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TO: Mr M Masina, MP

Chairperson: Portfolio Committee on Trade, Industry and Competition

COPY: Xolile George

Secretary to Parliament

FROM: Z Adhikarie

Chief Legal Adviser: Constitutional and Legal Services Office

DATE: 10 October 2024

REF: 342 / 2024/AT

SUBJECT: Opinion on various issues relating to the National Lotteries Commission

MESSAGE: Please find attached the above memorandum for your attention.

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A handwritten signature in black ink, appearing to read 'Z Adhikarie', written over a horizontal line.

Z Adhikarie

Chief Legal Adviser



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OF THE REPUBLIC OF SOUTH AFRICA

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MEMORANDUM

[Confidential]

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INTRODUCTION

1. Our Office was requested by the Chairperson of the Portfolio Committee on Trade, Industry and Competition, Mr M Masina, MP (“the Chairperson”) to advise on whether it is legally permissible for the National Lotteries Commission (“NLC”) to surrender R300 million from its reserve fund to the National Treasury in terms of section 53(3) of the Public Finance Management Act No.1 of 1999 (“the PFMA”)
2. The guidance sought by the Portfolio Committee on Trade, Industry and Competition (“the Committee”) arises from the circumstances set out in the background outlined below.

BACKGROUND

3. We are briefed as follows:
 - 3.1 On 18 September 2024, the leadership of the NLC appeared before the Committee and one of the matters that was traversed was the R300 million that was surrendered from the NLC reserve fund to the National Treasury.
 - 3.2 The money was held in trust by the Board as a contingency in the event the lottery operations are affected by litigation.
 - 3.3 The NLC reserve fund ensures that it has sufficient funds in its kitty if cash flow problems arise.
 - 3.4 The NLC indicated that section 25(2) of the Lotteries Act No.57 of 1997 (“the Lotteries Act”), prescribes that “[a]ny unexpended balance of the money of the fund at the end of any financial year shall be carried forward as a credit to the next succeeding financial year.”

- 3.5 Section 26 of the Lotteries Act provides that this money can either be used for the NLC's operations or be distributed to worthy causes.
- 3.6 However, the National Treasury invoked section 53(3) of the PFMA, which states that “[a] public entity which must submit a budget in terms of subsection (1), may not budget for a deficit and may not accumulate surpluses unless the prior written approval of the National Treasury has been obtained.” The National Treasury specifically relied on its Instruction No.12 2020/2021 which deals with the retention of surpluses by constitutional institutions and public entities listed in schedules 3A and 3C to the PFMA.
4. It is these developments – the tension between section 25(2) of the Lotteries Act and section 53(3) of the PFMA – that has prompted the Chairperson to seek a legal opinion, with reference to the following four questions:
- 4.1 *“The legal standing of an Instruction Note;*
- 4.2 *Whether the PFMA trumps section 25(2) of the Lotteries Act;*
- 4.3 *While the NLC is a Schedule 3A public entity, it does not receive any of its funding from the National Revenue Fund. Therefore, should funding for worthy causes be subject to section 53 (3) of the PFMA; and*
- 4.4 *If the interpretation of the National Treasury is not legally sound, is there a basis for the R300 million to be returned to the NLC.”*
5. As can be gleaned from the questions, the scope concerns, first and foremost, the ambit and hierarchy of authority in circumstances where there is a tension between the Lotteries Act and the PFMA. Secondly, the harmonisation, if any, of the provisions of the Lotteries Act and the PFMA, particularly on annual budgets in circumstances where the NLC, as a Schedule 3A public entity, experiences a deficit or accumulates a

surplus. The crux of the question being whether, in those circumstances, the NLC is restricted from expending its own funds and exercising its powers in terms of its enabling legislation.

6. These questions are addressed below.

LEGAL FRAMEWORK

7. Section 48(1) of the PFMA deals with the classification of public entities and provides that the Minister of Finance may by notice in the national *Government Gazette* classify public entities listed in Schedule 3 in accordance with the relevant definitions set out in section 1¹. Furthermore, section 48(2) of the PFMA provides that a public entity is for the purposes of this Act regarded as belonging to the class in which it is classified in terms of subsection (1).

8. In terms of section 1 of the PFMA a 'national public entity' means –

(a) a national government business enterprise; or

(b) a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is –

(i) established in terms of national legislation;

(ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and

(iii) accountable to Parliament. (Our underlining)

¹ National government business enterprise; provincial government business enterprise; national public entities and provincial public entities.

9. The provisions of sections 25(2) of the Lotteries Act and 53(3) of the PFMA have been aptly captured in the background to this opinion and, for the avoidance of prolixity, we will not repeat their corresponding contents here.

10. Section 83 of the PFMA deals with financial misconduct by accounting authorities and officials of public entities. Section 83(1)(a) provides that the accounting authority for a public entity commits an act of financial misconduct if that accounting authority wilfully or negligently fails to comply with a requirement of section 50, 51, 52, 53, 54 and 55. In addition, section 83(2) provides that if the accounting authority is a board or other body consisting of members, every member is individually and severally liable for any financial misconduct of the accounting authority. Moreover, section 83(4) provides that financial misconduct is a ground for dismissal or suspension of, or other sanction against, a member or person referred to in subsection (2) despite any other legislation. (Our underlining)

11. Section 3(3) of the PFMA provides that in the event of any inconsistency between the PFMA and any other legislation, the PFMA prevails.

DISCUSSION

12. The NLC is a Schedule 3A public entity that was established in terms of the Lotteries Act No.57 of 1997, as amended, to regulate the National Lottery, Sports Pools and society lotteries, to raise funds for worthy causes. The NLC is governed by a Board appointed by the Executive Authority. The Executive Authority of the NLC is the Minister in the Department of Trade, Industry and Competition.

13. The NLC gets money for funding through its regulation of lotteries and sports pools, from regulatory activities, and it collects revenues to distribute funds to good causes.

Sections 14(2)(e), 23 and 43 of the Lotteries Act bear testimony to this and speak to the funding model of the NLC.

14. Consequently, there can be no doubt that the NLC meets all the jurisdictional requirements of a national public entity, in that, it is governed by a Board which is established in terms of national legislation; is fully or substantially funded from money imposed in terms of national legislation; and is accountable to Parliament.

QUESTIONS

Question 1: The legal standing of an Instruction Note

15. An Instruction Note is subordinate or delegated legislation. Delegated legislation is law that is not enacted by a legislative body (Parliament) but made by a member of the Executive, a delegated person or an authorised body under powers given to them by an Act of Parliament. Differently put, delegated legislation is legislation made not directly by an Act of Parliament, but under the authority of an Act of Parliament.
16. In this instance, National Treasury Instruction Note No.12 of 2020/2021 derives its power from section 53(5) of the PFMA which provides that the National Treasury may regulate the application of section 53 of the PFMA by regulation or instruction in terms of section 76. Section 76 of the PFMA deals with treasury regulations and instructions. Section 76(4) of the PFMA provides that the National Treasury may make regulations or issue instructions to which the PFMA applies concerning, amongst others, any matter that may be prescribed for all institutions in terms of the PFMA and any other matter that may facilitate the application of the PFMA. Section 76(5)(a)(i) provides that a treasury regulation or instruction may differentiate between the categories of institutions to which the PFMA applies.

QUESTION 2: Whether the PFMA trumps section 25(2) of the Lotteries Act

17. Section 3(3) of the PFMA is very categorical that in the event of any inconsistency between the PFMA and any other legislation, the PFMA prevails.

QUESTION 3: While the NLC is a Schedule 3A public entity, it does not receive any of its funding from the National Revenue Fund. Therefore, should funding for worthy causes be subject to section 53(3) of the PFMA?

18. The fact that the NLC does not receive funding from the National Revenue Fund is neither here nor there. As previously advised, the NLC meets all the jurisdictional requirements of a national public entity. Accordingly, it cannot escape or be immunised from the rigorous dictates of section 53(3) of the PFMA.

19. The phrase 'worthy cause' is synonymous with the phrase 'good cause'. A worthy cause may be charitable, political or social in its character, but the phrase may not, in this instance, be used to insulate a Schedule 3A public entity from the clutches of section 53(3) of the PFMA.

QUESTION 4: If the interpretation of the National Treasury is not legally sound, is there a basis for the R300 million to be returned to the NLC?

20. This question does not arise as it has been answered above. However, we reiterate that section 53(3) of the PFMA, requires a public entity, which must submit a budget in terms of section 53(1) of the PFMA, not to budget for a deficit and not to accumulate surpluses unless the prior written approval of the National Treasury has been obtained.

21. Had the Board not complied with this injunction from the National Treasury, it would have been guilty of financial misconduct, which is a ground for dismissal or suspension of Board members in terms of section 83 of the PFMA.

ADVICE

22. In view of the foregoing, public entities like the NLC that are listed in Schedule 3A to the PFMA may not accumulate surpluses that were realised in the previous financial year without obtaining prior written approval of the National Treasury.

23. Public entities listed in Schedule 3A and whose founding legislation prevent such entities from surrendering surpluses to the National Revenue Fund must heed section 3(3) of the PFMA which provides that in the event of any inconsistency between the PFMA and other legislation, the PFMA prevails.

24. Accounting authorities of public entities listed in Schedule 3A to the PFMA must submit formal requests to the National Treasury to retain surpluses that have been realised in a preceding financial year, and guidance in processing the said formal requests is provided under Item 5 of the National Treasury Instruction No.12 of 2020/2021.

25. Item 6.1 of the aforesaid National Treasury Instruction provides that public entities listed in Schedule 3A to the PFMA must, through their designated departments, surrender for re-depositing into the National Revenue Fund, all surpluses that were realised in a particular financial year, which were not approved for retention by the National Treasury in terms of section 53(3) of the PFMA; or where no application was made to the National Treasury to accumulate the surplus in terms of section 53(3) of the PFMA. This, in our respectful view, seems to be the fate that befell the R300 million that is the subject of this opinion.

26. In terms of Item 6.3 of National Treasury Instruction No.12 of 2020/2021, failure by a public entity listed in Schedule 3A to submit a surplus retention request to the National Treasury by 30 September each year will result in the entity having to surrender the surplus to the National Treasury by 30 November, unless there has been a delay in the finalisation of the audit.

27. We so advise.

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Z Adhikarie

Chief Legal Adviser