MEC for Health, Eastern Cape Provincial Government & Others; Mbabo v MEC for Health Eastern Cape Provincial Government and Others; Ncumani v MEC for Health, Eastern Cape Provincial Government & Others [2019] 3 All SA 879 (ECM).