IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 22352/2009

In the matter between:

SOUTH AFRICAN EDUCATION AND ENVIRONMENT PROJECT	First Applicant
CLAREMONT METHODIST CHURCH SOCIAL IMPACT MINISTRY, SIKHULA SONKE	Second Applicant

and

NATIONAL LOTTERIES BOARD	First Respondent
TEBOGO MAITSE NO (as chairperson of The Distribution Agency for Charities)	Second Respondent
DORCAS JAFTA NO (as chairperson of the Distribution Agency for Arts, Culture and National Heritage)	Third Respondent
THE MINISTER OF TRADE AND INDUSTRY	Fourth Respondent

JUDGE	:	**P.A.L. Gamble**
FOR THE APPLICANT	:	**Adv. D. Borgström**
INSTRUCTED BY	:	**Edward Nathan Sonnenberg**
FOR THE RESPONDENTS	:	**Adv. N.A. Cassim S.C.**
INSTRUCTED BY	:	**Dockrat Attorneys**
DATES OF HEARING	:	**18 May 2010**
JUDGMENT	:	**26 August 2010**

ORIGINAL

REPORTABLE

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THE MINISTER OF TRADE AND INDUSTRY	Fourth Respondent

JUDGMENT DATED 26 AUGUST 2010

GAMBLE, J:

INTRODUCTION

[1] The two Applicants in this matter are non-governmental

organizations (NGO's) which render services to needy and marginalized people living on the Cape Flats. Their primary areas of focus in the field of education are in regard to early childhood development, childcare, pre-school education and the training of workers in these disciplines.

[2] Like so many of their fellow NGO's the Applicants struggle to make ends meet and are reliant on donor funding just to survive. In the hope of improving their financial position the Applicants submitted (independently of each other) a number of applications for funding to the First Respondent ("the NLB").

[3] In the case of the First Applicant (which is known by the acronym SAEP) there were seven applications for NLB funding during the period August 2003 to January 2009, while the Second Applicant (generally known as "Sikhula Sonke") submitted two applications – in July 2007 and November 2008.

[4] None of these requests (which for the sake of convenience, I shall call "funding applications") were successful. Both Applicants complain of administrative bungling in the processing of various of their funding applications and they seek redress by way of reviews under the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") which is the legislative embodiment of the right to fair administrative action guaranteed under

Section 33 of the Constitution. [1] The Applicants have made it clear that what they seek at this stage is only the reconsideration of their various funding applications by the NLB. They do not seek an order granting them a funding allocation or monetary award as such.

THE FUNDING APPLICATIONS

[5] In its founding papers the First Applicant referred to the following seven funding applications, which I shall describe with reference to the relevant reference numbers allocated by the NLB:

5.1 Reference no. 14842

An application for R642 040.00 submitted on 26 August 2003 (hereinafter "the first funding application")

5.2 Reference no. 4046

An application for R789 460.00 submitted on 28 July 2004 ("the second funding application")

5.3 Reference no. 21797

An application for R500 000.00 submitted on 13 July 2005 ("the third funding application")

5.4 Reference no. 21524

An application for R976 400.00 submitted on 3 November 2005 ("the fourth funding application")

5.5 Reference no. 28045

[1] Relevant cases to follow]

An application for R1 451 910.00 submitted on 24 July 2007 ("the fifth funding application")

5.6 Reference no. 35057

An application for R990 500.00 submitted on 12 November 2008 ("the sixth funding application"); and

5.7 Reference no. 35336

An application for R313 560.00 submitted on 28 January 2009 ("the seventh funding application")

[6] In its founding affidavit the Second Applicant made reference to the following two applications for funding submitted on its behalf:

6.1 Reference no. 27999

An application for R570 000.00 submitted on 26 July 2007 ("the eighth funding application"); and

6.2 Reference no. 33667

An application for an undisclosed amount submitted on 13 November 2008 ("the ninth funding application"). This application appears to have been a re-submission of the eighth funding application, which was allegedly made because of "delay and uncertainty regarding" the outcome of the eighth funding application.

[7] Each of the nine funding applications referred to above was refused by the NLB.

URGENCY

[8] On 22 October 2009 the Applicants jointly launched this application as one of some urgency and sought the allocation of an early date for hearing. By the direction of the erstwhile Acting Judge President the matter was enrolled for hearing on 17 March 2010.

[9] On that day Madima AJ declined to hear the matter due to lack of urgency. [2] When the matter came before the Court on 18 May 2010 there was no longer a challenge to urgency and both Mr Borgström (who appeared for the Applicants) and Mr Cassim S.C. (who appeared for the NLB and the other respondents) agreed that the matter was ripe for hearing, but that the costs of 17 March 2010 still had to be determined.

RELIEF SOUGHT

[10] When this application was launched the First Applicant did not seek the review of all the failed funding applications. It contented itself at that state with the review of funding applications numbers 2, 5, 6 and 7. The Second Applicant sought the review of the eighth and ninth funding applications.

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[2] Although the order granted by Madima AJ was to "dismiss" the application "due to lack of urgency", it is common cause that the matter was struck from the roll to be heard on an agreed date two months later.

[11] The First Applicant abandoned the relief sought in respect of the second funding application and when the matter was called Mr. Borgström informed the Court that the relief then sought was in respect of funding applications no. 5, 6, 7, 8, and 9. Mr. Cassim SC immediately conceded the reviews in respect of funding applications no. 5 and 6 and said that the NLB would reconsider them forthwith. He indicated that he would make submissions later regarding the question of costs.

[12] Mr Borgström then proceeded to argue the review of funding applications no. 7, 8 and 9 and during the course of argument made ample reference to the circumstances surrounding the other funding applications which, he said, were relevant by way of background. While complaining that such reliance was really for "atmospheric purposes", Mr Cassim SC did not object thereto.

[13] Mr. Borgström referred to the fact that the Applicants sought the referral of all the disputed funding applications back to the NLB with instructions and directions as to how they were to be dealt with thereafter. Given the history of alleged "institutional chaos" at the NLB (of which the various failed funding applications were said to provide ample proof), it was argued that this approach was warranted.

[14] Before dealing with the individual funding applications sought to be reviewed, it is necessary to look at the legislative and regulatory framework which underpins the various administrative procedures relevant to this matter.

STATUTORY FRAMEWORK

The NLB and the Distribution Agencies ("the DA's")

[15] The National Lottery Competition is operated under licence. In terms of Section 14(2)(e) of the Lotteries Act 57 of 1997 ("the Act"), portions of the amounts raised in competitions must be paid into the National Lottery Distribution Trust Fund ("the Fund ").

[16] The fund is established under Section 21 of the Act. In terms of Sections 10(c) and 22(1) and (2) of the Act, the NLB administers and holds the amount in the Fund in trust. In particular, Section 22(2) dictates that the NLB hold the moneys in the Fund "for the purposes" in chapter 3 of the Act. In essence, these purposes entail that after deducting amounts needed by the NLB for its functions, the entire balance of the monies in the Fund must be appropriated for expenditure by the NLB and "allocated" for socially worthy projects in terms of Section 26 of the Act.

[17] The members of the NLB are appointed by the Fourth Respondent ("the Minister").

[18] The Minister determines the proportions of the available amount that should be made available for different causes. In terms of current regulations [3]:

(1) Not less than 45% of the amount must be allocated for "charitable expenditure" (Section 23(b) of the Act and associated regulations); and

(2) Not less than 28% of the amount must be made available for "expenditure on or connected with the arts, culture and the national historical, natural, cultural and architectural heritage" (Section 26(3)(b) of the Act and associated regulations).

[19] The DA for Charities is primarily responsible for considering applications for the grant of funds earmarked for charitable expenditure; while the DA for Arts performs the same function in respect of funds earmarked for arts, culture and heritage.

[20] It is important to note that the DAs are not juristic persons in their own right: they are committees operating within the NLB. Their members are appointed by the Minister in terms of Section 28(1) and 30(1) of the Act and they are remunerated by the NLB.

[3] GN 1468/2004 published in Government Gazette 27118 of 15 December 2004

[21] Once deserving organizations are identified by the DA's and awarded a grant, the NLB is responsible for making the requisite payment and ensuring that all conditions are met and continue to be met.

[22] The NLB'S central applications office receives all applications for grants of lottery funds and liaises with applicants as to the progress and outcome of their applications.

[23] It is common cause that the consideration of applications for funding by the NLB and the DA's constitute "administrative action" as defined in Section 33 of the Constitution and PAJA. As such the decisions are reviewable on the grounds set out in Section 6(2) of PAJA. Similarly, any failure to make a decision is reviewable in terms of Sections 6(2)(g), read with 6(3)(a) and (b) of PAJA.

THE NLB's JUSTIFICATION OF ITS CONDUCT

Generally

[24] In argument Mr Cassim SC, in somewhat forthright terms, stated that the NLB's case was to the following effect. It says it has the right to fix guidelines applicable to funding applications and if Applicants do not comply therewith, that is the end of it. As he put it, "If you want the charity, you must meet the requirements the NLB has set".

Ad: The Seventh Funding Application

[25] The NLB justified its refusal of the seventh funding application as follows. It says that in 2008 it called for applications to be made to the DA (Arts) for funding from the National Lottery. The relevant advertisement called for applications to be lodged by 30 January 2009 and contained the following condition:

> *"Applications for projects will be considered if they include the following documents:*
>
> *...5. Signed Audited Financial Statements for the most recent two years prepared by a firm of registered auditors."*

[26] It says that the First Applicant submitted a set of financial statements which did not comply with this requirement in that they were signed, not by an auditor, but by a management accountant. Furthermore, the documents submitted did not cover the requisite financial years.

[27] In asserting the rationality of its decision to decline this funding application, the NLB pointed to a six-page document which it had issued entitled "Guidelines for Submission of Applications" in which the following is stated:

> *"F. SIGNED AUDITED FINANCIAL STATEMENTS*
>
> *It is compulsory for organizations to submit signed audited financial statements for the two most recent years. Organizations that submit*

only one set of signed audited financial statements will not be considered...

Applicants must ensure that their auditors are registered with recognised professional bodies e.g. Public Accountants and Auditors Board. Financial Statements that have been reviewed by an Accounting Officer are not audited. Any application (sic) that submits such statements, will be declined..."

Ad: The Eighth Funding Application

[28] In relation to this application by the Second Applicant the NLB says that the DA (Charities) issued guidelines in 2007 to be adhered to in relation to requests for funding. These include the following requirement which the NLB claimed in its answering affidavit was "peremptory":

> *"3. Please note that an application should have exactly the **SAME NAME** throughout This means that **ALL** the documents you attach should match the name on the organization's Registration Certificate, Constitution, Articles and Memorandum of Association or Trust Deed....*
>
> ***NOTE:***
>
> *• If the names on any of the above differ, the application will NOT be considered."*

[29] The NLB observed that the application form filled in on behalf of the Second Applicant was made out in the name "Sikhula Sonke", whereas its statutory documents referred to "Claremont Methodist Church Social Impact Ministry, Sikhula Sonke". The NLB claimed that there was a lack of consistency in the use of names by the Second Applicant which justified

its refusal of the eighth funding application on the basis of non-compliance with guideline 3 above.

Ad: The Ninth Funding Application

[30] In relation to this funding application the NLB said that the Second Applicant had omitted to submit a set of signed financial statements with its application. The unsigned set which it had submitted was said to be insufficient to enable it to properly adjudicate the application.

THE STATUS OF THE DA's GUIDELINES

[31] The stance adopted by the NLB that the Applicants simply failed to comply with the criteria set out in the various guidelines issued by the DA's, and the further contentions that the guidelines were peremptory, drew sharp criticism from Mr. Borgström. It is therefore necessary to examine this aspect in a little more detail.

[32] The DA's have no statutory or regulatory power to make rules which are binding on applicants for funding. Accordingly the guidelines laid down by them have no formal status and cannot be interpreted as absolute and inflexible rules.

[33] That does not mean that there are no applicable principles or rules to ensure that organisations applying for funds are credible and financially secure. There are indeed several:

(i) Under Section 28(2) of the Act, "*directions*" maybe issued by the Minister (after consultation with the Ministers of Social Development) and/or the Minister of Finance regarding the allocation of funds earmarked for charities. These are found in Regulation 3 of the "*Allocation Regulations*".

(ii) Similarly under Section 30(2) of the "Act", "*directions*" may be issued by the Minister (after consultation with the Ministers for Arts and Culture; Environmental Affairs; and Science and Technology) and/or the Minister of Finance, regarding the allocation of funds earmarked for arts and culture. These are found in Regulation 5 of the "*Allocation Regulations*".

(iii) In terms of Section 32(3) of the Act, the Minister has the further power to make "*directions*" which must be taken into account by the DA's when "*determining the persons to whom, the purposes for which and the conditions subject to which the distributing agency is to allocate any amounts*". The Minister has, however, not issued any such directions.

(iv) Regulation 10(2) of the "*Distributing Agencies*" regulations also impose certain rules stipulating that DA's cannot make a grant to organisations under legal administration, which are insolvent, or have breached conditions attached to previous allocations.

[34] The DA's do not, however, have a power of their own to introduce additional rules in addition to those imposed by the Minister and his Cabinet colleagues in the National Government. The powers of the DA's are limited to receiving and considering applications, and suggesting conditions to be imposed when money is granted. They do not have the power to call for applications, decide how much money should be made available for different causes, or to distribute money.

[35] I agree with the submission made by *Mr Borgström* that the "*guidelines*" thus cannot sensibly be interpreted to be peremptory rules imposed by the DA's which have to be strictly obeyed. If the guidelines were to be interpreted in this manner they would plainly be *ultra vires* and unlawful. And, it is trite law that a court should, if possible, avoid an interpretation which results in unlawfulness. [4] Mr Cassim SC accepted in argument that the guidelines set by the DA's were no more than that.

[36] Mr Cassim SC went on to argue that any decision made by the NLB would of course have to be rational and that such rationality would have to be evaluated utilizing the conditions fixed under the guidelines as a yard-stick. Once again, Mr. Cassim SC submitted quite bluntly that "that is the end of the matter". He pointed out that no case had been made out in the founding affidavit for a failure by the NLB (or any of its subsidiary bodies such as the DA's) to apply the guidelines fairly: there

[4] Centre for Child Law v Minister of Justice and Constitutional Development and Others 2009 (6) SA 632 (CC) at para 108 and the cases cited therein.

was no inconsistency argument made out for the Respondents to address. Similarly there was no attack in the Notice of Motion relating to the applicability of the guidelines, and he complained that the Respondents had not been adequately put on their defence to explain the necessity for the guidelines or the relevant criteria contained therein in their opposing papers. He accordingly submitted that it was now open to the applicants to argue this point.

[37] It was, of course, the Respondents who raised the applicability of the guidelines and the alleged peremptory nature thereof in the opposing papers. And, with no prior warning in that regard it would have been difficult for the Applicants to foreshadow this in their founding papers. I am therefore of the view that it was open for the applicants to raise these arguments: if the respondents felt prejudiced by the alleged novelty of the point it was open to them to apply for the filing of a fourth set of affidavits to deal therewith.

[38] In my view a more pragmatic approach to the guidelines issued by the DAs is that they are non-legislative "guiding policies" of the kind referred to in cases such as Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd [5] and Minister of Education v Harris. [6]

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[5] 2001(4) SA 501 (SCA) at 509C para 7
[6] 2001 (4) SA 1297 (CC) at p 1304 B para 9-10

[39] Accordingly such policies cannot override, amend or be in conflict with the relevant legislative provisions and cannot be elevated to a position akin to subordinate the legislation thereby replacing the Minister's power to make directions. Further, such policies must be distinguished from legally binding enactments, since they do not create obligations of law.

[40] But whatever the status of the guidelines may be (there can be no doubt that they serve a useful purpose to enable the DA's to apply some measure of uniformity when considering applications for funding), it is settled law that such guidelines should not be applied with undue rigidity (or "blind rigour" as Mr Borgström submitted) and, they cannot be applied in circumstances in which there is no legitimate concern as to the honesty of an application and the functionality of the applicant. [7]

[41] In the present case, the Minister has seen fit not to publish regulations dealing with the criteria to be considered the DA's or the requirements for a valid funding application as such. Rather it is the DA's which have issued the guidelines referred to above. Being guidelines, it seems inimical to me to fair administrative action and the exercise of a wide discretion, to label such guidelines as "peremptory". Such an approach merely serves to restrict the discretion unduly.

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[7] Hofmeyr v Minister of Justice 1992 (3) SA 108 (C) at 124-135; Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA) at 209 F para 22 1979 (1) SA 879 (T) at 898 C.

[42] The approach was well summarized by Human J in the pre Constitutional era in Computer Investors Group Inc and Another v Minister of Finance. [8]

> *"Where a discretion has been conferred upon a public body by a statutory provision, such a body may lay down a general principle for its general guidance, but it may not treat this principle as a hard and fast rule to be applied invariably in every case. At most in can be a guiding principle, in no way decisive. Every case that is presented to the public body for its decision must be considered on its merits. In considering the matter the public body may have regard to a general principle, but only as a guide, not as a decisive factor. If the principle is regarded as a decisive factor, then the public body will not have considered the matter, but will have prejudiced the case, without having regard to its merits."*

[43] But if I am wrong and the guidelines are rightfully to be regarded as peremptory, the DA's would have been at liberty to condone strict non-compliance therewith. In Millenium Waste Management (Pty) Ltd v Chair person, Tender Board: Limpopo [9], Jaftha JA describes the preferable approach as follows:

> *"Moreover, our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted (SA Eagle Co Ltd v Bavuma [10].)*

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[8] 1979 (1) SA 879 (T) at 898 C.
[9] 2008 (2) SA 481 (SCA) at 487 G 17
[10] 1985 (3) SA 42 (A) at 49 G-H

[44] What is required is a common sense approach in order to achieve the purpose of the statutory enactment, rather than to pedantically rely on categorical imperatives and the peremptory application of guidelines.[11] These only serve to restrict the power of the DA's to distribute as much of the lottery funds as possible which after all is the object of the legislation. One is left with the distinct impression from the papers filed herein that any number of imaginary trip – wires were set up by the DA's and the NLB to defeat this purpose.

[45] Finally, in the Unlawful Occupiers, School Site case (*supra*) the Supreme Court of Appeal commented as follows regarding non-compliance with the statutory formality presented in that case:

> *"Nevertheless, it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defect, the object of the statutory provision had been achieved."*

CONSIDERATION OF THE UNSUCCESSFUL APPLICATIONS

Ad: The Seventh Funding Application

[46] In submitting the seventh funding application the First Applicant included a set of financial statements which had been vetted by Mr Joshua van der Rede. Mr van der Rede is a chartered management accountant who holds an Honours degree in commerce from the University of South

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[11] Weenen Transitional Local Council v Van Dyk 2002 (4) SA 653 (SCA) at 659 B-F

Africa, is a Fellow of the Institute of Management Accountants and belongs to the Institute of Management Accountants. As such, he is permitted to audit a variety of financial entities, but not public companies. He says that he has previously audited the books of the First Applicant. It appears to be common cause that Mr van der Rede is not an auditor i.e. he is not registered with the Public Accountants and Auditors Board. However, he claims that his previous audits of the First Applicant's books were conducted in accordance with acceptable South African auditing standards.

[47] The reason given by the NLB for the rejection of the seventh funding application was that the First Applicant's relevant financial statements had not been "audited". No detail was given by the NLB at the time as to what the term "audited" embraced but the relevant guidelines do state the following:

> *"Financial Statements that have been reviewed by an Accounting Officer are not audited."*

Once again it is not clear what the term "review" is intended to mean and how this differs from "audit".

[48] It seems however that the NLB required a particular level of professional assessment/approval of an applicant's financial statements.

Why it does so is not evident from the papers. What is evident, however, is that the DA's have applied the concept of "auditing" inconsistently. So, for instance, in relation to the most recent guidelines, provision is made for the submission of financial statements prepared by *inter alia* bookkeepers, accountants or accounting officers provided the application does not exceed R750 000.00.

[49] Certainly, the NLB is obliged to take adequate steps to ensure the financial integrity of the organisation to which it is making a grant. Given that it itself recognises various levels of accounting functionaries, it would seem that its dogged insistence upon "audited" financial statements was unduly rigid and consequently unreasonable in the circumstances, and certainly, its consideration of its own requirement as "peremptory" was not fair in the circumstances.

[50] In the light of the approach and the authorities to which I have referred above, the rejection of the seventh funding application on this basis falls to be reviewed.

Ad: The Eighth Funding Application

[51] In argument Mr Cassim SC did not make much of the NLB's refusal of this application. In fact he all but conceded that the refusal was reviewable. In my view it clearly is. The NLB's requirement of consistency in the use of a name or acronym in the various funding

application documents once again makes eminent sense. The NLB must be certain that the application is being brought in the name of an entity which is duly registered and not some other entity relying on the name of a reputable agency.

[52] The Second Applicant has, as it were, a "trading name" namely "Sikhula Sonke". This is the name by which the Claremont Methodist Church's Social Impact Ministry is commonly known. And given the somewhat cumbersome nature of the full name, it is not reasonable for the Second Applicant to abuse its shortened Xhosa "trading name". It is difficult to understand how the NLB came to reject the eighth application on this basis. Any reasonable person considering the full name and the shortened/trading name used on the application form would surely realise that this is one and the same body. But if there was any confusion this could quite easily have been resolved by a simple request from the NLB to the Second Applicant for clarification.

[53] In my view the NLB clearly failed to apply its mind to the eighth funding application and its refusal thereof falls to be reviewed accordingly.

Ad: The Ninth Funding Application

[54] On 13 November 2008 the Second Applicant submitted an application for funding to the DA for charities. The amount requested was R300 000.00.

[55] The application was refused on 12 June 2009 and on 2 July 2009 the Second Applicant was informed that the reasons thereof were two-fold:

55.1 Firstly, it was said that the Second Applicant had submitted its articles of association without a memorandum of association outlining the objects of the organization; and

55.2 Secondly, it was said that the Second Applicant had submitted only one set of its 2008 financial statements instead of the two sets stipulated in the guidelines.

[56] The Second Applicant was informed that it could file an appeal against this ruling, despite the fact that neither the Act nor the Regulations make provision for an appeal process or the establishment of an appeal tribunal. Mr Cassiem S.C, did not take the point that the Second Applicant had failed to exhaust its internal remedies under Section 7(2)(C) of PAJA, nor was this point taken in the opposing papers. It is therefore not necessary to deal with any condonation of this apparent procedural short-coming under PAJA other than to remark that it is questionable whether any right of appeal actually exists at all.

[57] As a company incorporated under Section 21 of the Companies Act, 1973 the Second Applicant's memorandum of association must contain

the provisions stipulated in Sections 21(2)(a) and (b) of The Companies Act read with Section 52(3) thereof. This is integral to an association which, in terms of Section 21(1)(b) must have –

> *The main object of promoting religion, arts, sciences, education, charity, recreation, or any other cultural or social activity or commercial or group interests."*

[58] A Section 21 company does not have a share capital and in terms of Section 19(1)(b) of the Companies Act, is termed "*a company limited by guarantee*". It need not, therefore, have the statutory articles of association as contemplated in Table B of Schedule 1 to the Companies Act. However, in terms of Section 33 of that Act its main object(s) must appear from its memorandum of association.

[59] In terms of Section 59 of the Companies Act every company that is registered must have a set of articles of association. In relation to a Section 21 company the articles of association are as prescribed by Regulation 18 of the Companies Administrative Regulations, 1973, and consist of Forms CM 44B and 44C.

[60] The Second Applicant did not submit to the DA for charities it's memorandum of association but did submit its "*Articles of Incorporation*", so it says. This document is not one referred to in the Companies Act but presumably it intended to refer to its Certificate of Incorporation, a

copy whereof is attached to the founding papers and which clearly reflects that it is an "*Association Incorporated under Section 21*". It says it also submitted a copy of its certificate of registration of non-profit organization under the 1997 Act of that name.

[61] The Regulations entitled "Allocation of Money in The National Lottery Distribution Trust Fund" published under GN 3446 in Government Gazette 21619 of 29 September 2000 include the *pro forma* application form, which in terms of Regulation 7 thereof, must be filled in by an applicant for funding. Section E of that document is entitled "Checklist" and reads as follows:

> ***"Please make sure the following documents are attached to this form.***
>
> *Your organisation's Constitution, Articles of Association or Trust Deed.*
>
> *Signed, audited financial statements for the past two years.*
>
> *A copy of your organisation's registration certificate.*
>
> *A detailed budget for funds applied for.*
>
> *Your Business/Implementation Plan."*

[62] It will be noted that the terms of Regulation 7 are cast in peremptory language – "*shall be made to the distributing agency on the form in the Annexure*".

[63] The Second Applicant says that it only complied with the provisions of Section E by submitting its "Articles of Incorporation", there being no "*Articles of Association*". It says too, that its memorandum of association (which was at all times available) was not sent to the NLB because it was not requested.

[64] The Second Applicant points out that in clause 4 of Part A of the guidelines relevant to the Ninth Funding Application, reference is made to the inclusion of "*signed and dated Constitution/Articles and Memorandum of Association/Trust Deed*" and, further that clause 9 thereof cautions against the inclusion of unnecessary additional information. The Second Applicant says that the NLB has created confusion amongst applicants by its inarticulate description of the requisite supporting documents.

[65] In both the answering affidavit and the heads of argument filed on behalf of the Second Applicant the point is made that the Second Applicant has no Articles of Association, only "Articles of Incorporation", and, it is alleged that this document accompanied the ninth application. The NLB is taken to task for not accepting the documents.

[66] Both the Second Applicant and its legal representatives seem to have overlooked the Articles of Association which indeed accompanied the ninth application for funding. [12] The first allegation made by the NLB in declining the application is therefore factually incorrect and the only question is whether the Second Applicant was required to also file its memorandum of association.

[67] It appears that the legal representatives for the Second Applicant also overlooked the contents of the NLB's letter of 2 July. The NLB is castigated in the replying papers for referring to the non-submission of the Second Applicant's "Memorandum of Articles", the point being derisively made that there is no such document and that obviously the NLB was confused and required either the "*Articles of Incorporation*" or memorandum of association.

[68] The Second Applicant contends that it was entitled to elect which document to submit and says that its application form was therefore in order.

[69] A simple reading of the first reason indicates what the NLB was after: it wanted to satisfy itself that the aims and objectives of the Second Applicant met the criteria for a funding application to the DA for charities. This is what it is required to do under the Regulations. This

[12] Rule 53 Record Vol 6 p 695

information would appear from the memorandum but not the Articles of Association which govern the internal management and functioning of the Second Applicant.

[70] However, to the extent that Section E of the application form referred to above, only emphasised the necessity to submit "*your organization's Constitution, Articles of Association or Trust Deed*", I am of the view that the Second Applicant supplied what was required of it and that the rejection of the application on the basis of a failure by Second Applicant to file its memorandum of association is misplaced. In so doing the NLB has committed a number of reviewable errors:

70.1 it was materially influenced by an error of law i.e. that Second Applicant's memorandum of association had to be supplied;

70.2 it was swayed by irrelevant considerations, viz. the non-inclusion of the memorandum; and

70.3 it failed to have regard to the other documentation filed (e.g. the Second Applicant's annual reports for 2007 and 2008) from which the activities, aims and objectives of the organization are abundantly clear.

[71] Accordingly, I am of the view that the refusal of the ninth funding application falls to be reviewed for this reason alone. However, for sake of clarity in relation to the future handling of the ninth funding

application, I will deal briefly with the second reason for refusal viz. only one set of financial statements were filed.

[72] In response to the second reason, the Second Applicant's director Ms Wiemers says in her founding affidavit that as far as she was concerned, two copies of the 2008 financial statements were sent to the NLB. This allegation is not directly challenged in the answering affidavit which is drawn in wide and relatively non-specific terms.

[73] Rather, the NLB now puts up entirely different reasons for its refusal of the ninth funding application. It lists a number of issues which it says has the effect that "*the audit requirements set out in the guidelines were woefully disregarded by the Second Applicant*". These included the fact that neither the 2007 or 2008 financial statements submitted to it were signed by an independent accounting officer, that the name of the accountant or the partners in his/her firm are not specified and that there is no proof of the accounting officer's current registration.

[74] These reasons differ materially from those originally given by the NLB in the letter of 2 July 2009 and are in fact new reasons. It is not open to the NLB to employ this tactic. In Jicama 17 (Pty) Ltd v West Coast District Municipality [13], Justice Cleaver quoted with approval the

[13] 2006 (1) SA 116 (C) at p 121 E-11

judgment of Lord Justice Hutchinson in the Court of Appeal in England in R v Westminster City Council, Ex parte Ermakov: [14]

> *"There are .... good policy reasons why this should be the case...To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties...(I)t might be suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings."*

MISJOINDER

[75] In a supplementary note filed shortly after the hearing Mr Cassim S.C. sought leave to amplify his argument which had to be curtailed due to travel requirements. It is wrong, so he submitted, for the applicants to have referred to seven or eight review applications in a single application. These would allegedly have the effect of improperly influencing the adjudicator. Further, it was submitted that this led to the Court having regard to matter which was extraneous to the issues to be determined.

[76] I will deal more fully with this point below when I comment on the allegations of "administrative disarray" at the NLB. Suffice it to say that there was no misjoinder in the present case – both the First and Second Applicants brought review applications before the Court and persisted

[14] [1996] 2 All ER 302 (CA) at 315 h – 316 d.

with them. At a late stage some of the First Applicant's complaints were abandoned by it, while the NLB properly conceded those cases which were evidently without merit.

[77] There is no question of a misjoinder in the tactic employed by the applicants. They have similar causes of action arising from interrelated facts. And to suggest that each applicant (represented by the same set of legal representatives) should have launched separate review proceedings would have led to an unnecessary burdening of this Court's roll with the concomitant escalation in costs. In my view the approach adopted was eminently reasonable.

[78] If the complaint is that the Court has been exposed to extraneous, vexatious or irrelevant material, the proper approach is to apply to strike out the offending matter. No such application was made.

COSTS

[79] The wasted costs of the hearing before Madima AJ on 17 March 2010 were reserved for later determination. Mr Cassim S.C. argued that those costs should be for the account of the applicants.

[80] Mr Cassim S.C. further submitted that the respondents were entitled to a tender of wasted costs in respect of those review applications abandoned by the First Applicant. It was also said the applicants should

bear the costs of the supplementary affidavits filed on 8 May 2010. In regard to the latter, Mr Borgström said that these papers were necessary because at that stage urgency was still in issue; the respondents only abandoned this stance after filing of the supplementary affidavits.

[81] It is not clear why Madima AJ upheld the urgency point on 17 March 2010. In the first place, the matter had been set down with the permission of Justice Traverso, who must have been satisfied as to the degree of urgency at that stage. Further, Madima AJ did not strike the matter from the roll as is customary when urgency arguments are upheld [15]. Rather, the learned Acting Judge postponed the case to a fixed date which suited the parties. This may be indicative of the Court simply not being satisfied as to the exact degree of urgency. As it was, the matter was only adjoined for some two months.

[82] In the absence of clear reasons as to why the applicants should bear the costs of the postponement of the matter on 17 March 2010 (and it was obviously open to Madima AJ to make an order to that effect) it seems to me that those costs should be costs in the cause.

[83] Similarly, the costs of the supplementary affidavits of 8 May 2010 should be costs in the cause: it appears that the affidavits may well have

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[15] Commissioner, SARS v Hawker Air Services (Pty) Ltd 2006 (4) SA 292 (SCA) at 300A

been the spur which induced the respondents to abandon their attack on the semi-urgency of the matter.

"INSTITUTIONAL DISARRAY"

[84] In both the applicant's affidavits and their heads of argument there was ample reference to the state of functioning (the applicants would say "malfunctioning") of the NLB and its various agencies. The applicants claimed that matters at the NLB were so chaotic that it would be appropriate for this Court to exercise its powers under Section 8(1) of PAJA and require the performance of the NLB's functions within specified parameters. Mr Cassim S.C. took umbrage at the aspersians cast upon his clients and said that if it was the applicants' intention to bring a *quasi* class action aimed at shaking up the efficiency of the NLB's distribution of public funds, this should have been properly pleaded and based on accurate facts. The sample of complaints before the Court was, he said, simply not sufficient to draw an inference of institutional chaos and maladministration.

[85] I agree with Mr Cassim S.C. that there is not sufficient material before the Court to conclude that a state of institutional disarray exists at the NLB. Having said that, I would be failing in my duty if I did not express my reservations about the functioning of the NLB.

[86] As I mentioned at the beginning of this judgment, the NLB holds the public's money (wagered in the hopes of becoming instant millionaires) in trust for purposes of it being allocated for socially worthy projects. As this application has demonstrated there are many such projects who are simply being deprived of the opportunity to deliver much needed social services by the inability to speeding access lottery funds.

[87] Certainly, public funds should not be distributed indiscriminately and it is incumbent on the NLB to ensure that there are no fraudulent claims. But at the same time, it is simply unacceptable that needy NGO's and other agencies in civil society should have to wait for more than a year (up to eighteen months in certain cases, I was told) to access much needed funds which are to spent at grass-roots level. Furthermore, in an era of transparency where fair and just administrative action is entrenched in the Constitution, there is no reason why applicants for funding have to partake in a game of administrative snakes and ladders, where the slightest non-compliance with self-imposed peremptory criteria means that one has to return to the start.

[88] As an indication of my concern about the functional ability of the NLB I will fix certain time limits in relation to the enforcement of this order.

ORDER

In the circumstances the following order is made:

1. The decisions of the First Respondent to refuse the funding applications to it under its reference no's 35336, 27999 and 33667 are hereby reviewed and set aside.

2. The First Respondent is to reconsider the aforesaid funding applications and to make decisions thereon within sixty calendar days of this Court's order.

3. In the event that the NLB declines to grant any of the funding applications after reconsideration thereof, it is to provide the unsuccessful applicant(s) with written reasons for such refusal, together with the communication of its decision.

4. The First Respondent is ordered to bear the First and Second Applicants' costs of suit herein, such costs to include the wasted costs of 17 March 2010 and the costs of the preparation and filing of the supplementary affidavits filed by the applicants on 8 May 2010.

P.A.L. GAMBLE