

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

CASE NUMBER: 57493/2020

In the matter between: -

AFRICAN LIBERTY MOVEMENT

Applicant

(REGISTRATION NUMBER: 2020/497603/08)

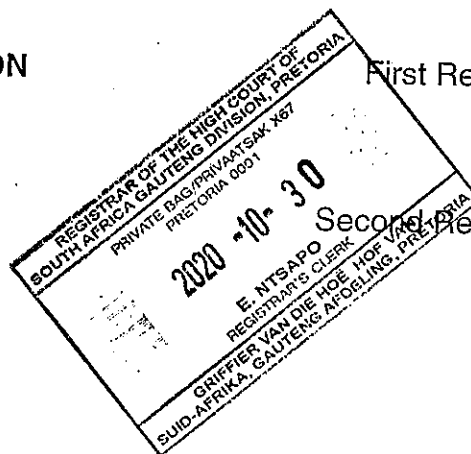
And

NATIONAL LOTTERIES COMMISSION

First Respondent

**PORTFOLIO COMMITTEE ON
TRADE & INDUSTRY**

Second Respondent



NOTICE OF MOTION

TAKE NOTICE that application will be made on behalf of the above-named Applicant on Thursday the 5th day of November 2020 at 10:00 or as soon

thereafter as Counsel may be heard on an *ex parte* basis for an order in the following terms:-

1. That the Application be heard on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court and that condonation be granted in regard to deviation from forms, time periods and service;
2. That the First Respondent be interdicted from publishing the names of beneficiaries in its 2019/20 Annual Report, as required by the Lotteries Act (Act No. 57 of 1997).
3. To interdict the Second Respondent from ordering the First Respondent to publish such list of beneficiaries in any public platform, on social media or other platforms or causing such statements to be made.
4. That no party may publish the names of any beneficiaries in compliance with the instruction of the Committee.
5. That the Respondents are liable for the Applicants' costs, only in the event of the Respondents opposing this application.
6. Further and or alternative relief as the honourable court deems fit.

PLEASE TAKE FURTHER NOTICE that Seventy Two (72) Hour has lapsed since the organs of the state mentioned as the Respondents have been served as required in terms of Section 35 of the General Law Amendment Act 62 of 1955.

TAKE FURTHER NOTICE that the Founding Affidavit of **CHRISTOPHER L. SHABANGU**, together with Annexures thereto, will be used in support hereof.

KINDLY PLACE THE MATTER ON THE ROLL FOR HEARING ACCORDINGLY.

SIGNED AT PRETORIA ON THIS 30th DAY OF OCTOBER
2020.



RJ TABANE ATTORNEYS

Attorneys for the Applicants

Mooikloof Ridge, Pretoria

0081

Cell: 0631639138

Email: info@rjtattorneys.co.za

TO: THE REGISTRAR OF THE HIGH COURT
PRETORIA

TO: THE FIRST RESPONDENT

NATIONAL LOTTERIES COMMISSION,

The Legal Manager,

Block D, Hatfield Gardens.

333 Grosvenor Street. Hatfield.

PRETORIA. 0083

Received by: _____

Date: _____

Time: _____

Signature: _____

TO: THE SECOND RESPONDENT

PORTFOLIO COMMITTEE ON TRADE & INDUSTRY,

The Chairperson,

77 Mentjies Street,

Sunnyside,

Pretoria,

0001

Received by: _____

Date: _____

Time: _____

Signature: _____

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

CASE NUMBER: _____

In the matter between: -

AFRICAN LIBERTY MOVEMENT

Applicant

(REGISTRATION NUMBER: 2020/497603/08)

And

NATIONAL LOTTERIES COMMISSION

First Respondent

PORTFOLIO COMMITTEE ON

Second Respondent

TRADE & INDUSTRY

FIRST APPLICANT'S FOUNDING AFFIDAVIT

I, the undersigned,

NR *ek*

CHRISTOPHER L. SHABANGU

do hereby make oath and state that:

1.

1.1 I am an adult male, Chief Executive Officer (“CEO”) of African Liberty Movement (“ALM”), and with its primary place of business at 2 Dan Road, Glen Marais, Kempton Park, Johannesburg.

1.2 The facts herein contained fall within my personal knowledge, unless otherwise stated or the contrary appears from the context and are to the best of my knowledge and belief both true and correct.

1.3 As CEO of ALM, I am duly authorised to depose to this affidavit. This can be evidenced from the resolution passed by the board of directors of ALM, attached hereto as **Annexure “CS 1”**.

1.4 To the extent that I may make submissions of a legal nature in this affidavit, such is on the advice of my legal representatives, which advice I choose to accept.

THE PARTIES:

2.

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The First Applicant is AFRICAN LIBERTY MOVEMENT (“ALM”), a non-profit company

- 2.1. that seeks to advance, pioneer and protect the interests of black people and the previously marginalized,
- 2.2. is voluntarily joined by members of the public,
- 2.3. is duly registered and incorporated according to the law, with CIPC registration number: 2020/497603/08,
- 2.4. and with it's primary place of business/ registered office at 2 Dan Road, Glen Marais, Kempton Park, Johannesburg.

3.

I submit that ALM has the mandate to litigate on behalf of members who are also beneficiaries of the Lottery fund (“members”).

4.

Owing to relevant law that prohibits names of beneficiaries being published, ALM shall afford the Honourable Court with the names of the beneficiaries and related information at the date of hearing.

5.

The First Respondent is the **NATIONAL LOTTERIES COMMISSION** (“Commission”), a juristic person established in terms of section 2 of the Lotteries

NL CL

Act. The Commission is tasked with using funds generated from the lotteries and sports pools to fund worthy and good causes through financial grants.

6.

The Second Respondent is the **PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY** ("Committee"), an organ of state involved in the oversight position on matters of trade and industry, herein represented by it's Chairperson, Mr. Duma Nkosi ("Chairperson").

7.

Our members are beneficiaries of grants emanating from the Commission, Commission which serves as a Grant Funder, providing Non-Profit Organisations with funding to establish projects that improve the lives of everyday South Africans.

LOCUS STANDI:

8. .

In respect of section 38 of the Constitution, a party may be required establish and prove a right to litigate on behalf of another, if the another cannot litigate on it's own behalf.

9.

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Therefore, I place before the Honourable Court that our members afford us the requisite locus standi.

10.

As ALM is an organisation that caters and seeks to advance the plight of black people who are marginalised, I confirm that we are acting on mandate from our members, members who do not have the funding to approach a competent court to ventilate their issues.

JURISDICTION:

11.

11.1. The Honourable Court has jurisdiction to determine this matter because the First Respondent carries on its business within the jurisdiction of this court.

11.2 Furthermore, our members also carry on business within the jurisdiction of the Honourable Court.

11.3 It is therefore submitted that this Court has the jurisdiction to hear and determine this matter.

PURPOSE OF APPLICATION:

12.

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The purpose of this application is to seek an order that interdicts the Commission (the First Respondent) from publishing the names of beneficiaries, in compliance with a resolution taken by the Committee (the Second Respondent).

13.

Further, the Applicant seeks an order where the Committee and the Chairperson of the Committee are to be interdicted from forcing the Commission to publish the names of the beneficiaries.

14.

Furthermore, the Applicant has a reasonable trepidation that despite the Lotteries Act forbidding the publication of names of beneficiaries, the Committee will persist with its instruction to the Commission, thus the Applicant seeks an order where it will be forbidden by any party to publish such names.

15.

Accordingly, the Applicant submits that what is set out in this affidavit makes a good case for the relief sought by them.

SALIENT BACKGROUND:

16.

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On Thursday, 16 July 2020, the Committee, through its Chairperson, “resolved to inform the National Lotteries Commission (NLC) that it must publicly publish the names of the beneficiaries that received money from the NLC during the 2018-2019 financial year and the money disbursed to each.

17.

In amplification of the above, I hereby attach the Parliamentary press release marked as Annexure “CS 2”. The press release can also be accessed online at <https://www.parliament.gov.za/press-releases/trade-and-industry-committee-orders-nlc-publish-details-all-beneficiaries>.

18.

The release advised that the Committee had sought a legal opinion from Parliament’s Legal Services, which found that the names ought to be released, on the basis that:

“The constitutional right to privacy is not an absolute right, but may be limited in terms of laws of general application and must be balanced with other rights entrenched in the Constitution.”

19.

Soon thereafter, the NLC, through its Chairperson, dispatched a letter, attached here to as Annexure “CS 3”, to the Chairperson of the Committee highlighting grave concerns in releasing the names of the beneficiaries, the amounts disbursed to each beneficiary, in that:

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- 19.1. The NLC does not disclose the beneficiary names,
- 19.2. The names of beneficiaries from previous years had not been published in the annual reports,
- 19.3. That the names being sought were confidential in respect of the Lotteries Act
- 19.4. Reiterating that the public could only access (beneficiary) information in terms of section 67(1)(b) of the Lotteries Act, and Regulation 8(3), as well as the Constitution,¹ POPI,² PAIA,³ PAJA⁴ or the PDA.⁵
- 19.5. Section 67 of the Lotteries Act provides for circumstances under which information relating to grant beneficiaries, can be published.

20.

On 22 June 2020, the Minister of Trade, Industry and Competition (“the Minister”), responded to the NLC Chairperson’s letter, attached hereto as Annexure “CS 4”.

21.

In the letter, the Minister, we submit incorrectly in our view, held that “the names of beneficiaries are not information about a grant or grant application”.

PENDING COURT ACTION:

¹ The Constitution of the Republic of South Africa, no. 108 of 1996.

² Protection of Personal Information Act, no. 4 of 2013.

³ Promotion of Access to Information Act, no. 2 of 2000.

⁴ Promotion of Administrative Justice Act, no 3 of 2000.

⁵ Protected Disclosures Act, no. 26 of 2000.

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22.

On 9 June 2020, United Civil Society in Action (“UCSA”) launched urgent court proceedings, under case number 24775/2020, against Groundup, an online news publishing company and the Commission, for amongst others:

- 22.1. Interdicting GroundUp from publishing the details of beneficiaries of grant allocations,
- 22.2. Ordering GroundUp to remove all articles about beneficiaries from its publications,
- 22.3. Ordering the Commission to not disclose the personal details of its beneficiaries, the amount of grants and allocations as it contravenes the law, Regulation 8 to be specific.

23.

The UCSA Urgent application is attached hereto as Annexure “CS 5”.

24.

The UCSA ultimately withdrew, as we understand it, due to a lack of financial resources.

25.

On 22 July 2020, the Trustees for the Time Being of Media Monitoring Africa Trust and the South African National Editors Forum, launched an action against, amongst

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others, the Minister and the Commission, under case number 32127/2020, in this Honourable Court. I attach the Notice of Motion as Annexure “CS 6”.

26.

In the main, the action sought to have Regulation 8 unconstitutional and invalid to the extent that it fails to provide for a defence of publication in the public interest. Later on, I shall deal with Regulation 8.

27.

That 32127/2020 court action is pending, before this Honourable Court.

INVOLVEMENT OF ALM:

28.

In middle of October 2020, it came to the Applicant's attention that the Committee was persisting in its instruction to have the names of beneficiaries published in the NLC annual report, due to be published by the end of October 2020 or first week of November 2020.

29.

On 19 October 2020, ALM sent an urgent letter in respect of the matter to the Minister, the Chairpersons of the Committee and the Commission. I attach hereto the letter marked as Annexure “CS 7”.

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30.

ALM gave the Minister and the Chairpersons five business days in which to respond to the concerns raised in the letter. No response has been forthcoming.

EVENTS SUBSEQUENT TO AN EARLIER DISCLOSURE BY GROUNDUP:

31.

As stated earlier, GroundUp is a publishing house, especially in the online news media space.

32.

On or about the 5 October 2018 GroundUp began publishing the details of beneficiaries of the Lotteries grant and the amounts received thereof despite it being unlawful and in contravention to Regulation 8.

RELEVANT LAW

LOTTERIES ACT

33.

Section 67 deals with access to information by persons.

34.

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It states as follows:

“Subject to the Constitution. any legislation which may be enacted in pursuance of sections 32(2) or 33(3) of the Constitution or any other relevant law, no person, including the Minister, a member or employee of the board or the Department, or a former member or employee of the board or the Department, may—

(a) in any way disclose any information submitted by any person in connection with any application for any licence, certificate or appointment under this Act: or

(b) publish any information obtained in contravention of paragraph (a),

unless ordered to do so by a court of law or unless the person who made such 5 application consents thereto in writing. (2) Any person who contravenes subsection (1) shall be guilty of an offence.”

35.

It is quite clear that no person, including the Minister or officials acting in the capacity, or the NLC may release information, and that if they do, it is crime.

36.

Further, the section is explicit that one of two conditions must be satisfied, if the information is to be released, namely:

36.1 That it can be ordered by a court of law,

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36.2 That the person who made such an application (in other words, the grant beneficiary appointee) consents to in writing.

37.

Therefore, we submit that any order from any official or Chairperson of a committee, in contravention of this section, is *ultra-vires* and should not be entertained.

38.

Further, it is quite evident from section 67 that an amendment of the Lotteries Act is necessary in order for any party to comply with the directive or instruction issued by the Committee.

39.

It is submitted that the pending court action looks to address the privacy contained in the Act and its regulations.

THE REGULATIONS RELATING TO DISTRIBUTING AGENCIES:

40.

The Regulations Relating to Distributing Agencies was gazetted in Gazette Number GoN R182, G. 22092, on 22 February 2001.

41.

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These regulations govern the way lottery funds are distributed to beneficiaries, and the protection of such beneficiaries.

42.

Regulation 8 states the following:

(1) Subject to the Constitution, the Promotion of Access to Information Act, 2000 (Act 2 of 2000), the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) and the Protected Disclosures Act, 2000 (Act 26 of 2000), no person may in any way—

(a) disclose any information in connection with any grant application or a grant itself;

(b) disclose the contents of a report contemplated in regulation 6(1); or

(c) publish any information obtained in contravention of paragraph (a) or (b); unless—

(i) ordered to do so by a court of law;

(ii) making a bona fide confidential disclosure or publication to the Minister, the Public Protector, Parliament or a committee designated by Parliament, a member of the South African Police Service or the national prosecuting authority;

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(iii) the juristic person who made a grant application and the board consent thereto in writing prior to that disclosure or publication; or (iv) provided for in these regulations

(3) Any person who contravenes subregulation (1) or (2) shall be guilty of an offence and liable to a fine or to imprisonment or to both a fine and imprisonment..

43.

It is self-evident from the reading of Regulation 8, that only when the Constitution, PAIA, POPI, PAJA, PDA, so requires, may a person disclose beneficiary information.

44.

The only other instance when a disclosure may happen is if it is a protected disclosure, and it is made to:

44.1 The Minister,

44.2 The Public Protector,

44.3 Parliament,

44.4 A committee of Parliament,

44.5 South African Police Services,

44.6 The National Prosecuting Authority.

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45.

Therefore, it is evident that the instruction of the Committee to publicly disclose the details of the grants falls foul of this Regulation because:

45.1. it is not a protected disclosure they are asking for,

45.2. It is not according to the Constitution, PAIA, POPI, PAJA and PDA.

45.3. It may lead to a fine or imprisonment, as per subsection 3.

46.

It follows therefore that the instruction of the Committee, through its chairperson, is *ultra-vires* and it gives the Committee outside powers to what the Lotteries Act, allows.

47.

Further, a protected disclosure is defined⁶ as

“the disclosure of information by an employee, regarding any conduct of an employer, or an employee of that employer, which shows that:

- 1. A criminal offence has been committed, or is being committed or is likely to be committed;*
- 2. A person has failed, is failing or is likely to fail to comply with any legal obligation which they have;*
- 3. A miscarriage of justice has occurred, is occurring or is likely to occur;*

⁶ Protected Disclosures Act, Section 1, Definitions.

4. *The health or safety of an individual has been or is likely to be endangered;*
5. *The environment has been, is being or is likely to be damaged;*
6. *Unfair discrimination is taking place, as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; or*
7. *Any matter related to the above, has been or is likely to be deliberately concealed.*

48.

It is plainly evident that there is no protected disclosure to made in such a scenario. The Chairperson is acting ultra-vires by requesting the names, yet the matter does not concern a protected disclosure.

URGENCY:

49.

I submit to this Honourable Court, that this application is urgent for the following reasons:

- 49.1 The rights as enshrined in the Lotteries Act are at stake,
- 49.2 There is a reasonable apprehension of harm that the members may face from some members of the public, and criminal elements, owing to their names being published,

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- 49.3 The right to privacy for the members are being trampled upon, not because a law of general application exists, but due to an instruction by the Committee,
- 49.4. The right to a good name is at stake, as the unlawful publication may tarnish the names of the members,
- 49.5. The right to dignity is being infringed upon due to the Committee requesting the names of the members without the express consent of the Applicants,
- 49.6. There is no law permitting, at present, the publication of the names of the beneficiaries. Any publication is in contravention of the law and no state functionary or office has the power to publish these names, unless it is as per the Acts mentioned at paragraph 44.
- 49.7. This Honourable Court is currently seized with the matter of deciding whether to declare Regulation 8 unconstitutional,
- 49.8. There is no other remedy in law which would return the beneficiaries and the members to the position of having their names treated with confidentiality.

50.

It is thus imperative that this Honourable Court be the protector of those who are being marginalized by instructions not grounded in law.

REQUIREMENTS FOR AN INTERDICT

51.

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There are three requirements for an interdict to be granted:

- 51.1. A *clear* right on the part of the Applicants,
- 51.2. An injury committed or well-grounded reasonable apprehension;
- 51.3. No other satisfactory remedy available to the Applicant

52.

It is submitted on behalf of the Applicants that:

- 52.1. The actions of the Second Respondent in giving an ultra-vires instruction to the First Respondent clearly put in jeopardy the right to dignity of the members.
- 52.2. The right to privacy of the Members are being put in jeopardy over a process they have not been allowed to partake in, or give consent to.
- 52.3. Owing to the already experienced threats to life of the members, there is a great likelihood that such threats would continue if the names of beneficiaries are published.
- 52.4. There is a pending court action in this Honourable Court so as to determine the matter of publication.
- 52.5. No remedy would exist for the Applicants once their names are out in the public domain.

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PROSPECTS OF SUCCESS

53

It is humbly submitted that this application has strong prospects of success as

- 53.1 The Second Respondent has given what amounts to an instruction not based in law, but on an opinion.
- 53.2 If the Second Respondent were serious about transparency, then they would canvas the changing of the current Regulations.
- 53.3 The right to dignity, which includes a good name, is unrestricted and must be applied fully to the Applicants.
- 53.4 The right to privacy is being infringed upon by the Second Respondent without availing the Applicants the time and opportunity to state their views. Therefore, this amounts to unjust administrative action.
- 53.5 The Court has a duty to protect the interests of those who are being marginalised by decisions not based on the law.

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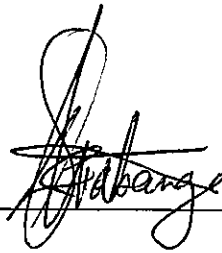
It is submitted that the Application ought to succeed, on the strength of the averments made here.

RELIEF SOUGHT

WHEREFORE, I humbly pray for the following orders:

1. That the Application be heard on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court and that condonation be granted in regard to deviation from forms, time periods and service;
2. That the First Respondent be interdicted from publishing the names of beneficiaries in its 2019/20 Annual Report, as required by the Lotteries Act (Act No. 57 of 1997).
3. To interdict the Second Respondent from ordering the First Respondent to publish such list of beneficiaries in any public platform, on social media or other platforms or causing such statements to be made.
4. That no party may publish the names of any beneficiaries in compliance with the instruction of the Committee.
5. That the Respondents are liable for the Applicants' costs, only in the event of the Respondents opposing this application.
6. Further and or alternative relief as the honourable court deems fit.

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DEPONENT

THUS SIGNED AND SWORN TO BEFORE ME AT PRETORIA ON
THIS 30th DAY OF OCTOBER 2020, THE DEPONENT HAVING
ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF
THE ABOVE AFFIDAVIT, THAT HE HAS NO OBJECTION TO TAKING THE
PRESCRIBED OATH AND THAT HE CONSIDERS THE SAID OATH BINDING ON
HER CONSCIENCE.



COMMISSIONER OF OATHS

Name: **COMMISSIONER OF OATHS**
NTHABISENG LORRAINE SERABELE
Designation: **Practicing Attorney**
316-317 Centenary Building
Address: **23 Bureau Lane, Pretoria**
Tel: 012 023 0704

African Liberty Movement NPC
(Registration number: 2020/497603/08)
("the Organization")

ROUND ROBIN RESOLUTION OF THE DIRECTORS

WHEREAS, the Organisation wishes to appoint the non-executive board of directors, the chairperson of the board of directors, appoint the chief executive officer and adopt the Constitution of the Organization.

IT IS THEREFORE RESOLVED AS FOLLOWS:

1. RESOLUTION 1:

That the following are appointed as non-executive directors of the Organization:

- 1.1 Gugulethu Givenson Xaba ID number: 7306085336083
- 1.2 Adv Christopher Linda Shabangu ID Number: 7407055809081
- 1.3 Ramathabathe Johannah Tabane ID Number: 9307270379084
- 1.4 Adv VJazz Vilakazi ID Number: 7804275710083
- 1.5 Zazi Molobane Nsibanyoni- Mugambi: 7905140372080
- 1.6 Matsela Tlhologelo Nkoabela ID Number: 9309030868083

2. RESOLUTION 2:

- 2.1. That Gugulethu Xaba be appointed as the chairperson of the Board of Directors.
- 2.2. That Christopher be appointed as the Vice chairperson of the Board of Directors.
- 2.3. That Ramathabathe Johannah Tabane appointed as the secretary of the Board of Directors.

3. RESOLUTION 3:

3.1. That Adv Christopher Linda Shabangu be appointed as the Chief Executive officer of the Organisation.

3.2. That Adv Christopher is given the authority to appoint the executive members of the Organisation.

4. RESOLUTION 4:

4.1. That the Constitution of the Organisation be adopted as the governing constitution.

IT IS RESOLVED FURTHER THAT,

1 Adv Christopher Linda Shabangu and/or failing him, any other director of the Organization appointed by him and approved by the Board of Directors, each acting in his capacity as director of the Organization (the Authorised Signatories) be and is hereby authorised, empowered and directed (with the power of substitution) to -

1.1 Appoint the executive members and the employees of the Organisation;

1.2 settle the terms of and sign all notices, deeds, documents or powers of attorney, which may be necessary for or incidental to the implementation of the objectives of the Organization;

1.3 institute and or defend legal action against/ and for the Organisation, sign any court proceedings papers on behalf of the Organization; and

1.4 generally do everything that may be necessary for the implementation of the abovementioned , and any agreements, court documents, deeds or documents signed by the Authorised Signatories acting under the authority of this and the preceding resolutions, shall conclusively be deemed to be the agreements, deeds and documents authorised by this and the preceding resolutions.

2 These resolutions may be signed by the members of the Board in as many counterparts as may be necessary by original, electronic or telefacsimile signature, each of which signed shall be deemed to be an original, and such counterparts shall together constitute one and the same instrument.

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3 To the extent that an Authorised Signatory has already signed any Transaction Documents and/or other deeds or documents which may be necessary for the implementation of the Transaction Documents, as the case may be, on behalf of the Company, his/her actions in this regard be and are hereby ratified.

SIGNATURE: [Signature]
NAME: Lana Khatun Tasneem
DATE: 30 June 2020

SIGNATURE: [Signature]
NAME: Matsela Mkoabela
DATE: 30-06-2020

SIGNATURE: [Signature]
NAME: Christopher Linda Shabangu
DATE: 30.06.2020

CL [Signature]

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<http://www.youtube.com/user/ParliamentofRSA>

<https://www.instagram.com/ParliamentofRSA/>

30



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

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OUR PARLIAMENT

OUR PEOPLE

BUSINESS OF PARLIAMENT

MEDIA

HAVE YOUR SAY

PUBLICATIONS

ADMINISTRATION

TRADE AND INDUSTRY COMMITTEE ORDERS NLC TO PUBLISH DETAILS OF ALL BENEFICIARIES

BUSINESS OF PARLIAMENT (HTTPS://WWW.PARLIAMENT.GOV.ZA/BUSINESS-PARLIAMENT) » PRESS RELEASES

Parliament, Thursday, 16

July 2020 – The Portfolio Committee on Trade and Industry today resolved to inform the National Lotteries Commission (NLC) that it must provide the list of beneficiaries that benefited from the R150 million Covid-19 relief fund.



Committee Chairperson Mr Duma Nkosi said the committee resolved that it also requires a list of all beneficiaries that received money from the NLC during the 2018-2019 financial year. "This should include the names, the amounts that were disbursed, as well as the categories it was paid out from. It should also include all beneficiary lists that have not be made public up to now."

Furthermore, the committee requests that the NLC publish the names of beneficiaries in its 2019/20 Annual Report, as required by the Lotteries Act (Act No. 57 of 1997).

The committee decision follows an opinion from Parliament's Legal Services, which states the NLC's financial statements must disclose this information. In addition, this information must be available to the Auditor-General, as the NLC is subject to the Public Finance Management Act.

DID YOU KNOW?

Committees have the power to summons any person to appear before them to give evidence or produce documents. They may ask any person or institution to report to them and may receive petitions, representations or submissions from the public. They play a crucial role in the law-making process.

LEARN MORE (/DID-YOU-KNOW)

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VISIT PARLIAMENT

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The NLC has not disclosed beneficiaries for the past few years. The NLC argued that while in the past such lists were published, on consideration of the laws governing private information and complaints from some beneficiaries, it reached the conclusion that the publication of such information was erroneous and not in the public interest.

However, according to Parliament's legal advice: "The constitutional right to privacy is not an absolute right, but may be limited in terms of laws of general application and must be balanced with other rights entrenched in the Constitution." Furthermore, purposeful interpretation of the Lotteries Act shows that a culture of openness and transparency is required.

Mr Nkosi said the committee unanimously agreed that NLC must comply within seven days.

ISSUED BY THE PARLIAMENTARY COMMUNICATION SERVICES ON BEHALF OF THE CHAIRPERSON OF THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY, MR DUMA NKOSI.

For media enquiries or interviews with the Chairperson, please contact the committee's Media Officer:

Name: Rajaa Azzakani (Ms)

Tel: 021 403 8437

Cell: 081 703 9542

E-mail: razzakani@parliament.gov.za

(<mailto:razzakani@parliament.gov.za>)

TOUR (/VISITING- 31

PARLIAMENT#ARRANGE-TOUR)

ATTEND A DEBATE (/VISITING-PARLIAMENT#ATTENDING-DEBATE)

DIRECTIONS (/VISITING-PARLIAMENT#DIRECTIONS)

CONTACT DETAILS (/HAVE-YOUR-SAY#CONTACTDETAILSPARL

FEATURED MEMBER



(/person-
details/3719)

Ms
Babalwa
Mathulelw
a

(/person-
details/3719)

National Assembly

(/group-
details?
chamber=2)

Economic
Freedom
Fighters

(/group-
details?
party=EFF)

NLC

☎ 021 403 2109 32

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(<mailto:bmathulelwa@parliament.gov.za>)

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National Lotteries Commission (NLC)
P O Box 1556
Brooklyn Square 0083, Pretoria

Mr D Nkosi, MP

The Honorable Chairperson: Portfolio Committee on Trade and Industry

P.O. Box 15

Cape Town

8000

Dear Honourable Mr Nkosi,

NATIONAL LOTTERIES COMMISSION – BENEFICIARY INFORMATION

We refer to the above matter and your letter of 17 July 2020.

We note that we are required to submit three classes of information by 24 July 2020. In responding to the request, we find it prudent to first deal with the matters raised in your letter in so far as they provide the basis for the request to produce the documents.

We have taken note of the opinion provided to the Committee by the Legal Advisor. We note that the premise of the opinion is that the legislation cited by the NLC *“does not provide a basis to refuse the said information”*, and further that *“[t]he stance of the NLC seems to be that, there is a blanket prohibition on the provision of this information, which is untenable”*.

The above premise is incorrect for the reasons we set out below. First, the NLC has explained the basis of the non-disclosure of the information based on the legislation cited. However, to the extent that the NLC's position was not clear, we take this opportunity to substantiate the NLC's position. It is important to note that section 67 of the Lotteries Act deals with access to information. It provides as follows:

“(1) Subject to the Constitution, any legislation which may be enacted in pursuance of sections 32(2) or 33(3) of the Constitution or any other relevant law, no person,

CHANGING LIVES

Board Members: Ms A Brown (Minister's Representative), Ms D Dondur, Prof YN Gordhan, Adv WE Huma
Dr MA Madzivhandila, Prof NA Nevhutanda (Chairperson), Adv Nompumelelo Nene (Company Secretary)

Established in terms of the Lotteries Act 57
of 1997, as amended

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including the Minister, a member or employee of the board or the Department, or a former member or employee of the board or the Department, may –

- (a) in any way disclose any information submitted by any person in connection with any application for any licence, certificate or appointment under this Act; or
- (b) publish any information obtained in contravention of paragraph (a), unless ordered to do so by a court of law or unless the person who made such application consents thereto in writing.

(2) Any person who contravenes subsection (1) shall be guilty of an offence.”

The legislation enacted in pursuance of sections 32(2) and 33(3) of the Constitution are PAIA.¹ and PAJA.² The PDA.³ and POPI.⁴ are any other relevant law because they deal with the disclosure of information.

It is important to note that the NLC has never made a submission to the effect that Section 67 and Regulation 8 entitle it to a blanket refusal of the information sought. The NLC has explained that the appointments under the Lotteries Act, as contemplated in section 67, are broad and varied. They include appointments of grant beneficiaries, which is the information which the NLC has been requested to publish.

Section 67 is clear. It prohibits disclosure of “any information submitted by any person in connection with...”, such grant appointments. The NLC has therefore indicated that the information concerning the beneficiary/ grant recipients, falls squarely within the ambit and protection of section 67.

¹ Promotion of Access to Information Act, 2 of 2000.

² Promotion of Administrative Justice Act, 3 of 2000.

³ Protected Disclosures Act, 26 of 2000.

⁴ Protection of Personal Information Act, 4 of 2013 – to the extent that it is in force.

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Secondly, section 67 does not provide a blanket refusal. It limits the prohibition against disclosure and publication of the information by subjecting it to the Constitution, PAIA, PAJA and any other relevant law, including the PDA and POPI. This makes the provision consistent with the Constitution because rights guaranteed under the Constitution, to be exercised under PAIA, PAJA and any other relevant law in a manner consistent with the constitutional principle of subsidiarity, are not trampled upon at all. It is therefore incorrect to imply that the NLC's position is that the constitutional right to privacy is an absolute right. Section 67 itself places limits on the right to privacy, by making it subject to these laws. Additionally, section 67 provides for circumstances under which the information relating to amongst others, grant beneficiary appointments can be published. These are:

- By order of court; or
- The grant beneficiary appointee consents thereto in writing.

Regulation 8 provides protections regarding information that is submitted by applicants for grant and those granted grants under the Lotteries Act read with the Regulations. It provides as follows:

"8. Security of information. —

- (1) *Subject to the Constitution, the Promotion of Access to Information Act, 2000 (Act 2 of 2000), the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) and the Protected Disclosures Act, 2000 (Act 26 of 2000), no person may in any way—*
 - (a) *disclose any information in connection with any grant application or a grant itself;*
 - (b) *disclose the contents of a report contemplated in regulation 6 (1); or*
 - (c) *publish any information obtained in contravention of paragraph (a) or (b); unless—*
 - (i) *ordered to do so by a court of law;*
 - (ii) *making a bona fide confidential disclosure or publication to the Minister, the Public Protector, Parliament or a committee designated by Parliament, a member of the South African Police Service or the national prosecuting authority;*
 - (iii) *the juristic person who made a grant application and the board consent thereto in writing prior to that disclosure or publication; or*
 - (iv) *provided for in these regulations.*

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- (2) *An agency, a person appointed to an agency or any person rendering services to an agency in whatever capacity may not in any way disclose any information in respect of or comment upon a grant application or a grant itself unless authorised thereto in writing by the Minister or the chairperson of the board.*
- (3) *Any person who contravenes sub regulation (1) or (2) shall be guilty of an offence and liable to a fine or to imprisonment or to both a fine and imprisonment.”*
(underlining added for emphasis)

As is the case with section 67 of the Lotteries Act, the prohibition in regulation 8 is not absolute. It is subject to a person wishing to have access to the relevant information and to publish it, exercising such a right of access in terms of the applicable law, i.e. PAIA, PAJA, the PDA, POPI or other law, all of which are interpreted in accordance with the provisions of section 39(2) of the Constitution.

Regulation 8 additionally provides for the circumstances under which the grant application or grant details themselves may be published. It does so in Regulation 8(3). In addition to the two circumstances set out in section 67, Regulation 8(3) recognizes that the disclosure of the information may be made on a confidential basis to the Minister; the Public Protector; Parliament or a committee designated by Parliament, a member of the South African Police Service or the National Prosecuting Authority.

What is plain from the provisions of Regulation 8 is that information relating to applications for grants and the grants themselves falls within the regulation, whose purpose is to ensure the security of such information. The names of grant applicants and grant recipients, including their other private or personal information such as addresses, the information they furnish to the NLC in connection with applications for grant and grants themselves, including grant agreements and reports that are furnished in connection with grants fall within the ambit of regulation 8(1), and section 1 of POPI.⁵

⁵ See the definition of 'personal information' in section 1 of POPI⁵.

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In relation to the view that the NLC did not indicate the reasons for refusing access to information in terms of PAIA, it must be noted that the information was not requested in terms of the provisions of PAIA. However, it should be noted that the information requested at any rate falls within the ambit of Chapter 4 of PAIA, which provides for Mandatory Refusal Provisions. As a result, Third Party notification and consent provisions would kick in as per Chapter 5 of PAIA. Furthermore, the information which was requested is third party information that would have required permission from the beneficiaries prior to it being released to third parties.

In relation to production of the information to the Committee, the NLC has previously indicated that to the extent that Regulation 8(3) recognizes that the information requested can be disclosed to the Committee, such disclosure must be in line with the Rules of the National Assembly, ("the Rules"). The information sought would fall within the ambit of Rule 189 as confidential information given that some of the information sought constitutes personal information as defined in section 1 of POPI, and is subject to the disclosure limitations as provided for in section 67 and Regulation 8.

Rule 189 recognises that the disclosures made can be subjected to rules of confidentiality, in circumstances where the disclosures "contain information of a private nature that is prejudicial to a particular person,"⁶ or are "confidential in terms of legislation"⁷.

The NLC submits that the information which it was required to produce contains information of a private nature which may be prejudicial to the grant recipients; and is rendered confidential by legislation, in particular, Section 67 of the Lotteries Act, and Regulation 8 thereto; as well as the Constitution, POPI, PAIA, PAJA or the PDA.

⁵ See the definition of 'personal information' in section 1 of POPI.

⁶ Rule 189(4)(a).

⁷ Rule 189(4)(c).

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We note the intimation that the public may have access to the information, given that the NLC is required to disclose this information in its financial statements and that the information must be available to the Auditor General. In this regard, we reiterate that the public can only access this information in terms of the provisions of Section 67(1)(b) of the Lotteries Act, and Regulation 8 (3); as well as the Constitution, POPI, PAIA, PAJA or the PDA.

The NLC is indeed subject to the PFMA, and the Public Audit Act⁸, in so far as it relates to the disclosures to be made in its financial statements. It should, however, be noted that there is no requirement for the NLC to disclose the information of the sort that has been requested in its financial statements. The NLC does not disclose beneficiary names; addresses, and grant details in its financial statements. What is disclosed is the expenditure in relation to allocation of grants, in particular, the current year allocations and the revocations.

The NLC further makes disclosures of related party transactions. For instances, the NLC reports on allocations made to projects in which members of distribution agencies or other officers of the NLC may have a conflict. Such members recuse themselves when such projects are being adjudicated upon. The NLC makes provision for a list of balances and transactions with those organizations which were funded by the NLC and in which Distributing Agencies of officers of the NLC have significant interest.

⁸ No 25 of 2004.

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We now proceed to address the requests for submission of the three classes of information, in turn below:

Information pertaining to the names of beneficiaries that received funds from the NLC's COVID-19 Relief Fund

This information is attached and supplied in terms of Rule 189 and 184 of the Rules. Rule 184 precludes attendance of the public, the media from attending the meeting of the committee, when considering a matter which is amongst others, confidential in terms of legislation. As set out above, the information sought is deemed confidential in terms of the legislation cited above, in particular, section 1 of POPI read together with section 67 and regulation 8 of the Lotteries Act; as well as PAIA.

The names of beneficiaries for the previous financial years where they had not been published in the Annual Reports.

This information is attached and supplied in terms of Rule 189 and 184 of the Rules. The information sought is deemed confidential in terms of the legislation cited above, in particular, section 1 of POPI read together with section 67 and regulation 8 of the Lotteries Act; as well as chapters 4 and 5 PAIA.

Tabling of a separate report to Parliament "Report of the NLC on beneficiaries" containing the names of beneficiaries from previous financial years where they had not been published in Annual Reports

This information is attached and supplied in terms of Rule 189 and 184 of the Rules. The information sought is deemed confidential in terms of the legislation cited above,

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in particular, section 1 of POPI read together with section 67 and regulation 8 of the Lotteries Act; as well as chapters 4 and 5 PAIA.

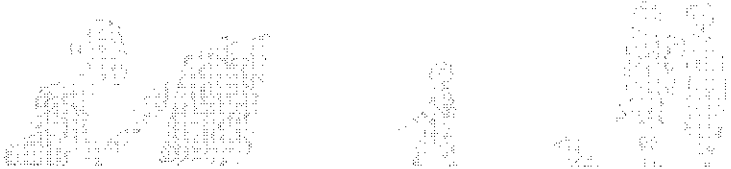
Yours Faithfully,

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

Prof NA Nevhutanda

Chairperson - National Lotteries Commission

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MINISTER
TRADE, INDUSTRY AND COMPETITION
REPUBLIC OF SOUTH AFRICA

Private Bag X84, PRETORIA, 0001, the dtic Campus, 77 Meintjies Street, Sunnyside, 0002, Tel: (012) 394 1480, Fax: +27 12 394 0337
www.thedtic.gov.za

22 June 2020

Prof NA Nevhutanda
The Chairperson: National Lotteries Commission
Block B, Hatfield Gardens
333 Grosvenor Street
Hatfield
0083

Dear Prof Nevhutanda

Publication of beneficiary information

I refer to the various requests by Members of Parliament for information relating to the beneficiaries of various monies administered by the National Lotteries Commission, and to the NLC's view on confidentiality of information.

The purpose of this letter is to record my disagreement with the approach adopted by the National Lotteries Commission to the publication of beneficiary information by the Commission and to request to have a change effected in the current practice of the NLC.

This issue arises out of the interpretation of Regulation 8 of the Regulations Relating to Distribution Agencies made in terms of section 60 of the Lotteries Act 57 of 1997 ("the Act") in February 2001.

Regulation 8 provides that –

"8. Security Information –

(1) Subject to the Constitution, the Promotion of Access to Information Act, 2000 (Act No. 2 of 2020), the Promotion of Administration Justice Act, 2000 (Act No. 3 of 2000) and the Protected Disclosure Act, 2000 (Act No. 26 of 2000), no person may in any way-

(a) disclose any information in connection with any grant application or a grant itself;

(b) disclose the contents of a report contemplated in regulation 6(1); or

(c) publish any information obtained in contravention of paragraph (a) or (b); unless-

(i) ordered to do so by a court of law;

(ii) making a bona fide confidential disclosure or publication to the Minister, the Public Protector, Parliament or a committee designated by Parliament, a member of the South African Police Service or the national prosecuting authority;

(iii) the juristic person who made a grant application and the board consent thereto in writing prior to that disclosure or publication; or

(iv) provided for in these regulations.

(2) An agency, a person appointed to an agency or any person rendering services to an agency in whatever capacity may not in any way disclose any information in respect of or comment upon a grant application or a grant itself unless authorised thereto in writing by the Minister or the chairperson of the board.

(3) Any person who contravened subregulation (1) or (2) shall be guilty of an offence and liable to a fine or to imprisonment or to both a fine and imprisonment."

The NLC has adopted the view that Regulation 8 prohibits the sharing of information relating to beneficiaries including their names, NPO numbers, grant amounts allocated to them including the dates when tranches in which respect of these amounts are paid. It advised the Parliamentary Portfolio Committee that it had received a legal opinion from its attorneys adopting this approach and circulated a copy of this opinion to the Committee in February 2020.

I have taken legal advice on this issue and disagree with this conclusion.

Firstly, this approach is in clear conflict with the emphasis that the Act places on the importance of the principles of openness and transparency in the administration of the National Lottery.

Section 2A(1) of the Act provides –

“(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.”

Similarly, Section 10 deals with the functions of the Board stating that the Board must ensure that the Commission applies the principles of openness and transparency when performing its functions.

The prohibition on disclosure in Regulation 8 is drafted in similar terms to section 67 of the Act. Section 67 applies to the disclosure of any information in connection with an application for any license, certificate or appointment under this Act. It is evident that Regulation 8 was enacted to extend the approach of section 67 to the disclosure of information concerning grants and grant applications.

The rationale given for the interpretation of Regulation 8 is that the names of beneficiaries should not be disclosed to protect beneficiaries from the prospects of extortion or other criminal activities. In addition, the opinion received by the NLC refers to the publication of defamatory statements concerning the NLC and beneficiaries of grants in relation to the pro-active funding activities of the NLC.

In my view, neither the possibility of certain beneficiaries being exposed to criminal threats nor press reporting, whether defamatory or not, justifies a prohibition on the naming of beneficiaries. There are numerous other legal remedies available to deal with these eventualities.

A similar approach to the Regulations is adopted in memorandum to me by the United Civil Society in Action received, 5 March 2020, who suggest that the naming of NLC beneficiaries is illegal. They write as follows –

“Our personal information is protected by this Act, and the National Lotteries Commission and the Minister of Trade and Industry have to comply with the requisite of this Act in full, that for private information to be disclosed publicly should be done so only after following the Act, which unfortunately have not been followed.”

The effect of this argument is that the identity of a beneficiary under the Act cannot be publicly disclosed, unless the beneficiary consents thereto or a court has ordered disclosure.

A list of beneficiaries was previously included in the NLC's Annual Reports. However, with effect from the 2018/19 financial year, the NLC stopped including beneficiary information in its Annual Report on the basis that this would amount to a breach of Regulation 8. It is perturbing the NLC has altered its interpretation of Regulation 8.

In my view, Regulation 8 does not prohibit the disclosure of the identity of the beneficiaries. The names of beneficiaries do not constitute a part of a grant application or a grant. Had the Minister who published the regulations intended for Regulation 8 to prohibit the disclosure of the identity of beneficiaries of public funds, one would have certainly expected that such a prohibition would have been explicit in the Regulation.

While I accept that the practice of listing beneficiaries were named in Annual Reports for many years does not amount to a legal precedent, the fact that this interpretation was assumed by all stake- holders to be correct for almost 20 years is an indication of how tortured the revised interpretation of Regulation 8 adopted by the NLC is.

The absurdity of this construction is also revealed when it is applied to the language of section 67. Section 67 would have to be interpreted as meaning that the name of an applicant for a licence, certificate or appointment in terms of the Act could only be named with its consent.

In response to a request by the Director-General to receive a list of pro-actively funded projects for 2016-2018, the Commissioner disclosed the list to the Minister in terms of Regulation 8. However, in the letter dated 31 January 2020, the Commissioner stated

"It is noteworthy that the information provided is classified as SECRET in line with the NLC's Information Classification and Management Policy. The contents of the information provided are deemed to be beneficiary information and the NLC, as the custodian of this information, are obliged to ensure that information shall not be reproduced, used or disclosed in any manner in accordance with applicable legislation".

The letter goes on to quote the text of Regulation 8 of the Distribution Agencies Regulations as the basis for this approach.

To the extent that the NLC is also seeking to rely on the Protection of Personal Information Act 4 of 2013 ("the POPI") as a basis for not disclosing the names of beneficiaries, I am advised that POPI is not yet in effect and, in any event, would not prevent the publication of this information.

The classification of the list of pro-actively funded projects as "SECRET" is not warranted by any legislation and is in clear breach of the obligation of the NLC.

It is my considered view that the NLC has adopted an interpretation of Regulation 8 that is incorrect. The names of beneficiaries are not information about a grant or grant application as contemplated by Regulation 8. Regulation 8 does not justify altering the long-held practice of publishing the names of beneficiaries in the Annual Report. The publication of such a list is consistent with the clear requirements of the Act for open and transparent governance as referred to above.

I therefore, call upon the NLC to resume the practice of publishing the names of beneficiaries and that such information include those who receive funds for pro-actively funded projects.

Yours faithfully



EBRAHIM PATEL
MINISTER OF TRADE, INDUSTRY AND COMPETITION

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

COPY

CASE NO:

24775/20

In the matter between:

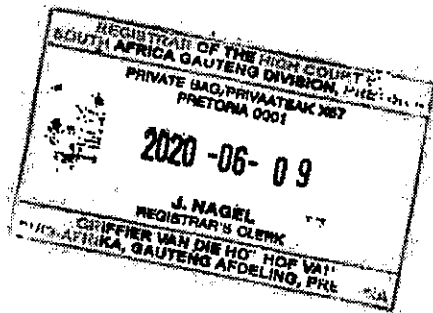
UNITED CIVIL SOCIETY

IN ACTION

APPLICANT

And

GROUNDUP



FIRST RESPONDENT

NATIONAL LOTTERIES COMMISSION

SECOND RESPONDENT

URGENT NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE THAT the Applicant intends to make an urgent application to the above Honourable Court on **Wednesday the 17th June 2020 at 10H00** or so soon thereafter as Counsel may be heard for an order in the following terms:

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1. **Condoning non-compliance with and dispensing with the forms and service provided for in the rules and allowing the matter to be heard as one of urgency under Rule 6(12) of the Uniform Court Rules, and service of the court process to the Respondents to be effected by e-mail transmission;**
2. **Ordering the First Respondent immediately cease to publish the personal details of beneficiaries of the Second Respondent, being members of the Applicant, such details including the names of the beneficiaries, the names of the projects partook by the beneficiaries, the amount of grants and allocations distributed to the beneficiaries, the NPO and NGO registration numbers of the beneficiaries and the dates when the trenches in which these amounts of grants and allocations are paid over time from the Second Respondent;**
3. **Ordering the First Respondent to remove all articles about beneficiaries of the Second Respondent from all of its publications, particularly the online publication of the 25th May 2020 within (5) five days of this order;**
4. **Ordering the Second Respondent not to disclose the personal details of its beneficiaries including the names of the beneficiaries, the names of the projects partook by the beneficiaries, the amount of grants and allocations distributed to the beneficiaries, the NPO and NGO registration numbers of the beneficiaries and the dates when the trenches in which these amounts of grants and allocations are paid over time from the Second Respondent, to any other person subject to Regulation 8(1)(c) of the National Lotteries Act of 57 of**

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1997: Regulations Relating to Distributing Agencies issued on or about the 22nd February 2001.

5. Ordering the Respondents to pay the cost of this application in the event of opposition.

TAKE FURTHER NOTICE that the accompanying affidavit of **SIYABULELA JENTILE** together with annexure thereto, will be used in support of this urgent application.

TAKE NOTICE FURTHER that if you wish to oppose this application you are required:

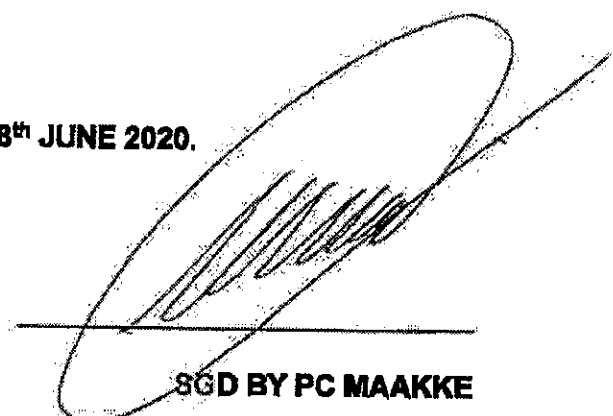
- (a) To notify the Applicant's attorneys in writing at the address set out hereunder, by notice of your intention to oppose sent to such address or by e-mail at the e-mail address below, of your intention to do so by no later than 16H00 on Tuesday, 09th June 2020;
- (b) To deliver your answering affidavit, if any, by no later than 16H00 on Wednesday, 10th June 2020;
- (c) For the Applicant to deliver its replying affidavit, if any, by no later than 12H00 on Thursday, 11th June 2020;
- (d) To appoint in such notification an address referred to in Rule 6(5)(b) of the Uniform Court Rules at which you will accept notice and service of all

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documents in these proceedings, as well as your postal address and electronic e-mail address.

TAKE FURTHER NOTICE THAT the Applicant has appointed the address and e-mail address of its attorneys of record, **POPELA MAAKE INCORPORATED C/O LEBALA MOLOI ATTORNEYS** set out below at which it will accept notice and service of all process in these proceedings.

DATED AT JOHANNESBURG ON THIS THE 08th JUNE 2020.



**SGD BY PC MAAKKE
ATTORNEY WITH A RIGHT OF
APPEARANCE IN THE HIGH COURT
IN TERMS OF SECTION 4(2) OF
THE RIGHT OF APPEARANCE IN COURTS ACT 62 OF 1895**

POPELA MAAKE ATTORNEYS

(Applicant's Attorneys)

171 Columbine Avenue

MONDEOR

Tel: (011) 941 -2664

Fax: (011) 942 1146

pcmaake@pmaakeattorneys.co.za

*ML
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Ref: 244/PCM1042020

C/O LEBALA MOLOI ATTORNEYS

LA PONTO CHAMBERS

270 Trow St, Capital Park

PRETORIA

0084

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

CASE NUMBER:

In the matter between:

UNITED CIVIL SOCIETY

IN ACTION

APPLICANT

And

GROUNDUP

FIRST RESPONDENT

NATIONAL LOTTERIES

COMMISSION

SECOND RESPONDENT

FOUNDING AFFIDAVIT

I, the undersigned

SIYABULELA JENTILE

PL CL SW R-R

South Block, Tannery Park, 21 Belmont Road, Rondebosch Cape Town in the Western Cape Province with e-mail address at info@groundup.org.za.

7. The Second Respondent is the National Lotteries Commission, a juristic person established in terms of the Lotteries Act No 57 of 1997 as amended by the Lotteries Amendment Act No 32 of 2013, with its main place of business situated at Block D Hatfield Gardens, 333 Grosvenor Street, Hatfield Pretoria in the Gauteng Province with e-mail address at nlotf@nlcqa.org.za.

LOCUS STANDI

8. The Applicant is a voluntary association and represents a significant number of Non-Profit Organisations (NPO) and Non-Governmental Organisations (NGO) in the Republic of South Africa who are a collective of civil society and beneficiaries of grants and allocations distributed by the Second Respondent, and derives its right or capacity to institute this application on behalf of the beneficiaries before this Honourable Court therefrom and also from its Constitution.

RELIEF SOUGHT

9. In this application, the Applicant seeks:

9.1. Condonation of non-compliance with and dispensing with the forms and service provided for in the rules and allowing the matter to be heard as one of urgency under Rule 6(12) of the Uniform Court Rules, and service of the court process to the Respondents to be effected by e-mail transmission;

9.2. An order that the First Respondent immediately cease to publish the personal details of beneficiaries of the Second Respondent, being members

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of the Applicant, such details including the names of the beneficiaries, the names of the projects partook by the beneficiaries; the amount of grants and allocations distributed to the beneficiaries, the NPO and NGO registration numbers of the beneficiaries and the dates when the trenches in which these amounts of grants and allocations are paid over time from the Second Respondent;

9.3. An order that the First Respondent removes all articles about beneficiaries of the Second Respondent from all of its publications, particularly the online publication of the 25th May 2020 within (5) five days of this order;

9.4. An order that the Second Respondent not to disclose the personal details of its beneficiaries including the names of the beneficiaries, the names of the projects partook by the beneficiaries, the amounts of grants and allocations distributed to the beneficiaries, the NPO and NGO registration numbers of the beneficiaries and the dates when the trenches in which these amounts of grants and allocations are paid over time from the Second Respondent, to any other person subject to Regulation 8(1)(c) of the National Lotteries Act 57 of 1997: Regulations Relating to Distributing Agencies issued on or about the 22nd of February 2001.

9.5. An order for the Respondents to pay the cost of this application in the event of opposition.

URGENCY

10. On or about the 02nd of March 2020, the Applicant instructed its attorneys of record to correspond with the Second Respondent to the effect that threats have abounded in public that certain media houses or publications have pressurised the Minister of Economic Development, Trade and Industry to consider putting the Second Respondent under administration in the event where the personal details of its beneficiaries including amounts of grants and allocations distributed to them were not published in the media. I attach

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the said correspondence for ease of reference hereto marked as "Annexure SJ3".

11. The contents of the said correspondence were to re-iterate that the Lotteries Act, particularly Section 87 together with the regulations thereto categorically forbid the personal details of the beneficiaries of the Second Respondent, including the amounts of grants and allocations distributed to them to be accessed and published by anyone without due process in terms of Regulations 8(1)(c), and that the Applicant cautioned against the Second Respondent disclosing such details to anyone or the public.
12. As advised by the Applicant's attorneys of record, the Second Respondent unfortunately not only failed to acknowledge receipt of the Applicant's correspondence but did not respond to it at all. It is important to note that only (3) three weeks later, the Minister of Cooperative Governance and Traditional Affairs declared a State of Disaster as per the Disaster Management Act 57 of 2002 due to Covid-19, which was subsequently followed by the national lockdown by the President of the Republic of South Africa.
13. On the 05th of March 2020, the constituent members of the Applicant marched to the Office of the Minister of Economic Development, Trade and Industry and handed over a memorandum of demands to the Minister to highlight pertinent issues affecting the beneficiaries of the Second Respondent as a collective including the issue of access and publication of the beneficiaries' personal details, amounts of grants and allocations distributed to the beneficiaries, to the public without due process. I attach hereto for ease of reference to the Honourable Court the said memorandum of demands marked as "Annexure SJ4".
14. It is only after the national lockdown was eased by the President of the Republic of South Africa and the country was put on Alert Level 3 that the Applicant resumed administration of its operations and in the process, I became aware of the online news publication by the First Respondent of the 25th May 2020 only on the 02nd of June 2020. I contacted the Applicant's

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attorneys of record to solicit legal advice and an appointment for a consultation was scheduled for the 05th June 2020, where after I instructed them to institute these urgent legal proceedings against both the First and Second Respondents. I again attach the said online publication for ease of reference to the Honourable Court marked as "Annexure SJ5".

15. Notwithstanding the correspondence and memorandum of demands by the Applicant to caution against access and publication of personal details of beneficiaries of the Second Respondent, including the amounts of the grants and allocations distributed to them, dates when tranches of these amounts were paid over time, the said information was accessed from the Second Respondent and published by the First Respondent, and in the process contravened the Act and the Regulations thereto without due process having been followed.
16. It is quite evident reading from the contents of the online publication that the First Respondent is unwavering in its intent to access the personal details of the Applicant's members and publish same for public consumption without due process and will not stop, and as such I was advised by the Applicant's attorneys of record and submit that the matter requires to be dealt with under Rule 5(12) and this court should properly dispense with the forms and service provided for in the rules and hear the matter as one of urgency.
17. I am advised that if this is not done, the Applicant will not get effective relief in the circumstances. It is therefore crucial for the Applicant to interdict the First Respondent from accessing and publishing the Applicant's members' personal details to the public domain from the Second Respondent, and also for the Second Respondent not to disclose the personal details of its beneficiaries, being the Applicant's members without due process as envisaged in the Regulations to the Act.
18. I am advised further that if this application were to proceed in the ordinary course, it would not be heard before the first or second term of the New Year in 2021, and as such the Applicant under the circumstances of this case will

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not be afforded substantial redress at a hearing if the matter is heard in due course and placed on the normal roll. The Applicant and its members being the Second Respondent's beneficiaries would be seriously prejudiced if their rights as enshrined in the Act is trampled on by the Respondents without the intervention and protection of this Honourable Court. On the advice of the Applicant's attorneys of record, I propose:

- 18.1. Enrolling this matter for hearing on Wednesday the 17th of June 2020. Ordinarily this matter would be enrolled for the Tuesday but on Tuesday the 16th of June 2020 it is a public holiday, the National Youth Day;
 - 18.2. Allowing for appropriate periods of time for the delivery of affidavits and preparation for the matter so it may be heard during the motion week ended the 18th of June 2020.
19. That I am informed would afford a court a reasonable time to give judgment in the matter before it is too late. In these circumstances, the Honourable Court should exercise a discretion to allow the matter to be heard on an urgency basis.

THE BASIS FOR A FINAL INTERDICT

20. I am advised that in order to obtain a final interdict, I am required to satisfy the requisites thereof being:

- 20.1. *A clear right on the part of the Applicant;*
- 20.2. *An injury actually committed or reasonably apprehended;*

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- 20.3. *The absence of any other satisfactory remedy available to the Applicant.*
21. In terms of Section 67 of the Act and subject to the Constitution of the Republic of South Africa, no person including the Minister, a member or employee of the board of the Second Respondent, may *"in any way disclose any information submitted by any person in connection with any application for any license, certificate or appointment under this Act, or publish any information obtained in contravention of paragraph (a), unless ordered to do so by a court of law or unless the person who made such application consents thereto in writing"*.
22. The Applicant's members are persons who had made application to the Second Respondent in connection with their appointment as beneficiaries, and for anyone including the Second Respondent to publish their personal details in the public domain, a court order must be granted by a competent court of law or the beneficiaries must consent to the publication thereof.
23. The Regulations to the Act further provides at Regulation 8 the following:
- (1) *Subject to the Constitution, the Promotion of Access to Information Act No 2 of 2000, the Promotion of Administrative Justice Act No 3 Of 2000 and the Protected Disclosures Act No 26 of 2000, no person may in any way-*
- a. *Disclose any information in connection with any grant application or a grant itself;*
 - b. *Disclose the contents of a report contemplated in regulation 8(1);*
or
 - c. *Publish any information obtained in contravention of paragraph (a) or (b); unless-*
 - i. *Ordered to do so by a court of law;*
 - ii. *Making a bona fide confidential disclosure or publication to the Minister, the Public Protector, Parliament or a committee designated by Parliament, a member of the South African Police or the National Prosecuting Authority;*

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- iii. *The juristic person who made a grant application and the board consent thereto in writing prior to that disclosure or publication; or*
- iv. *Provided for in these regulations.*

(2) An agency, a person appointed to an agency or any person rendering services to an agency in whatever capacity may not in any way disclose any information in respect of or comment upon a grant application or a itself authorised thereto in writing by the Minister or the chairperson of the board.

(3) Any person who contravenes subregulation (1) or (2) shall be guilty of an offence and liable to a fine or to imprisonment or to both a fine and imprisonment.

24. It is patent that the Applicant enjoys these rights as articulated and enshrined succinctly in Statute, particularly in Section 67 of the Act as well as in terms of Regulation 8, which rights are clear and definite, and therefore I am advised that the requisite of a clear right on the part of the Applicant has been satisfied by the Applicant.

25. By publishing the personal details of the Applicant's members being the beneficiaries of the Second Respondent in the media and for public consumption, the First Respondent has contravened both Section 67 of the Lotteries Act No 57 of 1997 as well as the Regulations (8) Relating to Distributing Agencies of the Act as the publication does not accord with the provisions particularly of Regulations 8(1)(c) because there is no court order granting the First Respondent permission to publish, nor did the beneficiaries of the Second Respondent consent to their personal details to being published in the media and in the public domain.

26. An injury to the Applicant's members has actually been committed as their clear right has been attacked and interfered with by the First Respondent without due process, notwithstanding the fact that the First Respondent is of the full knowledge that a consent or a court order is required before publication of the personal details of the beneficiaries in the public domain

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can be made. The First Respondent reported in their article that the Second Respondent has refused to publish a list of Lottery-funded grantees, but nonetheless it proceeded to publish same.

27. It is further reasonably apprehended that the First Respondent will continue to publish the personal details of the Applicant's members in the public domain further prejudicing them as it has reported in its article that as part of its ongoing investigation, it will report on more beneficiaries who have received funding in the form of grants from the Second Respondent, and further that it had access to an independent investigation by auditors Sekela Xabiso into allegations of improper use of funds intended for good causes, which document it alleged was submitted to Parliament's Portfolio Committee on Trade and Industry.

28. I am personally not aware of this document alleged to have been submitted to the Parliament's Portfolio Committee on Trade and Industry by Sekela Xabiso Auditors, but that if indeed it exists, it was meant for the attention of the members of the Committee alone and how the First Respondent managed to access it, I would not know suffice to say that it would still be a contravention of Regulation 8 as already alluded to *supra* for the First Respondent to publish it without a court order or a consent from both the beneficiaries and the Second Respondent.

29. It is also apparent that the Second Respondent has been pressurised by the media and chief amongst them the First Respondent to publish the personal details of the beneficiaries including the amount of grants and allocations distributed by the Second Respondent, how the grants and allocations were spent by the beneficiaries and when those tranches of grants and allocations were made by the Second Respondent. It is also evident that the First Respondent accessed the personal details of the beneficiaries from a source within the Second Respondent nefariously so and the Applicant's members have a reasonable apprehension that more details will be sourced from the Second Respondent whether by pressure or by nefarious means and it is

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upon that apprehension that a final interdict must be granted in favour of the Applicant's members.

30. The Applicant cannot obtain adequate redress in some other form of ordinary relief, therefore there are no other satisfactory remedy available. It is evident from the conduct of the First Respondent that the rights of the Applicant's members interfered with will continue unabated without following due process. This Honourable Court has a discretion to award damages in lieu of an interdict where the injuries are trivial and occasional or where the Applicant has shown that it only wants money or in vexatious and oppressive cases and lastly where the Applicant has so conducted itself to render it unjust to give it more than pecuniary relief. However, in this matter before this Honourable Court, the injury suffered by the Applicant is not trivial but real and has long lasting damage to the privacy of personal information, trampling of its enshrined rights as per the Act and Regulations, reputational damage to the image of the beneficiaries. Pecuniary loss is not alleged by the beneficiaries as yet and it would be difficult for the Honourable Court to assess and compute the exact damage if an award of damages was an alternative relief.

31. The action for damages will be needlessly expensive and time-consuming and therefore the Applicant does not have any alternative relief except to approach this Honourable Court for a final interdict on an urgent basis. I submit with respect that all the (3) three requisites to satisfy the granting of a final interdict have been satisfied by the Applicant in this matter, and I pray for the orders as per the Notice of Motion of which this Founding Affidavit is attached to.


DEPONENT

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Office 310, 353
Cnr Acordia & Festival Str
Hatfield
Pretoria
0002

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EXTRACT OF THE MINUTES OF THE MEETING OF THE UNITED CIVIL SOCIETY IN ACTION HELD ON 5 JUNE 2020

RESOLVED

1. The Society shall forthwith institute legal action against both Ground Up and National Lotteries Commission for the publication of the personal details of the Commission's beneficiaries.
2. In so doing, the Society hereby nominates Siyabulela Jentile as chairperson, whose powers include but are not limited to:
 - 2.1. Signing and executing all documents necessary relating to the matter,
 - 2.2. Appointing Popela Maake Attorneys, situated at 171 Columbine Avenue, Mondeor, Johannesburg with power of substitution to be our lawful agent;
 - 2.3. Doing all that is necessary to finalize the above matter, and in doing so, we confirm that this power is irrevocable.
 - 2.4. Suing and defending any action in any court of law or wherever may be necessary and generally for effecting the purposes aforesaid, to do or cause to be done whatsoever shall be requisite, as fully and effectually, for all intents and purposes, as the Society might or could do if personally present and acting herein - hereby ratifying, allowing and confirming and promising and agreeing to



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Office 310, 353
Cnr Acordia & Festival Strt
Hatfield
Pretoria
0002

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ratify, allow and confirm all and whatsoever the chairperson shall lawfully do, or
cause to be done by virtue of these powers.

[Handwritten signature]

SIYABULELA JENTILE - Chairperson

[Handwritten signature]

KENNETH THLAKA - Secretary

[Handwritten signature]

TEBOGO SITHATHU - Treasurer

[Handwritten signature]

THEMBA MASANGO - Dep Secretary



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UNITED
CIVIL SOCIETY IN ACTION

CONSTITUTION

1. Name

1.1 The voluntary organisation hereby constituted will be called **UNITED CIVIL SOCIETY IN ACTION**

1.2 Its shortened name will be **UCSA** (hereinafter referred to as the voluntary organisation).

1.3 Body corporate

The voluntary organisation shall:

- Exist in its own right, separately from its members.
- Continue to exist even when its membership changes and there are different office bearers.
- Be able to own property and other possessions.
- Be able to sue and be sued in its own name.

2. Objectives

The organisation's objectives are to:

- To advocate for the interest of the civil society structures in South Africa.
- To build capacity of the civil society organizations that implement social development programs in the previously disadvantaged communities.
- To raise funds and mobilize resources for effective implementation of poverty eradication, social development and skills development projects.
- To facilitate support and development of women and youth, through potential enhancing programs.
- To empower the civil society organizations to understand the power they possess through the constitution of the republic.
- Ensuring the country has civil leadership that speaks truth into power.

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3. Income and property

- 3.1 The organisation will keep a record of everything it owns.
- 3.2 The organisation may not give any of its money or property to its members or office bearers. The only time it can do this is when it pays for work that a member or office bearer has done for the organisation. The payment must be a reasonable amount for the work that has been done.
- 3.3 A member of the organisation can only get money back from the organisation for expenses that she or he has paid for or on behalf of the organisation.
- 3.4 Members or office bearers of the organisation do not have rights over things that belong to the organisation.

4. Management

- 4.1 A management committee will manage the voluntary organisation. The management committee will be made up of not less than 4 persons. They are the office bearers of the organisation;
1. Chairperson
 2. Secretary
 3. Treasurer
 4. Deputy Secretary
- 4.2 Office bearers will serve for 5 years, but they can stand for re-election for another term in office after that. Depending on what kind of services they give to the voluntary organisation, they can stand for re-election into office again and again. This is so long as their services are needed and they are ready to give their services.
- 4.3 If a member of the management committee does not attend three management committee meetings in a row, without having applied for and obtaining leave of absence from the management committee, then the management committee will find a new member to take that person's place.
- 4.4 The management committee will meet at least four times a month. More than half of members need to be at the meeting to make decisions that are allowed to be carried forward. This constitutes a quorum.

- 4.5 Minutes will be taken at every meeting to record the management committee's decisions. The minutes of each meeting will be given to management committee members at least two weeks before the next meeting. The minutes shall be confirmed as a true record of proceedings, by the next meeting of the management committee, and shall thereafter be signed by the chairperson.
- 4.6 The organisation has the right to form sub-committees. The decisions that sub-committees take must be given to the management committee. The management committee must decide whether to agree to them or not at its next meeting. This meeting should take place soon after the sub-committee's meeting. By agreeing to decisions the management committee ratifies them.
- 4.7 All members of the organisation have to abide by decisions that are taken by the management committee.

5. Powers of the voluntary organization

The management committee may take on the power and authority that it believes it needs to be able to achieve the objectives that are stated in point number 2 of this constitution. Its activities must abide by the law.

- 5.1 The management committee has the power and authority to raise funds or to invite and receive contributions.
- 5.2 The management committee does, however, have the power to buy, hire or exchange for any property that it needs to achieve its objectives.
- 5.3 The management committee has the right to make by-laws for proper management, including procedure for application, approval and termination of membership.
- 5.4 Organisations will decide on the powers and functions of office bearers.

6. Meetings and procedures of the committee

- 6.1 The management committee must hold at least four ordinary meetings each year.
- 6.2 The chairperson, or two members of the committee, can call a special meeting if they want to. But they must let the other management committee members know the date of

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the proposed meeting not less than 21 days before it is due to take place. They must also tell the other members of the committee which issues will be discussed at the meeting. If, however, one of the matters to be discussed is to appoint a new management committee member, then those calling the meeting must give the other committee members not less than 30 days' notice.

- 6.3 The chairperson shall act as the chairperson of the management committee. If the chairperson does not attend a meeting, then members of the committee who are present choose which one of them will chair that meeting. This must be done before the meeting starts.
- 6.4 There shall be a quorum whenever such a meeting is held.
- 6.5 When necessary, the management committee will vote on issues. If the votes are equal on an issue, then the chairperson has either a second or a deciding vote.
- 6.6 Minutes of all meetings must be kept safely and always be on hand for members to consult.
- 6.7 If the management committee thinks it is necessary, then it can decide to set up one or more sub-committees. It may decide to do this to get some work done quickly. Or it may want a sub-committee to do an inquiry, for example. There must be at least three people on a sub-committee. The sub-committee must report back to the management committee on its activities. It should do this regularly.

7. Annual general meetings

The annual general meeting must be held once every year, within a period of four months after the voluntary organisation's financial year.

The voluntary organisation should deal with the following business, amongst others, at its annual general meeting:

- Agree to the items to be discussed on the agenda.
- Write down who is there and who has sent apologies because they cannot attend.
- Read and confirm the previous meeting's minutes with matters arising. Chairperson's report.

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- Treasurer's report.
- Changes to the constitution that members may want to make.

8. Finance

- 8.1 An accounting officer shall be appointed at the annual general meeting. His or her duty is to check on the finances of the voluntary organisation.
- 8.2 The treasurer's job is to control the day to day finances of the organisation. The treasurer shall arrange for all funds to be put into a bank account in the name of the organisation. The treasurer must also keep proper records of all the finances.
- 8.3 Whenever funds are taken out of the bank account, the chairperson and at least one other members of the organisation must sign or release the withdrawal or cheque.
- 8.4 The financial year of the organisation ends on the last day of 31 May of each year
- 8.5 The organisation's accounting records and reports must be ready and handed to the Director of Non-profit Organisations within six months after the financial year end.
- 8.6 If the organisation has funds that can be invested, the funds may only be invested with registered financial institutions such as banks.

9. Changes to the constitution

- 9.1 The constitution can be changed by a resolution. The resolution has to be agreed upon and passed by not less than two thirds of the members of the management committee who are at the annual general meeting or special general meeting. Members must vote at this meeting to change the constitution.
- 9.2 Two thirds of the members shall be present at a meeting ("the quorum") before a decision to change the constitution is taken. Any annual general meeting may vote upon such a motion, if the details of the changes are set out in the notice referred to in 6.3
- 9.3 A written notice must go out not less than fourteen (14) days before the meeting at which the changes to the constitution are going to be proposed. The notice must indicate the proposed changes to the constitution that will be discussed at the meeting.

9.4 No amendments may be made which would have the effect of making the organisation cease to exist.

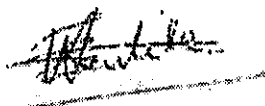
10. Dissolution/Winding-up

10.1 The voluntary organisation may close down if at least two-thirds of the members of the management committee present and voting at a meeting convened for the purpose of considering such matter, are in favour of closing down.


10.2 When the voluntary organisation closes down it has to pay off all its debts. After doing this, if there is property or money left over it should not be paid or given to members of the organisation. It must be distributed to another non-profit organisation that has similar objectives. The organisation's management committee must decide what organisation this should be.

This constitution was approved and accepted by the members of the voluntary organization's management committee, at a special meeting held on 05 February 2020, in Midrand - Gauteng

Chairperson



Secretary



"53"



POPELA MAAKE
INCORPORATED

Registration Number: 2010/013331/21
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DATE: 02 March 2020	OUR REF: REF: 244/PCM1042020	YOUR REF:
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The Chairperson of the National Lotteries Commission Board
Professor Ntshengedzeni Alfred Nevhutanda
Per E-mail: nwabisa@nlcaa.org.za

RE: CIVIL SOCIETY CONCERNS WITH PROTECTION OF NLC BENEFICIARIES' INFORMATION

We refer to above matter.

We confirm that we act on behalf of the United Civil Society in Action, our client in above matter and at whose specific instance and request we direct this correspondence to you.

Our client is a lobby group campaign representing various Non-Governmental Organisations in South Africa inclusive of #NotinMyName, SANGOCO, Independent Beneficiaries Forum and SANGONeT.

Attorneys/Conveyancers/Notaries/Administrators of Estates & Labour Law Practitioners
Director: Popela Coffet Maake (LLB/LLM UniLim)
Polokwane Branch: 152A Marshall Street, 0700. Tel: 015 295 7682, 015 291 3593, Fax 015 291 3848

Though Heavens Might Fall- We ensure that Justice Prevails

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It is our instructions that continuous media reporting has been heightened about alleged widespread corrupt activities, nepotism and mismanagement within the National Lotteries Commission over the past months, and our client has been in the forefront calling for engagement on the matter through several communiqués written to your office with no response.

It is further our client's instructions that these media reporting has called on the National Lotteries Commission to disclose the full details of the beneficiaries' personal information into the public domain to show transparency and accountability. As already indicated, our client stands for accountability and transparency but not at the expense of infringing on our client's rights to privacy as enshrined in the Constitution of the Republic of South Africa.

The National Lotteries Commission is constituted by the Lotteries Act 57 of 1997 and is under the authority of the board. In terms of Section 67 of this Act, it is provided that:

"(1) Subject to the Constitution, any legislation which may be enacted in pursuance of sections 32(2) or 33(3) of the Constitution or any other relevant law, no person, including the Minister, a member or employee of the board or the Department, or a former member or employee of the board or the Department, may-

(a) In any way disclose any information submitted by any person in connection with any application for any license, certificate or appointment under this Act; or

(b) Publish any information obtained in contravention of paragraph (a), unless ordered to do so by a court of law or unless the person who made such application consents thereto in writing.

(c) Any person who contravenes subsection (1) shall be guilty of an offence".

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Our client has learnt that the Office of the Minister of Trade and Industry has been pressured to put the National Lotteries Commission under administration in the event where the National Lotteries Commission does not disclose publicly the full details of its beneficiaries including the value of the grant received by them. Any publication of our client's personal information will be in contravention of this Act and our client is prepared to invoke it to protect its personal information.

It must be noted that our client and its constituent members welcome and supports all the efforts to root out corrupt activities including within the National Lotteries Commission if any, but until such time that these allegations are proven to be authentic through a properly constituted investigation by either the Office of the Minister of Trade and Industry or the Board of the National Lotteries Commission, our client maintains that due process and the rule of law should be adhered to at all times, whereas nefarious methods must not be entertained at all costs. Our client has taken a stern stance against this; hence they will be marching to the Office of the Minister of Trade and Industry this coming Thursday the 05th March 2020 to hand over a memorandum at 11h00am.

The personal information of our client is protected by the Protection of Personal Information Act 4 of 2013, and the National Lotteries Commission nor the Minister of Economic Development, Trade and Industry have to comply with the requisite of this Act in full in order to render the personal information of our client to be in the public interest for it to be disclosed publicly and only after following the prescribed procedure as per the Act, which unfortunately have not been followed.

It is therefore our instructions that in terms of the Lotteries Act 57 of 1997 as amended as well as the Protection of Personal Information Act 4 of 2013, that prescribed procedures to publicly disclose our client's personal information have not

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404 Kriasant Street
Silverton
0184
012 516 0250

MEMORANDUM OF DEMANDS

FROM: UNITED CIVIL SOCIETY IN ACTION

404 Kriasant Street
Silverton, 0184
012 516 0250
011 483 4935

TO: MINISTER OF TRADE AND INDUSTRY --

Honorable Ebrahim Patel
77 Meintjies Street
Sunnyside, Takwane

DATE: 05 MARCH 2020

1. We, members of the UNITED CIVIL SOCIETY IN ACTION, a lobby movement formed by various Civil Society and Non-profit Organizations as well as structures that focus on sustainable positive change in the lives of previously disadvantaged people;

initiated by the Southern Africa National NGO Coalition (SANGOCO); Southern Africa Non-Governmental Organizations Network (SANGONeT); the Independent Beneficiaries Forum (IBF) and NoInMyName Campaign - further involved the Ekurhuleni Civil Society Forum and the NGO Workers Union of South Africa;-

- a counter-vailing force to those who are intent on undermining our civil liberties and constitution;
- involved in mobilizing sectors, organizations and individuals to fight any form of social injustice, corruption and the erosion of our democracy, and to restore pride and dignity in our people;

2. We have had to leave our work obligations in the society because it has become clear to us that we need to constantly remind you of your legal and constitutional obligations.

3. Having observed media publications;

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- a. continuous media reporting about alleged widespread corrupt activities, nepotism and mismanagement within the National Lotteries Commission over the past few months;
 - b. pressure upon the National Lotteries Commission to release and publicize the full details of the beneficiaries on its database; and
 - c. demands for the Minister of Trade and Industry to dismiss the NLC board and put the commission under administration;
4. While we, and our constituent members welcome and support all the efforts to root out corrupt activities, we maintain that due process and the rule of law should be adhered to at all times whereas nefarious methods must not be entertained at all.
5. We, therefore, have been in the forefront calling for engagement on the matter through several communiques written to the office of the Minister of Trade and Industry, with no response,

We are, herewith, presenting our concerns and demands for caution towards the following factors;

- i. The National Lotteries Commission is constituted by the Lotteries Act 57 of 1997 and is under the authority of the board. In terms of Section 67 of this Act, it is provided that:
 - ii. " (1) Subject to the Constitution, any legislation which may be enacted in pursuance of sections 32(2) or 33(3) of the Constitution or any other relevant law, no person, including the Minister, a member or employee of the board or the Department, or a former member or employee of the board or the Department, may-
 - iii. (a) In any way disclose any information submitted by any person in connection with any application for any license, certificate or appointment under this Act; or
 - iv. (b) Publish any information obtained in contravention of paragraph (a), unless ordered to do so by a court of law or unless the person who made such application consents thereto in writing.
 - v. (c) Any person who contravenes subsection (1) shall be guilty of an offence".

6. We wish to highlight our principle standpoint that publicizing the information of NLC beneficiaries is against the above-mentioned clauses of the law, and therefore, illegal. Any publication of our personal and/or organizational information will be in contravention of this Act and we are prepared to invoke it to protect personal information.
7. Our personal information is protected by this Act, and the National Lotteries Commission and the Minister of Trade and Industry have to comply with the requisite of this Act in full, that for private information to be disclosed publicly should be done so only after following the prescribed procedure as per the Act, which unfortunately have not been followed.
8. Our further concern is the impact to the civil society, which will be as a result of dismissal of the commission's board and commission being under Administration; that:
 - a. Operations of the commission are bound to be disrupted, if not suspended;
 - b. Beneficiaries of the commission's funding being negatively affected through lack of funding, thus disruptions in civil society's developmental activities; in retrospect, levels of poverty increasing with needed services not delivered; and
 - c. NGOs and NPOs workers eventually go without sustenance for ground work so desperately needed by the poor and marginalized communities.
9. Therefore, we demand;
- 8. That the minister refrain from publishing the information of the civil society to the public;

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been followed, and/or that consent has not been given by our client to have its personal information disclosed to the public.

We caution against the National Lotteries Commission disclosing our client's personal information to the public until such time that our client has been engaged meaningfully by the Commission and/or that proper prescribed procedures to disclose have been followed to the letter by such individuals or media houses, failing which we hold instructions to institute legal proceedings against the Commission to safeguard our client's constitutional rights.

Our client's rights are reserved, and we hope that above is in order.

Yours Faithfully,

PC MAAKE

electronically transmitted

PEPELA MAAKE ATTORNEYS

Attorneys/Conveyancers/Notaries/Administrators of Estates & Labour Law Practitioners
Director: Popela Coffat Maake (LLB/LLM Unilim)
Polokwane Branch: 152A Marshall Street, 0700. Tel: 015 295 7882, 015 291 3593, Fax: 015 291 3848

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- b. The minister follow due process regarding corruption allegations, and neither suspend the board of the commission nor put the commission under administration; and duly provide assurance to the civil society;
- c. That the minister be considerate of the plight of the disadvantaged societies of our country, without being pressurised by the politics of the Democratic Alliance;

- 10. Failing which, the civil society, hence represented, is prepared to take a legal route.
- 11. While we understand that the Act gave the minister to appoint distributing agencies, we, however, feel that these agencies are not fully representative of all races, thus;
 - a. Request the minister to provide civil society with the guidelines for appointing distributing agencies.

In relation to the National Lotteries Commission:

- 12. We demand the minister to assist civil society in amending the Act to be favourable regarding;
 - a. Funding threshold for the commission's beneficiary applicants be favourable to previously disadvantaged communities (being the small-scale funding), in that the small-scale seems to be designed for black organizations, does not promote growth and sustainability of small projects and/or civil society organizations;
 - b. Short term funding, followed by the twelve (12) months' break before organizations could apply for subsequent funding, kills organizations and does not promote momentum of projects' impact and growth

- 13. It is our sincere hope that this matter is addressed through amicable means, and that no negative effect hampers the work of the civil society.
- 14. NB. The Minister needs to note that after twenty-one (21) days of no positive action towards these demands, the civil society shall be continuing to seek legal action.

Issued by UNITED CIVIL SOCIETY IN ACTION:

Name: _____ Date: _____

Signature: _____

Name: _____ Date: _____

Signature: _____

Name: _____ Date: _____

Signature: _____
Name: _____ Date: _____

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Signature: _____

Received on behalf of the office of the Minister of Trade and Industry:

Name: _____ Date: _____

Signature _____

1 | Page Civil Society Memorandum of Demands

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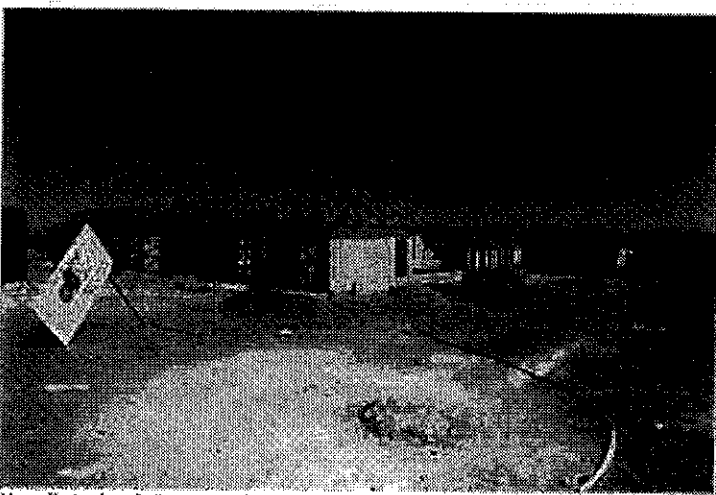
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Lottery throws millions more at dodgy projects

25 May 2020 By Raymond Joseph (/author/341/) and Anton van Zyl (/author/416/)

The National Lotteries Commission has refused to disclose its beneficiaries. But we found them



/media/uploads/images/photographers/anton_van_zyl/malla_01d_age1.jpg

Malla Village elderly care home in Limpopo photographed late last year. Nothing much has happened since then. Photo: Anton van Zyl

The National Lotteries Commission paid out millions of rands more in grants to organisations already involved in questionable, unfinished Lottery-funded projects. This is revealed in a leaked list of payments made from April to December 2019.

In several cases the projects have ground to a halt because they have run out of money and the service providers, many of them small businesses, have struggled to be paid.

GroundUp has scrutinised the leaked list of payments made to organisations. We found payments to non-profits involved in projects that we have previously exposed as being dodgy, as part of our ongoing reporting (<https://www.groundup.org.za/topic/lotto/>) on misadministration, nepotism and corruption involving Lottery funding.

Several of these projects are included in an "independent investigation (<https://citizen.co.za/news/south-africa/investigation/2237014/lotteries-commission-appoints-investigator-to-look-into-its-own-alleged-corruption/>)" by auditors Sekela Xabiso "into allegations of improper use of funds intended for good causes" according to a document (https://drive.google.com/file/d/1M_L8ixesV0bYXgAmaMN1xb2d9CaLB85/view?usp=sharing) submitted to Parliament's Portfolio Committee on Trade and Industry.

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It is not known whether any of these organisations received additional funding in the 2018/19 financial year because the NLC has refused (<https://www.groundup.org.za/article/national-lotteries-commission-refuses-release-list-beneficiaries/>) to publish a list of Lottery-funded grantees for that period, something it had done for the previous 18 years when it first began funding "good causes".

I'm late with rent. Can the landlord attach my vehicle? (/qanda/241/)

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Organisation	Date	Amount
Nunnovation	17 September 2019	R4.2 million
Zibellunon	4 April 2019	R9 million
Dinoyya	4 April 2019	R8 million
Kuruman elderly care home	23 May 2019	R3.8 million
Manapyanne elderly care home (Mafeni Community Centre)	23 May 2019	R3.8 million
Mushume Ushwya Zwanda	29 May 2019	R9 million
WAR_RnA	29 May 2019	R2.5 million
SA Youth Movement (1)	29 May 2019	R2.9 million
SA Youth Movement (2)	29 May 2019	R3.6 million
Tswanda (1)	30 August 2019	R570,000
Tswanda (2)	12 November 2019	R100,000
Abrine	21 May 2018	R780,000
Mevu	29 August 2018	R2 million

This is only the list of payments mentioned in this story that have not been previously disclosed. The full list for April to December 2019 contains many hundreds of payments, including very large ones that we will be investigating in due course. (Amounts are rounded and listed in the order they are mentioned in this article.)

Among the projects that were paid money in the 2019/2020 financial year (which ended on 31 March 2020) are:

Nunnovation

Nunnovation Africa Foundation (<https://www.nunnafricafoundation.org/>), a Gauteng-based NPO, received a grant of R23,720,000 on 13 July 2017 to develop a boxing arena (<https://web.archive.org/save/https://nlcgrantfundersportal.wordpress.com/2019/10/28/national-lotteries-commission-brings-boxing-facility-to-the-community-of-stormsriver-in-the-eastern-cape/>) In the tiny Eastern Cape hamlet of Storms River. Nunnovation, which has a core focus on innovation, has no experience in managing construction projects,

Almost two-and-a-half years later a GroundUp Investigation late last year revealed (<https://www.groundup.org.za/article/lottery-and-mystery-multi-million-rand-boxing-arena/>) that the "boxing arena" had morphed into a still-under-construction "multi-purpose community centre". Work was continuing on the interior of the building but was halted after the nationwide Covid-19 lockdown was imposed, according to a source in Storms River.

Nunnovation still says on its website (<https://drive.google.com/file/d/1RxlCoaFE-ypa8G7ovdeM6l-MPVwD6QJH/view?usp=sharing>) that it has "partnered" with the NLC "to build a boxing arena" that would be run by Boxing South Africa (BSA). The NLC also still describes the project as a "boxing facility" (<https://web.archive.org/web/20200521102709/https://nlcgrantfundersportal.wordpress.com/2019/10/28/national-lotteries-commission-brings-boxing-facility-to-the-community-of-stormsriver-in-the-eastern-cape/>). But BSA has told the Daily Dispatch

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(<https://www.pressreader.com/south-africa/daily-dispatch/20191026/281505048005792>) that it knew nothing about the project.

Details of the cost of the project are also shrouded in secrecy, Pumalelo Kate, the municipal manager of Koukamma Municipality, under which Storms River falls, previously told GroundUp.

"We have tried to get a figure relating to this project but unfortunately the Implementers were not prepared to share this information, except that the budget was R14,500,000," Kate said in a WhatsApp response to questions at the time. "We do not know anything about R23.7 million. I also cannot tell you about the value of the work on the ground. My understanding is that the multi-purpose community centre will be equipped and furnished."

Khaya Lukwe, the owner of Khaya Construction, the main contractor, said he had charged R8 million for building the hall but had abandoned the project over "payment issues".

Despite this, NLC paid Nunnovation an additional R4,165,555.61 on 17 September 2019, bringing the total of Lottery money used for building a large hall to almost R28 million.

Dinosys and Zibsifusion

These two projects - which have sequential NLC project numbers but were effectively run as a single project - were granted a total of R20 million late in 2018 to replace pit toilets with Enviro Loo toilet systems at schools in Limpopo and the Eastern Cape.

Both companies are linked to controversial Pretoria lawyer Lesley Ramulifho (<https://www.groundup.org.za/article/lawyer-lottery-and-millions-dodgy-grants/>) who GroundUp has revealed (<https://www.groundup.org.za/article/how-lawyer-used-lottery-funded-project-his-personal-atm/>) used Lottery funding as his personal ATM, including paying for a luxury home (<https://www.groundup.org.za/article/how-buy-your-dream-house-using-public-money/>) in a "country estate" in Pretoria.

The National Lotteries Commission paid a first tranche of R7 million to Zibsifusion for toilets at Limpopo schools on 21 November 2018. Although a GroundUp report (<https://www.groundup.org.za/article/lottery-gives-out-more-money-associates-controversial-lawyer/>) published on 19 March 2019 raised red flags about the project, the leaked payments list reveals that Zibsifusion was nevertheless paid a further R3 million just a few weeks later, on 4 April 2019. Later reports (<https://www.groundup.org.za/article/zibsifusion-case-study-lottery-corruption/>) by Groundup indicate that prior to the April payment, very little progress had been made in delivering the toilets.

Although the exact payment date of the first tranche of R7 million to Dinosys, which was awarded the East London project, is not known, it was almost certainly around the same time as the first Zibsifusion payment. The second payment of R3 million was also made on 4 April 2019, two weeks after GroundUp had reported (<https://www.groundup.org.za/article/lottery-gives-out-more-money-associates-controversial-lawyer/>) that the company did not exist at the East London address it had supplied with its application for funding.

An analysis of the toilets projects, based on our own reporting, leaked bank statements, and a damning report (<https://www.ota.co.za/web/content/37200>) by OUTA, later revealed how the toilet projects are mired in corruption (<https://www.groundup.org.za/article/zibsifusion-case-study-lottery->

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The OUTA report, based on site visits to the Limpopo schools, called the toilets project a "disaster". The report was issued in November 2019, the same month the NLC paid the second tranche to Zibsifusion.

Old aged homes

The NLC has funded six old age homes in rural areas to the tune of tens of millions of rands. During the course of our investigation, GroundUp has revealed several examples which, almost three years later, are still under construction. They include one in Marapyane (<https://www.groundup.org.za/article/mystery-limpopo-outfit-gets-multi-million-lottery-contract-old-age-home-mpumalanga/>) — the home village of NLC COO Phillemon Letwaba — in Mpumalanga, and one in Kuruman (<https://www.groundup.org.za/article/kurumans-unfinished-r23-million-old-age-home/>) in the Northern Cape. Each received a payment of R20 million in October 2017.

Despite receiving multi million-rand grants, construction had ground to a halt at both sites, with sources saying the reason was that they had run out of money. The Kuruman project received a second tranche of R3,825,053.16 on 23 May 2019. The old age home in Marapyane received an additional R3,751,025.15 on the same day.

Mushumo Ushavha Zwanda, an NPC based in Soshanguve, Pretoria, with no obvious track record, also received a grant of R20 million in October 2017 to build an old age home at Maila village in rural Limpopo.

When a reporter visited the site in November 2019, more than two years later, he found only partly built structures with roof trusses, but no roof tiles or anything else protecting the buildings from the elements. There were also piles of building rubble where shoddily built structures had been demolished. There were no signs of active construction on the site and sources said contractors had downed tools as they had not been paid.

Despite the obvious lack of progress, an additional tranche of almost R3 million more was paid to Mushumo Ushavha Zwanda on 23 May 2019.

In January, NLC spokesperson, Ndivhuho Mafela, said: "The delay was caused by contractual matters between the funded NPO and its contractors." Mafela said that the NLC had appointed engineers together with the main contractor. A site visit was scheduled for 21 January 2020 to "discuss the technical issues and resumption date for construction. The NLC engineers will then advise on the revised schedule". He was unable to give an anticipated date of completion.

Mafela ignored specific questions about whether any further payments were made to the beneficiary, in light of the fact that the project is not even close to 50% completion.

Another grant of R20 million to develop an old age home in North West Province was paid to NPO WAR_RnA (https://www.facebook.com/pg/WAR_RnA-745769362149636/about/?ref=page_internal) (War Against Rape and Abuse) on 5 October 2017. It was an odd choice, since the organisation's constitution states that WAR_RnA is focused on combating sexual and domestic abuse, exposing "current sexual and domestic criminals", assisting "victims and survivors", and helping "mentor males against sexual and domestic crimes."

There is no indication that it has experience working with the aged or being involved in major infrastructure projects. The organisation was paid another R2.5 million on 23 May 2019.

Additional payments of just over R3.9 million and R3.6 million were made on 23 May 2019 to the SA Youth Movement - which had already received R20

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The sixth old age home is in KwaZulu-Natal, for which Ubusu NPC was paid R20 million on 5 October 2017 to develop. It did not receive any additional payments in 2019.

Plans by GroundUp to visit the North West, Free State and KZN old age homes in March were called off because of the nationwide Covid-19 lockdown.

Tawanda Productions

Tawanda Productions was named in a 2014 report (<https://www.groundup.org.za/article/lottery-was-warned-2014-about-fraud-and-yet-it-continued/>) which found "major irregularities" in Lottery funding applications it had submitted, and also on behalf of other non-profits. Despite this, Tawanda subsequently received grants of R2.7 million in 2017 and a further R570,000 and R100,000 in 2019.

The 2014 report revealed how Tawanda had applied for R25.4 million and R17.9 million for projects, of which R12.4 million and R10 million had already been allocated. A third application of R15.9 million has yet to be adjudicated. The report called for the allocated grants to be cancelled and the third not to be considered because of "major irregularities".

Tawanda also applied for R28.3 million and R7.9 million on behalf of other organisations, which were yet to be considered. Again, "major irregularities" were uncovered and the report recommended that they not be considered for funding.

Sanctuary Drug Rehabilitation Centre

Despite receiving grants totalling R17 million for the Sanctuary Drug Rehabilitation Centre in Kuruman, Northern Cape, construction (<https://www.groundup.org.za/article/lottery-funded-rehab-centre-unfinished-two-years-later/>) had ground to a halt over non-payment issues when GroundUp visited the site in August 2019.

The first tranche of R7.5 million was paid on an unspecified date in 2017 to Abrina 3641, a Kimberley-based non-profit company, according to the NLC's annual report for that year. A second tranche of R7.5 million was paid to Abrina on 8 January 2018. A further R2 million was also paid, but it is unclear when that payment was made.

A further R764,750 was paid to Abrina on 21 May 2019, about three months before the GroundUp visit that found half-finished buildings and no sign of building activity. A Lottery-branded sign at the site indicated that the building contractor was a company based in Limpopo.

The stadium of dreams

The NLC's Limpopo manager Matsobane Legodi announced (<https://www.limpomirror.co.za/articles/news/48237/2018-09-17/mbulaheni-stadium-slowly-gathers-momentum>) that an athletics stadium would be built at Muduluni, a small and remote village in Limpopo, to the south of the Soutpansberg mountain range, at a sod-turning ceremony in January 2018. The stadium would honour the late Olympic silver medalist Mbuliseni Mulaudzi, he said.

The ceremony was held about six months after the NLC had awarded R15.9 million to Mavu Sport Development, an NPO with no apparent experience in infrastructure projects. Mavu's stated vision is to promote grassroots sport. Part of its mission is to create support systems for emerging elite athletes.

The amount seemed not nearly enough to construct a stadium, but Legodi promised during the ceremony that the stadium would be completed by the

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Mavu has previously received Lottery funding for two other projects, although it is not known what they involved.

In the 2015/2016 financial year it received payments of R3 million and R2.8 million for projects. The next year, Mavu received another R1.9 million.

Almost four years later, on 23 August 2019, Mavu received a further R2 million, linked to a project dating back to 2015/16. This, coincidentally, was during a period when work at the athletics stadium had virtually ground to a halt.

Mavu has received over R26.6 million in Lottery funding between 2015 and 2019.

Former South African Football Association President Kirsten Nematandani serves on Mavu's board and is also its spokesperson.

Asked late in 2018 about the unrealistic completion date for the stadium, he agreed the deadline would not be met. He also said that R15.9 million was not enough to build the entire facility.

Nematandani said that the budget had been revised and R11 million was earmarked for an athletics track and soccer field. Basketball, netball, tennis and volleyball fields would cost R605,000, while R350,000 has been budgeted to fence off the facility.

By the end of 2019 very little of the stadium had materialised. A visit to the site in December 2019 revealed that only one multi-purpose court had been completed. As for the rest of the project, only unfinished groundwork was visible.

"The construction work started on 1 April [2019] and [the stadium] was supposed to be completed by end October, but due to challenges such as rain it could not be completed," Israel Ramambila, the project's liaison officer said recently. He added that they had asked the NLC for an extension to complete the first phase. "[It is] sitting at 70% completion," he said.

The stadium will have an eight-lane synthetic track surrounding a grass field that will cater for sports such as rugby and soccer, Ramambila said in a WhatsApp message. Another track, adjacent to the one currently in progress, is planned and three more multipurpose courts would be built to cater for tennis, volleyball, basketball and netball.

Mavu applied for additional funding from the NLC, but its request was rejected. The NPO also tried to get additional funding from the Makhado Municipality and the Department of Sports and Recreation, but when GroundUp visited the site in December 2019, no mention was made of any additional funding being received.

In March this year, shortly before the Covid-19 lockdown, Ramambila said that the concrete work on the athletic track as well as the preparation of the playground had been completed.

"But we are unable to plant grass nor rubberise the concrete track due to the delay on delivery of the fencing," he said.

NLC responds

Responding to detailed questions about additional payments to specific unfinished projects that had already received tens of millions, NLC spokesperson Ndivhuho Mafela responded with a general response (https://drive.google.com/file/d/1GDxsucA0FTwUR0_HQm16b-z8SMkK8T6F/view?usp=sharing). He also failed to respond directly to a

question about whether infrastructure projects that are still incomplete several years after receiving funding would benefit from the NLC's Covid-19 fund.

The NLC "used to fund organisations for infrastructure, who in turn implement projects on their own without any technical support," he said.

"Through a process of continuous improvement, the NLC identified a need to appoint a panel of professional engineers to assist in ensuring that infrastructure projects are implemented in line with relevant standards and norms." Qualified engineers were then appointed to assist, he said.

The NLC has identified "some of the major factors" resulting in delays and cost escalations for infrastructure projects. These include:

- "The geographical location of the site: the soil condition might not be conducive for the project";
- "Lack of required construction material locally";
- "Contractual disputes between the funded organisation and its contractors";
- Civil unrest, and;
- Natural disasters.

"The cost escalation leads to requests for variation or additional funding to complete the projects," Mafela said.

"In line with NLC processes, all requests for variation are submitted to NLC engineers for evaluation and recommendation for approval. Once [a] request for additional funding is approved, the engineers will continue to monitor and report on the implementation of the project."

Correction made after publication: Khaya Lukwe was not paid R8 million but he charged that amount.

Dodgy projects stand to benefit from NLC's Covid-19 bailout fund

The NLC, which earlier donated R50 million to the Solidarity Fund (<https://www.solidarityfund.co.za/>) has also established a Covid-19 Relief Fund (https://drive.google.com/file/d/1PN5SjLz45L_o6kRhRZdqjEcY33j0qE3M/view?usp=sharing) that will make an additional R150 million as "a further relief measure to NGOs/NPOs and NPC's struggling to stay afloat during this time". But organisations that qualify for this fund must have been funded by the NLC in the past two years or in the past five years in the case of projects that have been funded for "infrastructure projects".


This backdating means several highly questionable projects, where millions of rands have gone astray, qualify to benefit from this fund. The time period would include projects that have received money for dodgy multi-million-rand infrastructural projects that include old age homes, drug rehabilitation centres, educational and sports facilities, and toilets at rural schools.

This was pointed out in a statement (<https://www.da.org.za/2020/05/da-calls-on-nlc-to-exclude-alleged-corrupt-beneficiaries-from-covid-19-fund>) by Democratic Alliance MP Mathew Cuthbert, who said: "This poses several concerns as a number of these 'qualifying' organisations have been involved in alleged mismanagement of funds meant to deliver recreational, elder care, educational and sports facilities."

He said that the DA would not allow "footers ... [to] be given a free pass", and called on the NLC to bar NPOs and NGOs currently under investigation for the misappropriation of funds from receiving funding.

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GroundUp is being sued [\(/article/lottery-coo-sues-groundup-r500k/\)](#) after we exposed [\(/topic/lotto/\)](#) dodgy Lottery deals involving millions of rands. Please help fund our defence. You can support us via Givengain [\(https://www.givengain.com/cause/3569/campaigns/11273/donate/#start\)](https://www.givengain.com/cause/3569/campaigns/11273/donate/#start), Snapscan [\(https://pos.snapscan.io/qr/STB24E42\)](https://pos.snapscan.io/qr/STB24E42), EFT [\(/donate/\)](#), PayPal [\(/donate/#paypal\)](#) or PayFast [\(/donate/#payfast\)](#).

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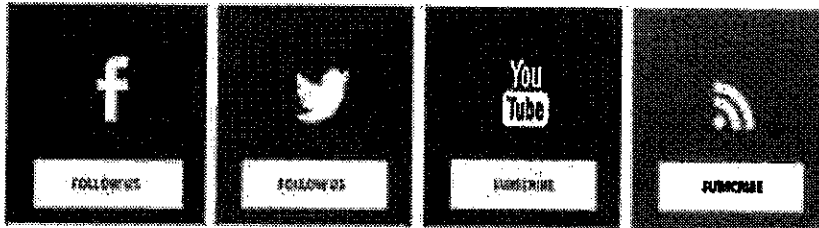
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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

**BEFORE THE HONOURABLE JUDGE
ON WEDNESDAY THE 17TH OF JUNE 2020**

Case No:

**In the matter between:
UNITED CIVIL SOCIETY
IN ACTION**

APPLICANT

And

GROUNDUP

FIRST RESPONDENT

**NATIONAL LOTTERIES
COMMISSION**

SECOND RESPONDENT

**HAVING read the documents filed of record, having heard Counsel for the Parties
and having considered the matter: -**

DRAFT ORDER

IT IS ORDERED THAT: -

- 1. Non-Compliance is condoned and the forms and service provided for in the
rules are dispensed with and allowing the matter to be heard as one of**

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urgency under Rule 6(12) of the Uniform Court Rules, and service of the court process to the Respondents to be effected by e-mail transmission;

2. Ordering the First Respondent immediately cease to publish the personal details of beneficiaries of the Second Respondent, being members of the Applicant, such details including the names of the beneficiaries, the names of the projects partook by the beneficiaries, the amount of grants and allocations distributed to the beneficiaries, the NPO and NGO registration numbers of the beneficiaries and the dates when the trenches in which these amounts of grants and allocations are paid over time from the Second Respondent;
3. Ordering the First Respondent to remove all articles about beneficiaries of the Second Respondent from all of its publications, particularly the online publication of the 25th May 2020 within (5) five days of this order;
4. Ordering the Second Respondent not to disclose the personal details of its beneficiaries including the names of the beneficiaries, the names of the projects partook by the beneficiaries, the amount of grants and allocations distributed to the beneficiaries, the NPO and NGO registration numbers of the beneficiaries and the dates when the trenches in which these amounts of grants and allocations are paid over time from the Second Respondent, to any other person subject to Regulation 8(1)(c) of the National Lotteries Act of 57 1997: Regulations Relating to Distributing Agencies issued on or about the 22nd of February 2001;

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5. Ordering the Respondents to pay the cost of this application in the event of opposition.

BY THE COURT

REGISTRAR

**ADVOCATE KHUPI RAMARUMO
JOHANNESBURG SOCIETY OF ADVOCATES
071 776 9007**

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 32127/20

In the application of:

**THE TRUSTEES FOR THE TIME BEING OF
THE MEDIA MONITORING AFRICA TRUST**

First Applicant

SOUTH AFRICAN NATIONAL EDITORS FORUM

Second Applicant

and

UNITED CIVIL SOCIETY IN ACTION

First Respondent

GROUNDUP NEWS NPC

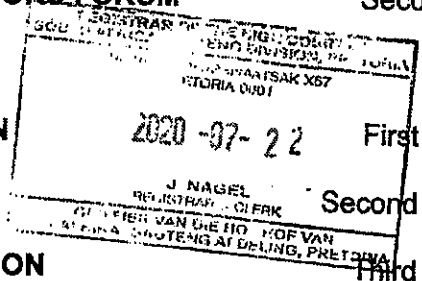
Second Respondent

NATIONAL LOTTERIES COMMISSION

Third Respondent

MINISTER OF TRADE, INDUSTRY AND COMPETITION

Fourth Respondent



NOTICE OF MOTION

TAKE NOTICE the applicants intend to apply, on the same date and time as the application brought by United Civil Society in Action against GroundUp under case number 24775/20, for an order in the following terms:

- 1 This application is consolidated with the application under case number 24775/20.
- 2 Regulation 8 of the Distributing Agencies Regulations, published in terms of section 60 of the Lotteries Act 57 of 1997 under GN R182 in GG 22092 of 22 February 2001 ("regulation 8"), is declared to be unconstitutional and invalid and is set aside.

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3 In the alternative to prayer 2:

3.1 It is declared that regulation 8 is unconstitutional and invalid to the extent that it fails to provide for a defence of publication in the public interest.

3.2 To remedy the defect, regulation 8(1)(c) is deemed to read as though it provides as follows (that is, such that the underlined words are deemed to be inserted into regulation 8(1)(c)):

"(c) publish any information obtained in contravention of paragraph (a) or (b); unless—

- (i) ordered to do so by a court of law;*
- (ii) making a bona fide confidential disclosure or publication to the Minister, the Public Protector, Parliament or a committee designated by Parliament, a member of the South African Police Service or the national prosecuting authority;*
- (iii) the juristic person who made a grant application and the board consent thereto in writing prior to that disclosure or publication; or*
- (iv) provided for in these Regulations; or*
- (v) the publication is in the public interest."*

4 In the further alternative to prayer 2, declaring that Regulation 8 does not prohibit any disclosure or publication that is in the public interest.

5 The costs of this application are to be paid by any party opposing the relief sought.

6 The applicants are granted further and/or alternative relief.

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TAKE NOTICE FURTHER that the founding affidavit of **WILLIAM BIRD**, and the confirmatory affidavit of **KATE SKINNER**, will be used in support of this application.

TAKE NOTICE FURTHER that the applicants have appointed the address of their attorneys of record described below as the address at which they will accept notice and service of all process and documents in these proceedings.

TAKE NOTICE FURTHER that if any of the respondents intends opposing the relief sought, it is required to do so in accordance with the following time periods, alternatively such time periods as directed by the Deputy Judge President in case management:

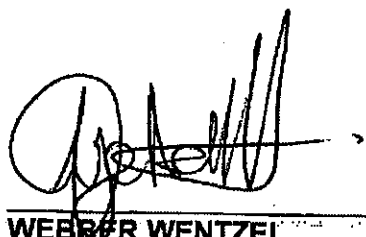
- (a) within 15 days of service of this application, file a notice of intention to oppose the relief sought in the application; and
- (b) within 15 further days to file an answering affidavit.

TAKE NOTICE FURTHER that the time-periods for the filing of papers may be amended or further determined pursuant to the directions of the Deputy Judge President in a case management process.

KINDLY ENROLL THE MATTER ACCORDINGLY.

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Dated at Pretoria on 20 July 2020.



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AND TO: MINISTER OF TRADE, INDUSTRY AND COMPETITION
 Third Floor, Block A
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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 32127/20

In the application of:

- | | |
|---|-------------------|
| THE TRUSTEES FOR THE TIME BEING OF
MEDIA MONITORING AFRICA TRUST | First Applicant |
| SOUTH AFRICAN NATIONAL EDITORS' FORUM | Second Applicant |
| and | |
| UNITED CIVIL SOCIETY IN ACTION | First Respondent |
| GROUNDUP | Second Respondent |
| NATIONAL LOTTERIES COMMISSION | Third Respondent |
| MINISTER OF TRADE AND INDUSTRY | Fourth Respondent |

FOUNDING AFFIDAVIT


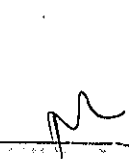
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REMEDY 42

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I, the undersigned,

WILLIAM BIRD

state under oath that:

INTRODUCTION

- 1 I am an adult male employed as the Director of the Media Monitoring Africa Trust.
- 2 I am authorised to bring this application on behalf of both applicants.
- 3 The facts to which I depose are true and correct, and, unless apparent from the context, are within my knowledge.
- 4 The submissions of law I make in this affidavit are made on the advice of the lawyers of the applicants.

THE PARTIES

- 5 The first applicant is THE TRUSTEES FOR THE TIME BEING OF THE MEDIA MONITORING AFRICA TRUST ("MMA"). MMA is an organisation which advocates for freedom of expression and supports the responsible free flow of information to the public on matters of public interest. I make this application and depose to this affidavit on behalf of MMA, having been duly authorised to do so.

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- 6 The second applicant, **SOUTH AFRICAN NATIONAL EDITORS' FORUM ("SANEF")**, is a non-profit organisation whose members are editors, senior journalists and journalism trainers from all areas of the South African media.
- 7 The first respondent, **UNITED CIVIL SOCIETY IN ACTION**, is a voluntary association with perpetual succession and authorised by its constitution to acquire, own and dispose of property apart from its members and to take or defend itself against legal action.
- 8 The second respondent, the **NATIONAL LOTTERIES COMMISSION ("Commission")**, is a juristic person established in terms of section 2 of the Lotteries Act. The Commission is the regulator of lotteries and sport pools in the country, and its board's primary responsibility is to advise the Minister and ensure that lottery and sport pools are conducted with all due propriety. The Commission is responsible for ensuring that the interests of participants in the National Lottery are protected. The Commission is also tasked with using funds generated from the lotteries and sports pools to fund worthy good causes through financial grants.
- 9 The third respondent, **GROUNDUP NEWS NPC ("GroundUp")**, is the publisher of the online news website: www.groundup.org.za. GroundUp's articles are usually available to other news publications for republication. GroundUp reports on news in the public interest.
- 10 The fourth respondent, the **MINISTER OF TRADE, INDUSTRY AND COMPETITION**, is cited in his official capacity as the member of cabinet

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responsible for the administration of the Lotteries Act, 57 of 1997 ("the Lotteries Act") and as the Minister that promulgated the Regulations in issue in this matter.

11 The applicants do not seek any relief against the first to third respondents. The applicants are aware of ongoing litigation between the first to third respondents under case number 24775/20. That is an application brought by United Civil Society in Action against GroundUp ("the United Civil Society in Action application"). The applicants seek to consolidate this application with the United Civil Society in Action application. Accordingly, the applicants have cited the first to third respondents because of their interest in the relief sought in this application.

12 The following parties have indicated their interest in being admitted as *amici curiae* in the United Civil Society in Action application. This application is accordingly served on them in the event they may have any interest they may have in the relief sought:

12.1 **CORRUPTION WATCH (NPC) RF**, a non-profit civil society organisation.

12.2 **CHILD WELFARE SOUTH AFRICA**, a statutory Child Protection NPO.

12.3 **EPILEPSY SOUTH AFRICA**, a national disability NPO serving persons with and affected by epilepsy.


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- 12.4 **SA FEDERATION OF MENTAL HEALTH**, the largest national mental health organisation in South Africa.
- 12.5 **SAVF**, which renders welfare and welfare related services.
- 12.6 **RATA SOCIAL SERVICES**, a Child Protection Organisation rendering social services to protect vulnerable children against abuse and neglect through preventative and statutory services.
- 12.7 **GIVE A CHILD A FAMILY**, which provides services such as: providing temporary safe care for 60 children; creating and maintaining a Foster Care Database for use in the District; community based family strengthening capacity building and development services; child protection services; and training and development services for other NPOs.
- 12.8 **SINANI KZN PROGRAMME FOR SURVIVORS OF VIOLENCE**, which started as an organisation in July 1994 and was registered as KwaZulu-Natal Programme for Survivors of Violence (PSV).
- 12.9 **THE TEDDY BEAR CLINIC FOR ABUSED CHILDREN**, which offers free victim empowerment services to abused children, specialising in sexually abused children, whilst also providing Diversion Services for child sexual offenders.

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publish information on matters of public interest and the right of members of the public to receive information on those matters. There is no basis on which this limitation can conceivably be justified.

- 18 The effect of regulation 8 is to cast a veil of secrecy and non-disclosure over the disbursement of public funds. As I explain below, secrecy of this kind enables corruption and abuse.
- 19 Regulation 8 is unlawful and invalid for at least three reasons:
- 19.1 First, it is an unjustifiable limitation of the right to freedom of expression, enshrined in section 16(1) of the Constitution.
 - 19.2 Second, it is unconstitutionally and impermissibly vague.
 - 19.3 Third, it is *ultra vires* the Lotteries Act.
- 20 MMA and SANEF seek an order declaring regulation 8 to be unconstitutional and invalid. In the alternative, they seek an order declaring regulation 8 to be unconstitutional to the extent that it fails to provide for an exception for publication in the public interest, and reading such an exception into regulation 8(1)(c).
- 21 The issues to be determined in this application are also relevant to the United Civil Society in Action application. As I have stated above, MMA and SANEF seek an order consolidating that application with this one. It would be convenient for the two matters to be determined together.

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22 The background to the United Civil Society in Action application is as follows:

22.1 During 2018, GroundUp published various articles reporting on suspected corruption, mismanagement and abuse of public funds by the Commission (or its officials) ("the articles"). Copies of the articles are attached to the Commission's answering affidavit in the United Civil Society in Action application, marked "TCM3", "TCM4", "TCM5", and "TCM6".

22.2 The articles speak for themselves. They are excellent examples of journalism that serves the public interest. They track how National Lottery money is spent and reveal significant misappropriation of lottery funds, which are intended for good causes. The articles include information of grant applicants and grant beneficiaries, including the names of the applicants and recipients and the grant amounts awarded to beneficiaries.

22.3 The Commission has purported to respond to the allegations contained in the articles in its answering affidavit in the United Civil Society in Action application, but its attempt to do so is woefully inadequate and fails to place the substance of the allegations in the articles in dispute.

22.4 United Civil Society in Action applied for an order preventing and reversing GroundUp's publication of information about beneficiaries of lottery grants. United Civil Society in Action contends that the publication of the articles breached section 67 of the Lotteries Act and regulation 8.

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- 23 The interpretation and application of regulation 8 will be critical to the determination of the United Civil Society in Action application.
- 24 GroundUp contends that regulation 8 does not apply to its articles. That may well be the case. However, regardless of whether regulation 8 applies to the articles in issue in the United Civil Society in Action application, MMA and SANEF are of the view that regulation 8 is unlawful and unconstitutional, and should be set aside. We bring this application in order to ensure that the constitutional validity of regulation 8 is interrogated and determined.
- 25 We submit that this is required in the public interest because of the wide-ranging and significant impact regulation 8 has for reporting on the National Lottery.
- 25.1 For example, the Commission and Minister have commissioned independent investigations into the allegations of improper use and mismanagement of the funds, and fraud and corruption: how money meant for charity is being disbursed in highly questionable ways. A copy of terms of reference dated 1 January 2020 for the investigation commissioned by the Commission is annexure "TCM21" of Commission's answering affidavit in the United Civil Society in Action application.
- 25.2 It is obviously in the public interest that the media be permitted to report on any findings made in these investigations, and on the facts underpinning the investigations. However, on the current


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interpretation and application of regulation 8(1)(c), this reporting will be impeded. It is therefore necessary and in the public interest that the ambit of regulation 8(1)(c) is determined.

- 26 This founding affidavit will address the following in turn:
 - 26.1 MMA and SANEF's standing to bring this application;
 - 26.2 The consolidation application;
 - 26.3 The regulatory framework;
 - 26.4 The effect of regulation 8;
 - 26.5 Regulation 8 impermissibly limits expression;
 - 26.6 Regulation 8 is unconstitutionally vague;
 - 26.7 Regulation 8 is ultra vires the Lotteries Act; and
 - 26.8 The appropriate remedy.

MMA AND SANEF'S STANDING

- 27 MMA and SANEF seek the relief in the notice of motion:
 - 27.1 in their own interest, in terms of section 38(a) of the Constitution; and
 - 27.2 in the public interest, in terms of section 28(d) of the Constitution.


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28 SANEF also acts in the interests of its members, as contemplated in section 38(e) of the Constitution.

29 MMA is a not-for-profit organisation that has been monitoring the media since 1993. MMA's objectives are to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent.

29.1 The three key areas MMA seeks to address through a human rights-based approach are media freedom, media ethics and media quality. MMA is the only independent organisation that analyses and engages with media from a human rights perspective.

29.2 MMA has a longstanding history in media monitoring and direct engagement with media, civil society organisations and citizens, and promoting media freedom and the right to free expression.

29.3 MMA has participated, as a party and as an *amicus curiae*, in several matters about the right to freedom of speech in South African courts at all levels.

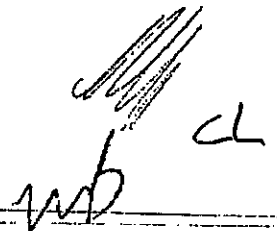
30 SANEF is a voluntary association of South Africa's most senior print, magazine, broadcast and other electronic media editors and media educators.

31 SANEF's objectives, as set out in SANEF's Constitution, include:

31.1 the promotion of access to and dissemination of information in the media and a free independent and pluralistic press;

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- 31.2 nurturing and deepening media freedom as a democratic value;
- 31.3 serving as a forum to promote the common interests of its members; and
- 31.4 defending media freedom through all available institutions, including the Constitutional Court.
- 32 SANEF has a direct and substantial interest in the outcome of the present proceedings as they will directly affect the type of information and commentary that may lawfully be published by its members and by the media as a whole about any maladministration, corruption and fraud in relation to grants made by the Commission. SANEF has been involved in several challenges to the constitutionality of statute and regulations that affected freedom of media.
- 33 The right to freedom of expression is a right in the Bill of Rights (section 16 of the Constitution). In terms of section 38 of the Constitution, MMA and SANEF may approach the court whenever a right in the Bill of Rights has been infringed or threatened. I am advised and submit that regulation 8(1)(c) violates the right to freedom of expression.
- 34 MMA and SANEF bring this application on their own behalf in terms of section 38(a) of the Constitution and in the public interest in terms of section 38(d) of the Constitution. SANEF also acts in the interests of its members, as contemplated in section 38(e) of the Constitution.

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35 I submit that MMA and SANEF have the requisite legal standing to launch this application and seek the relief specified in the notice of motion.

CONSOLIDATION

36 MMA and SANEF seek to consolidate this application with the United Civil Society in Action application.

37 If MMA and SANEF's application to have regulation 8 declared unconstitutional and invalid succeeds, United Civil Society in Action will not be able to rely on regulation 8 in support of the relief it seeks against GroundUp. The validity of regulation 8 is therefore an issue that must be determined in order to determine whether United Civil Society in Action is entitled to any relief against GroundUp.

38 I submit that:

38.1 There is a significant overlap of the issues of fact and law that must be decided in the two applications.

38.2 There is a significant overlap in the parties to the litigation – the only difference being that the Minister of Trade, Industry and Competition is a necessary respondent in this application, as the Minister responsible for promulgating regulation 8.

38.3 It would not be sensible for the two applications to be decided separately, as this would create the risk of conflicting judgments.

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38.4 It would be convenient for this application to be consolidated with the United Civil Society in Action application.

39 Therefore, I submit that this application should be consolidated with the United Civil Society in Action application.

40 I now turn to address the relief that MMA and SANEF seek in this application.

THE REGULATORY FRAMEWORK

41 The Lotteries Act regulates lotteries and sports pools in South Africa.

42 The Lotteries Act provides for a National Lottery, and establishes the Commission as the entity tasked with ensuring that the National Lottery and sports pools are conducted with all due propriety and in accordance with the law.

43 Section 13 of the Lotteries Act empowers the Commission to issue a licence authorising a person to conduct the National Lottery. In terms of section 14(2)(e) of the Lotteries Act, that licence must include a condition requiring the licensee to pay certain sums of money to the National Lottery Distribution Trust Fund ("the Fund") or to the Commission's board ("the board").

44 The Fund is an entity created by section 21 of the Lotteries Act, which is administered by the board. The board holds the Fund in trust for distribution

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to worthy good causes. After the Fund's expenses have been paid, prescribed percentages of the money in the Fund must be allocated for charitable expenditure; the development of sport and recreation; and arts, culture and the national historical, natural, cultural and architectural heritage.

45 I emphasise that the money in the Fund is public money.

45.1 The funds that are distributed are obtained through the payment of licence fees and other amounts to the board and the Fund.

45.2 The board is required to table financial reports in Parliament in respect of distributed funds, in accordance with the provisions of the Public Finance Management Act, 1 of 1999 ("PFMA"). The Commission is a national public entity in terms of Part A to Schedule 3 of the PFMA, and is thus bound to act in accordance with the PFMA.

45.3 The public thus has an interest in the manner in which the money in the fund is spent, and in ensuring that it is distributed in accordance with the law, and not misappropriated or otherwise misused.

46 The funds are distributed to worthy good causes through independent committees called distributing agencies, which are appointed in terms of the Lotteries Act. The distributing agencies are responsible for considering, evaluating and deciding applications for grants or recommendations of

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funding of worthy good causes received from the Commission. Distributing agencies also prepare reports on grants already awarded.

47 The Minister has promulgated the regulations, pertaining to distributing agencies, in terms of section 60 of the Lotteries Act.

48 Regulation 8 provides as follows:

- "(1) Subject to the Constitution, the Promotion of Access to Information Act, 2000 (Act 2 of 2000), the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) and the Protected Disclosures Act, 2000 (Act 26 of 2000), no person may in any way-*
 - (a) disclose any information in connection with any grant application or a grant itself;*
 - (b) disclose the contents of a report contemplated in regulation 6(1); or*
 - (c) publish any information obtained in contravention of paragraph (a) or (b); unless-*
 - (i) ordered to do so by a court of law;*
 - (ii) making a bona fide confidential disclosure or publication to the Minister, the Public Protector, Parliament or a committee designated by Parliament, a member of the South African Police Service or the national prosecuting authority;*
 - (iii) the juristic person who made a grant application and the board consent thereto in writing prior to that disclosure or publication; or*
 - (iv) provided for in these Regulations.*
- (2) An agency, a person appointed to an agency or any person rendering services to an agency in whatever capacity may not in any way disclose any information in respect of or comment upon a grant application or a grant itself unless authorised thereto in writing by the Minister or the chairperson of the board.*
- (3) Any person who contravenes subregulation (1) or (2) shall be guilty of an offence and liable to a fine or to imprisonment or to both a fine and imprisonment."*

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49 The effect of regulation 8 is that:

49.1 No person may disclose any information in connection with any grant application or a grant itself (regulation 8(1)(a)).

49.2 No person may disclose the contents of a report submitted to the board by a distributing agency (regulation 8(1)(b)).

49.3 No person may publish any information disclosed in contravention of these non-disclosure provisions unless ordered to do so by a court of law; making a confidential disclosure; with the consent of the juristic person who made a grant application and the board; or otherwise provided for in the regulations (regulation 8(1)(c)).

49.4 No agency or person appointed to an agency may disclose any information in respect of or comment on a grant application or a grant itself unless authorised in writing by the Minister or the Chairperson of the Board (regulation 8(2)).

50 A breach of any of these provisions is a criminal offence (regulation 8(3)).

51 I emphasise that the phrase "*any information in connection with any grant application or a grant itself*" is extraordinarily wide. It includes, for example:

51.1 the identity of the grant applicant or recipient;

51.2 the relationship between the grant applicant or recipient and members of the Commission or distributing agency;

51.3 the amount of money paid to a grant recipient;


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- 51.4 the project towards those grant funds were intended to be directed;
- 51.5 whether any of the funds were in fact spent on the intended projects;
- 51.6 the theft of grant funds by recipients;
- 51.7 the corrupt payment by grant recipients to members of the Commission or a distributing agency; and
- 51.8 any other information in connection with that grant application or the grant itself.

52 Regulation 8 accordingly criminalises the disclosure and publication of a wide range of information, and has a severe chilling effect on expression. It is draconian and severe. I explain this in more detail below.

53 In addition, regulation 8 has no basis in the Lotteries Act. Section 67 of the Lotteries Act regulates access to information. It prohibits the disclosure or publishing of certain information: however, the prohibition in section 67 is limited to "*any information submitted by any person in connection with any application for any licence, certificate or appointment under this Act*". The prohibition therefore does not apply to information about grant applicants or beneficiaries, since they are not applicants for any license, certificate or appointment under the Lotteries Act. I discuss the implications of section 67 for the constitutional validity of regulation 8 in more detail later in this affidavit.

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THE EFFECT OF REGULATION 8

54 Regulation 8(1)(c) criminalises the disclosure and publication of a wide range of information. These disclosures and publications will often be necessary in the public interest to expose corruption and malfeasance with regard to National Lottery funds.

55 For example:

55.1 On 28 January 2018 a news report was published detailing how millions of Rands meant to be spent on projects in Limpopo were unaccounted for. (Originally published at www.timeslive.co.za on 27 January 2018) The news report details how the Commission set out to proactively fund projects in the Limpopo province through conduit companies that would retain some of the money meant for certain projects. As a result, the projects were incomplete. A copy of the news report is attached to the Commission's answering affidavit in the United Civil Society in Action application, marked "TCM3".

55.2 On 19 November 2019 a news report was published detailing an instance of abuse of power where an officer responsible for monitoring and evaluating grants was suspended after he had refused to approve a grant to an applicant that that not fulfil the requirements for receiving a grant. The official was expected to approve a grant to a conduit non-profit organisation fronting for an organisation that did not qualify for the grant in terms of the Commission's policies. A copy of the news report is attached to the

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Commission's answering affidavit in the United Civil Society in Action application, marked "TCM7".

55.3 On 21 February 2020 a news report was published detailing how funds (R13 million) were approved and allocated for a project that did not exist after six years from when the funds were approved. A copy of the news report is attached to the Commission's answering affidavit in the United Civil Society in Action application, marked "TCM8".

55.4 On 21 February 2020 a news report was published detailing how an organisation owned by a member of one of the Commission's distribution agency received R8.5 million grant and refused to account for how the grant was used. A copy of the news report is attached to the Commission's answering affidavit in the United Civil Society in Action application, marked "TCM9".

56 These stories:

56.1 Are all clearly in the public interest and expose significant wrongdoing and corruption in the distribution of public funds. They are accordingly at the core of the protection of expression contained in section 16 of the Constitution.

56.2 Contain the details of the grant beneficiaries that operated as conduits and misappropriated funds meant for other projects. The ultimate or intended beneficiaries were also named as it was essential to confirm that the projects for which the funds were

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approved and granted remained incomplete notwithstanding the payment of the funds needed for the projects. There are also instances where there are indications of conflicts of interests where organisations affiliated to members of distribution agencies and members of the Commission's board (or their relatives) were receiving grants from the Commission. This information is essential to the credibility and newsworthiness of the stories.

56.3 Appear to be unlawful in terms of regulation 8 because they include information in connection with grants.

57 This illustrates the draconian impact of regulation 8, which operates to prohibit the publication of public interest journalism on the misuse of public funds.

58 This severe impact is not merely theoretical. The Commission actively makes use of regulation 8 to stifle public interest reporting and to undermine transparency and accountability.

59 First, the Commission relies on regulation 8 to attempt to silence critical reporting.

59.1 The Commission has instructed its attorneys of record, Malatji & Co Incorporated, to send letters to GroundUp, attached, marked "TCM33" and "TCM34" to the Commission's answering affidavit in the United Civil Society in Action application and to GroundUp's answering affidavit, marked "NG32" and "NG33".

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59.2 In those letters, the Commission threatens GroundUp and Joseph with criminal charges based on alleged breaches of regulation 8 unless it ceases further publications and retracts all publication of information that contravenes regulation 8.

60 Second, the Commission relies on regulation 8 to refuse to disclose information sought from it in terms of the Promotion of Access to Information Act, 2 of 2000 ("PAIA").

60.1 During 2018 GroundUp relied on the provisions of PAIA to request information from the Commission. However, relying on regulation 8, the Commission rejected the request for information in terms of PAIA (at paragraphs 66 to 68 of GroundUp's answering affidavit in the United Civil Society in Action application).

60.2 Copies of letters dated 3 September 2018 and 6 November 2018 detailing reasons for declining requests made in terms of PAIA are attached to the Commission's answering affidavit in the United Civil Society in Action application, marked "TM26" (annexures "B" and "C" of "TM26").

60.3 It is therefore clear that, far from treating regulation 8 as being "subject to" PAIA, the Commission regards it as a ground for refusal to make disclosures under PAIA.

60.4 GroundUp's attempts to appeal against these refusals were unsuccessful (at paragraphs 66 to 68 of GroundUp's answering affidavit in the United Civil Society in Action application).

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60.5 This makes a nonsense of the Commission's contention that the regulation is constitutionally compliant because it is preceded by the phrase "subject to the Constitution, the Promotion of Access to Information Act, the Promotion of Administrative Justice Act and the Protected Disclosures Act."

60.6 As a matter of fact, the Commission relies on regulation 8 to refuse legitimate PAIA requests, thus subverting its duties of openness and transparency.

REGULATION 8 IMPERMISSIBLY LIMITS EXPRESSION

61 The Constitution guarantees the right to freedom of expression in section 16(1) in the following terms:

- "Everyone has the right to freedom of expression, which includes—
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research."
- (emphasis added)

62 Regulation 8 is unconstitutional in that it violates the right to freedom of expression, contained in section 16(1) of the Constitution. In particular, regulation 8—

62.1 unjustifiably infringes the right to freedom of the press and other media, contained in section 16(1)(a) of the Constitution; and

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62.2 unjustifiably infringes the right to freedom to receive or impart information or ideas contained in section 16(1)(b) of the Constitution.

Regulation 8 limits the right to freedom of expression

63 I am advised and submit that the right to freedom of expression in section 16(1) of the Constitution includes the right of the media to publish information on matters of public interest. It also includes a corollary right on the part of members of the public to receive information on matters of public interest.

63.1 The constitutional guarantee of a free press is not one that is made for the protection of the special interests of the media. Rather, press freedom is constitutionally protected in the interests of broader society.

63.2 The media bears an obligation to provide the public both with information and with a platform for the exchange of ideas, which is crucial to the development of a democratic culture. Section 16 of the Constitution thus asserts and protects the media in the performance of their obligations to the broader society.

63.3 The role of the media in a democratic society includes informing the public about how our government is run. This information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state. This carries with it the

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responsibility to report accurately. Access to information is crucial to accurate recording and to imparting accurate information to the public.

63.4 The freedom of the press is thus imperative in two fundamental respects in a democracy: first, the ability of the public to hold accountable those in power and, second, the ability of the public to be informed on matters of public interest.

63.5 The freedom of the press and other media would have no utility if that freedom did not include as a corollary the right of persons to obtain and read news on matters of public interest.

64 The matters of public interest on which the media has the right to publish information (and the public has the right to receive information) must, of necessity, include information about suspected irregularities and maladministration in organs of state and misuse and misappropriation of public funds. These are matters of significant public interest, and on which the public, in a democratic state, has the right to be informed.

65 Regulation 8 prohibits the disclosure of any information in connection with any grant application or a grant itself and the publication of information obtained in contravention of that prohibition, unless one of a limited set of exceptions set out in regulation 8(1)(c) applies. Notably, publication of information in the public interest is not an exception listed in regulation 8(1)(c). Contravention of regulation 8 carries criminal sanction.

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66 This is self-evidently a significant limitation on the right to freedom of expression.

66.1 Information in connection with a grant application or grant award may well be information that it is in the public interest to disclose and publish. For instance, such information may evidence corruption or maladministration in the manner in which public funds are distributed. These are matters of significant public importance. Yet, regulation 8 prohibits the disclosure of this information, regardless of whether such disclosure is in the public interest.

66.2 Regulation 8 precludes the disclosure of information in particular to journalists, and the publication of that information by journalists, notwithstanding that there may be significant public interest in the disclosure of that information.

66.3 Regulation 8 thus limits both the right of the media to publish information on matters of public interest, and the right of members of the public to receive information on matters of public interest.

67 The effect of regulation 8(1)(c) is to stifle reporting on issues of public interest.

67.1 The provisions throw a veil of secrecy over lottery grants, including the process of considering and awarding grants, the amount of

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money paid out pursuant to such grants, and whether the grant moneys are applied for their intended purpose.

- 67.2 They prohibit the disclosure and publication of information relating to the distribution of public funds, for public purposes.
- 67.3 Transparency and accountability are critical in the context of the distribution of expenditure of public funds. These principles serve to inhibit corruption. In no other context is it permissible for the recipients of public funds for public purposes entitled to anonymity or privacy in respect of the receipt of those funds.
- 67.4 The Commission revealingly compares the *recipients of grants* to the *winners of lotteries* saying that both are entitled to their privacy (at paragraph 31 of its answering affidavit in the United Civil Society in Action application).
- 67.5 But there is a fundamental difference between the winner of a lottery (who is entitled to have the fact that they have come into a huge amount of money by virtue of luck, which they may spend as they wish, kept private) and the recipient of a grant in terms of the Lotteries Act.
- 67.6 The recipient of the grant has not won a lottery of funds in respect of which he is entitled to do with what he wishes. He has been allocated funding from a public resource to perform a public function on behalf of the public. Far from being entitled to privacy and confidentiality in respect of those funds, he or she is required to account for them and

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to behave transparently and openly in regard to the funds. There is accordingly no legitimate privacy interest sought to be protected here.

68 Moreover, the provisions have a substantial chilling effect. The fear of criminal prosecution created by the sections has the result that—

68.1 sources are less likely to provide valuable information to journalists; and

68.2 editors and journalists are less likely to investigate and publish stories about malfeasance in the area of lottery grants.

69 In this context, it is absolutely critical that the media be permitted, on behalf of the public, to discover and publish information pertaining to grants and grant applications that is in the public interest come to light, such as allegations of corruption and malfeasance.

70 The information that regulation 8 prohibits the media from publishing is information that lies at the heart of the right to free expression. Members of the public are entitled to know how public funds are spent. The media are entitled (and duty bound) to scrutinise the spending of public funds, and to inform the public on these issues. This is at the very core of the entitlement of free expression which is protected by section 16 of the Constitution. No grant recipient is entitled to secrecy in respect of their receipt and use of public funds.

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71 This is clear from the GroundUp stories, which the Commission seeks to suppress by applying regulation 8. These stories are stories of significant public interest, relating to issues of corruption and the theft of public funds. For regulation 8 to purport to prohibit – and indeed criminalise – the disclosure and publication of such stories, is a far-reaching and draconian limitation on expression. Such a prohibition has no place in a democratic state.

72 In addition, regulation 8 is inconsistent with a series of international instruments which South Africa has committed itself to.

72.1 South Africa is a founding partner of the Open Government Partnership which promotes accountable, responsive and inclusive governance through proactive disclosure of information and protecting the right to information.¹

72.2 Through its membership of the Open Government Partnership South Africa has recognised the importance of the right of access to information which permits access to justice and allows citizens to claim what is rightfully theirs.²

72.3 In 2019 the African Commission on Human and Peoples Rights adopted the Declaration of Principles on Freedom of Expression and Access to Information in Africa. Regulation 8 is inconsistent with the

¹ <https://www.opengovpartnership.org/process/joining-ogp/open-government-declaration/>

² <https://www.opengovpartnership.org/policy-area/right-to-information/>

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Declaration as a whole and in particular with Principle 29 which provides:

"Principle 29. Proactive disclosure


- 1. *Public bodies and relevant private bodies shall be required, even in the absence of a specific request, to proactively publish information of public interest, including information about their functions, powers, structure, officials, decisions, budgets, expenditure and other information relating to their activities.*
- 2. *Proactive disclosure by relevant private bodies shall apply to activities for which public funds are utilised or public functions or services are performed.*
- 3. *Information required to be proactively disclosed shall be disseminated through all available mediums, including digital technologies. In particular, States shall proactively publish information in accordance with internationally accepted open data principles."*

The limitation is not justifiable in terms of section 36 of the Constitution

73 In all the circumstances, the applicants have, I submit, at the very least demonstrated that the impugned provisions limit the rights guaranteed by section 16(1) of the Constitution.

74 Once that is so, it is for the respondents to seek to justify that limitation. To the extent that they seek to do so in their answering affidavits, the applicants will deal with that in reply. At this stage, I emphasise only that any attempt by the respondents to justify the limitation concerned would have to demonstrate:

74.1 why a less restrictive means is not available, in the form of a provision that permits disclosure and publication where to do so would be in the public interest; and

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74.2 why it is necessary to cast a veil of secrecy over lottery grants, where no other recipient of public funds requires or is entitled to such levels of secrecy.

75 I am advised and submit that there is no basis on which the limitation on the right to freedom of expression brought about by regulation 8 can be justified under section 36 of the Constitution:

75.1 The right to freedom of expression is extremely important and in particular in this context where public funds are being scrutinised.

75.2 There is no legitimate privacy or other interest sought to be protected by the limitation. The recipients of grants are not entitled to secrecy in respect of their receipt and use of public funds. They are the recipients of public funds for public purposes and are subject to scrutiny and duties of accountability in respect of those funds.

75.3 The impugned provisions could permit disclosure and publication where it is in the public interest. This constitutes less restrictive means to achieve the same ends.

The reference to PAIA does not save regulation 8

76 The Commission's position is that regulation 8 only prohibits disclosures and publications outside of the framework of PAIA. Provided information is obtained in terms of PAIA, regulation 8 does not prohibit its disclosure or publication. This is because regulation 8 is made expressly subject to PAIA.

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- 77 This approach does not save the regulation 8 from being unconstitutional.

- 78 First, PAIA does not regulate *publication*. It only provides for *disclosure* of documents. This means that, even if information regarding grants or grant applications is obtained in accordance with PAIA, regulation 8 still prohibits the publication of that information. Making regulation 8 subject to PAIA thus does not cure the limitation of the right to freedom of expression.

- 79 Second, the limitation of disclosure and publication to information obtained through PAIA is wholly inadequate to secure freedom of expression.
 - 79.1 PAIA is a notoriously slow mechanism to obtain information. In order to be valuable, news must be current and up to date. Requiring journalists to make use of the cumbersome and time-consuming processes of PAIA will frequently result in news becoming stale, or not being published at all.

 - 79.2 There is no culture of disclosure in public or private institutions and the vast majority of PAIA requests are simply refused without a proper basis, or partial or inadequate disclosures are made. The requester must then bring an internal appeal, which is time consuming and laborious, and usually again results in refusals or inadequate or incomplete disclosures. The only way to obtain legal redress is then to bring litigation to compel disclosure, which is expensive and time-consuming. As a result, PAIA is frequently used to frustrate, rather than enhance, access to information.


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79.3 It is critical that journalists be able to publish information received from a range of sources, and in particular from sources within organisations. The obtaining of documents through PAIA is not an adequate substitute. PAIA is a highly inadequate and insufficient substitute for information obtained from sources within organisations.

79.4 Journalists do not always receive information through formal channels or avenues provided for in law. Journalism is aided by cooperation of whistle-blowers who in aspiration for accountability share information about malfeasance and corruption in public institutions and concerning the management of public funds. It is therefore impermissible to provide for an absolute ban on the publishing of information received through these channels.

79.5 This is an unqualified incursion into freedom of expression and the right of access to information with the consequence of unreasonably restricting freedom of expression and having a chilling effect on editors because of the criminal sanction they are exposed to when they publish the information.

80 As a result, it is not constitutionally permissible for the regulation to criminalise any publication or disclosure other than that which occurs through the use of PAIA. I submit that the limitation of freedom of expression created by regulation 8 is unreasonable and unjustifiable. It should be declared unconstitutional and set aside.

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REGULATION 8 IS UNCONSTITUTIONALLY VAGUE

81 The Commission says that regulation 8 complies with the Constitution, PAIA, the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and the Protected Disclosures Act, 26 of 2000 ("PDA"), because it is expressly stated to be "subject to" the Constitution and that legislation.

82 The proviso to regulation 8 cannot possibly save it from constitutional invalidity, because it is utterly and unacceptably unclear what this proviso means.

83 Where legislation limits rights in the Bill of Rights, it is required to do so clearly. The nature and extent of the limitation must be clear from the provision.

84 However, it is simply impossible to know what it means to make regulation 8 "subject to" the Constitution and the listed legislation.

84.1 Regulation 8 provides that it is "subject to" the Constitution. However, what this means is entirely unclear. All law is subject to the Constitution. This is the principle of constitutional supremacy, on which our democratic state is founded. The effect of constitutional supremacy is that any law – including a regulation – that is inconsistent with the Constitution is invalid. An unconstitutional and invalid regulation – such as regulation 8 – is not cured of unconstitutionality simply because it is introduced by the truism that it is "subject to the Constitution".

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84.2 The criminal prohibition in regulation 8 is a patent and unjustifiable infringement of the right to freedom of expression. The only way to render regulation 8 constitutionally compliant is for the prohibition that follows not to exist, or to be subject to an exception that it is not an offence to disclose or to publish where it would be in the public interest to do so. The phrase "subject to the Constitution" cannot cure the defect.

84.3 Regulation 8 also provides that it is subject to PAJA. As PAJA has no applicability to the disclosure or publication of information whatsoever, it is not clear what this proviso is intended to mean.

84.4 Regulation 8 provides that it is subject to the PDA. But the PDA does not extend to the publication of the information in the manner contemplated (and prohibited) in regulation 8(1)(c). The provisions of the PDA apply specifically to the relationship between the employer and an employee.

84.5 Regulation 8 provides that it is subject to PAIA. In terms of PAIA, a person may request "records" held by the Commission of the distribution agency required to exercise or protect her rights in the Bill of Rights. However, PAIA does not regulate the publication of information that was not received in terms of the processes contemplated in PAIA. It is therefore irrelevant for purposes of interpreting and applying regulation 8(1)(c).

84.6 While PAIA provides for disclosure of information under certain circumstances, the lack of clarity is illustrated the way that the

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Handwritten initials: "NL" at the bottom right corner.

Commission refuses to accede to PAIA requests on the ground of the prohibition on disclosure contained in regulation 8.

85 It is accordingly entirely unclear what the intended effect of rendering regulation 8 "subject to" the Constitution, PAJA, PAIA and the PDA is. Whether regulation 8 applies in a given circumstance, and to what extent, is made impermissibly vague by the proviso in regulation 8(1).

86 This is made worse by the fact that failure to comply with regulation 8 is a criminal offence. Provisions creating criminal offences must be sufficiently clear to allow people to know in advance what conduct is prohibited, so that they might adjust their conduct accordingly. The proviso in regulation 8(1) means that a person seeking to disclose information relating to grants or grant applications cannot be certain in advance whether that disclosure is or is not prohibited. This stifles expression, because, in the face of criminal sanction, a person with such information is likely to err on the side of non-disclosure.

87 I am advised and submit that, if the intention of regulation 8 is to render publication permissible where it is in the public interest to do so, that should be made expressly clear. MMA and SANEF accordingly seek relief to that effect in the alternative.

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REGULATION 8 IS ULTRA VIRES THE LOTTERIES ACT


Regulation 8 goes beyond what is permitted by section 67 of the Lotteries Act

88 The Lotteries Act expressly deals with access to information (and the prohibition on the disclosure and publishing of certain information) in section 67. Section 67 provides:

- "(1) Subject to the Constitution, any legislation which may be enacted in pursuance of sections 32 (2) or 33 (3) of the Constitution or any other relevant law, no person, including the Minister, a member or employee of the board or the Department, or a former member or employee of the board or the Department, may-*
 - (a) in any way disclose any information submitted by any person in connection with any application for any licence, certificate or appointment under this Act; or*
 - (b) publish any information obtained in contravention of paragraph (a), unless ordered to do so by a court of law or unless the person who made such application consents thereto in writing.*
- (2) Any person who contravenes subsection (1) shall be guilty of an offence." (emphasis added)*

89 Thus, the Lotteries Act expressly addresses what limitations are to be put on disclosure and publication of grant information. It prohibits only the disclosure and publication of information submitted by any person in connection with any application for any licence, certificate or appointment under the Lotteries Act.

90 Section 67 therefore does not prohibit the public interest reporting of the kind performed by GroundUp on the recipients of grants under the lottery. This is because (a) grant recipients are not applicants for licenses, certificates or appointment under the Lotteries Act; and (b) the information published by

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GroundUp was not "information submitted by" the grant recipients in their applications for grants.

91 In making regulation 8, the Minister has gone far beyond what section 67 provides for. Regulation 8 applies to a much wider class of information and criminalises a wider range of disclosures and publications than that which is addressed in section 67. It is significantly more draconian and severe in its sweep than section 67.

92 Regulation 8 applies to "any information in connection with any grant application or a grant itself". This is a much wider category of information and conceivably includes, for example:

- 92.1 the identity of a grant recipient;
- 92.2 the fact that a grant was awarded;
- 92.3 the amount of the grant;
- 92.4 the purpose for which the grant was awarded; or
- 92.5 whether the grant money was spent for that purpose, or whether it was stolen or misappropriated.

93 Regulation 8(1)(b) also prohibits disclosure of a report by a distributing agency to the Commission, which is not prohibited in terms of section 67.

94 Regulation 8(2) in addition prohibits an agency, person appointed to that agency or someone rendering services to that agency from disclosing any

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information in respect of or commenting upon a grant application or a grant itself unless authorised in writing by the Minister or the chairperson of the board. This prohibition too goes far beyond that which was contemplated in section 67 and creates an additional criminal offence which was not created by or contemplated in section 67. This prohibition is not made "subject to" the Constitution or any other legislation.

95 The effect of regulation 8(2) is to inhibit any agency or an employee of an agency from making available to the press or the public any information in relation to a grant or a grant application on pain of criminal prosecution. This has a self-evidently chilling effect on expression and is calculated to cast a veil of secrecy over lotteries grants.


96 Section 67, by contrast, only precludes publication of information submitted by an applicant in connection with an application for a license, certificate or appointment. Regulation 8 goes much further than that, and criminalises disclosure and publication of vast swathes of information section 67 does not apply to. Regulation 8 therefore purports to expand and extend the prohibition contained in section 67 of the Lotteries Act.

97 It is not permissible for the Minister, through regulations, to expand and extend the criminal prohibition contained in section 67 of the Lotteries Act. I submit that regulation 8 is *ultra vires* the Lotteries Act and invalid for this reason alone.

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Regulation 8 goes beyond the Minister's powers in terms of section 60

- 98 The Minister purports to have enacted regulation 8 in terms of section 60 of the Lotteries Act.
- 99 Section 60 provides for the regulation of the conducting of the National Lottery or sports pools, and the procedures for a review against decisions regarding applications for grants – amongst other things – but does not contemplate the promulgation of regulations prohibiting the disclosure and publication of grant applicants' information.
- 100 Though section 60(d) permits the making of regulations regarding "*any other process that facilitates the efficient and effective application for grants and the distribution thereof,*" regulation 8 cannot be interpreted as falling within this provision. Prohibiting the disclosure and publication of information relating to grants and grant applications in the public interest in no way facilitates the efficient application for or distribution of grants.
- 101 The blanket prohibition of the disclosure and publication of information relevant to the management and expenditure of funds by the Commission is also inconsistent with sections 2A and 10 of the Lotteries Act, which requires that the Commission and the board of the Commission apply the principles of openness and transparency.
- 102 In promulgating regulation 8, the Minister thus acted ultra vires her powers under section 60 of the Lotteries Act. By failing to act within the ambit of

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section 60, the Minister also breached section 92(3)(a) of the Constitution. In terms of section 2 of the Constitution, the application of regulation 8(1)(c) is invalid because it is inconsistent with the Constitution.

103 If this Court finds that regulation 8 is *ultra vires*, it must grant the primary relief sought by the applicants and set the regulation aside in its entirety.

REMEDY


104 The primary remedy sought by MMA and SANEF is the setting aside of regulation 8. I submit that this would be just and equitable because:

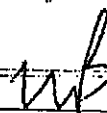
104.1 Regulation 8 is an unjustifiable and unconstitutional limitation of expression that serves no legitimate purpose.

104.2 The narrow prohibition created by section 67 of the Lotteries Act makes adequate provision for any limitation of access to information under the Lotteries Act.

104.3 As a result of the existence of section 67, setting aside regulation 8 would not result in any lacuna in the regulatory environment.

105 In the alternative, and only if the Court is not inclined to set aside regulation 8 in its entirety, I submit that this Court should declare that regulation 8 is invalid to the extent that it fails to provide for a defence of publication in the public interest; and read such a defence into regulation 8.

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105.1 I am advised that if the court finds that regulation 8 is unconstitutional, the court has the discretion to make any appropriate order that is just and equitable in the circumstances.

105.2 The appropriate remedial measure is to read words into regulation 8(1)(c) to include a public interest exception, to allow for publication of the information when that disclosure is in the public interest.

105.3 I submit that the following underlined words should be read into regulation 8(1)(c):

- ... no person may in any way—*
 - (a) disclose any information in connection with any grant application or a grant itself;*
 - (b) disclose the contents of a report contemplated in regulation 6 (1); or*
 - (c) publish any information obtained in contravention of paragraph (a) or (b); unless—*
 - (i) ordered to do so by a court of law;*
 - (ii) making a bona fide confidential disclosure or publication to the Minister, the Public Protector, Parliament or a committee designated by Parliament, a member of the South African Police Service or the national prosecuting authority;*
 - (iii) the juristic person who made a grant application and the board consent thereto in writing prior to that disclosure or publication; or*
 - (iv) provided for in these regulations; or*
 - (v) the publication is in the public interest.*


106 I note that the alternative, reading-in relief, only creates an exception for publication of information in the public interest. The disclosure of that information would remain prohibited. I submit that this is far from satisfactory.

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It is for this reason that this relief is sought only in the alternative, and only if the Court is not inclined to set aside regulation 8 in its entirety.

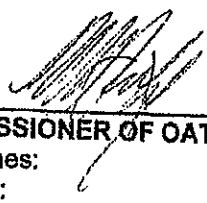
107 For this reason, and to the extent that the regulation may be capable of being read restrictively, in the further alternative the applicants seek an order declaring that regulation does not prohibit any disclosure or publication that is in the public interest.

WHEREFORE, the MMA and SANEF pray for the relief set out in the notice of motion.



WILLIAM BIRD

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at PARKHURST on this the 17 day of JULY 2020, and that the Regulations contained in Government Notice R.1256 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.



COMMISSIONER OF OATHS
Full names:
Address:
Capacity:

MICHAEL RICHARD HARTY
COMMISSIONER OF OATHS
PRACTISING ATTORNEY
REPUBLIC OF SOUTH AFRICA
THE ART HOUSE, No. 4, 4th. AVENUE
PARKHURST, JOHANNESBURG

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the application of:

THE TRUSTEES FOR THE TIME BEING OF
MEDIA MONITORING AFRICA TRUST

First Applicant

SOUTH AFRICAN NATIONAL EDITORS' FORUM

Second Applicant

and

UNITED CIVIL SOCIETY IN ACTION

First Respondent

GROUNDUP

Second Respondent

NATIONAL LOTTERIES COMMISSION

Third Respondent

MINISTER OF TRADE AND INDUSTRY

Fourth Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned,

KATE SKINNER

state under oath that:

- 1 I am an adult female and the Executive Director of the second applicant, the South African National Editors' Forum ("SANEF").
- 2 I am authorised to depose to this affidavit on behalf of SANEF.



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- 3 The facts to which I depose are true and correct, and, unless apparent from the context, are within my knowledge.
- 4 I have read the founding affidavit by WILLIAM BIRD ("the founding affidavit").
- 5 I confirm that SANEF has authorised me to authorise William Bird, the Director of the first applicant, to bring this application on behalf of SANEF.
- 6 I further confirm the contents of the founding affidavit insofar as they relate to SANEF.

K. Skinner

KATE SKINNER

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Parkview on this the 17 day of **JULY** 2020, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

[Signature]
20-07-20
Sgt

COMMISSIONER OF OATHS

Full names: *Liccalso*
 Address: *71, BIRNDALE AVE*
 Capacity: *Parkview Sergeant*

SOUTH AFRICAN POLICE SERVICE
STATION COMMANDER
 2020-07-17
CLIENT SERVICE CENTRE
PARKVIEW
SOUTH AFRICAN POLICE SERVICE

d

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MINISTER
TRADE, INDUSTRY AND COMPETITION
REPUBLIC OF SOUTH AFRICA

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22 June 2020

Prof NA Nevhutanda
The Chairperson: National Lotteries Commission
Block B, Hatfield Gardens
333 Grosvenor Street
Hatfield
0083

Dear Prof Nevhutanda

Publication of beneficiary information

I refer to the various requests by Members of Parliament for information relating to the beneficiaries of various monies administered by the National Lotteries Commission, and to the NLC's view on confidentiality of information.

The purpose of this letter is to record my disagreement with the approach adopted by the National Lotteries Commission to the publication of beneficiary information by the Commission and to request to have a change effected in the current practice of the NLC.

This issue arises out of the interpretation of Regulation 8 of the Regulations Relating to Distribution Agencies made in terms of section 60 of the Lotteries Act 57 of 1997 ("the Act") in February 2001.

Regulation 8 provides that –

"8. Security Information –

(1) Subject to the Constitution, the Promotion of Access to Information Act, 2000 (Act No. 2 of 2020), the Promotion of Administration Justice Act, 2000 (Act No. 3 of 2000) and the Protected Disclosure Act, 2000 (Act No. 26 of 2000), no person may in any way-

(a) disclose any information in connection with any grant application or a grant itself;

(b) disclose the contents of a report contemplated in regulation 6(1); or

(c) publish any information obtained in contravention of paragraph (a) or (b); unless-

(i) ordered to do so by a court of law;

(ii) making a bona fide confidential disclosure or publication to the Minister, the Public Protector, Parliament or a committee designated by Parliament, a member of the South African Police Service or the national prosecuting authority;

(iii) the juristic person who made a grant application and the board consent thereto in writing prior to that disclosure or publication; or

(iv) provided for in these regulations.

(2) An agency, a person appointed to an agency or any person rendering services to an agency in whatever capacity may not in any way disclose any information in respect of or comment upon a grant application or a grant itself unless authorised thereto in writing by the Minister or the chairperson of the board.

(3) Any person who contravened subregulation (1) or (2) shall be guilty of an offence and liable to a fine or to imprisonment or to both a fine and imprisonment."

The NLC has adopted the view that Regulation 8 prohibits the sharing of information relating to beneficiaries including their names, NPO numbers, grant amounts allocated to them including the dates when tranches in which respect of these amounts are paid. It advised the Parliamentary Portfolio Committee that it had received a legal opinion from its attorneys adopting this approach and circulated a copy of this opinion to the Committee in February 2020.

I have taken legal advice on this issue and disagree with this conclusion.

Firstly, this approach is in clear conflict with the emphasis that the Act places on the importance of the principles of openness and transparency in the administration of the National Lottery.

Section 2A(1) of the Act provides –

“(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.”

Similarly, Section 10 deals with the functions of the Board stating that the Board must ensure that the Commission applies the principles of openness and transparency when performing its functions.

The prohibition on disclosure in Regulation 8 is drafted in similar terms to section 67 of the Act. Section 67 applies to the disclosure of any information in connection with an application for any license, certificate or appointment under this Act. It is evident that Regulation 8 was enacted to extend the approach of section 67 to the disclosure of information concerning grants and grant applications.

The rationale given for the interpretation of Regulation 8 is that the names of beneficiaries should not be disclosed to protect beneficiaries from the prospects of extortion or other criminal activities. In addition, the opinion received by the NLC refers to the publication of defamatory statements concerning the NLC and beneficiaries of grants in relation to the pro-active funding activities of the NLC.

In my view, neither the possibility of certain beneficiaries being exposed to criminal threats nor press reporting, whether defamatory or not, justifies a prohibition on the naming of beneficiaries. There are numerous other legal remedies available to deal with these eventualities.

A similar approach to the Regulations is adopted in memorandum to me by the United Civil Society in Action received, 5 March 2020, who suggest that the naming of NLC beneficiaries is illegal. They write as follows –

“Our personal information is protected by this Act, and the National Lotteries Commission and the Minister of Trade and Industry have to comply with the requisite of this Act in full, that for private information to be disclosed publicly should be done so only after following the Act, which unfortunately have not been followed.”

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The effect of this argument is that the identity of a beneficiary under the Act cannot be publicly disclosed, unless the beneficiary consents thereto or a court has ordered disclosure.

A list of beneficiaries was previously included in the NLC's Annual Reports. However, with effect from the 2018/19 financial year, the NLC stopped including beneficiary information in its Annual Report on the basis that this would amount to a breach of Regulation 8. It is perturbing the NLC has altered its interpretation of Regulation 8.

In my view, Regulation 8 does not prohibit the disclosure of the identity of the beneficiaries. The names of beneficiaries do not constitute a part of a grant application or a grant. Had the Minister who published the regulations intended for Regulation 8 to prohibit the disclosure of the identity of beneficiaries of public funds, one would have certainly expected that such a prohibition would have been explicit in the Regulation.

While I accept that the practice of listing beneficiaries were named in Annual Reports for many years does not amount to a legal precedent, the fact that this interpretation was assumed by all stake- holders to be correct for almost 20 years is an indication of how tortured the revised interpretation of Regulation 8 adopted by the NLC is.

The absurdity of this construction is also revealed when it is applied to the language of section 67. Section 67 would have to be interpreted as meaning that the name of an applicant for a licence, certificate or appointment in terms of the Act could only be named with its consent.

In response to a request by the Director-General to receive a list of pro-actively funded projects for 2016-2018, the Commissioner disclosed the list to the Minister in terms of Regulation 8. However, in the letter dated 31 January 2020, the Commissioner stated

"It is noteworthy that the information provided is classified as SECRET in line with the NLC's Information Classification and Management Policy. The contents of the information provided are deemed to be beneficiary information and the NLC, as the custodian of this information, are obliged to ensure that information shall not be reproduced, used or disclosed in any manner in accordance with applicable legislation".

The letter goes on to quote the text of Regulation 8 of the Distribution Agencies Regulations as the basis for this approach.

To the extent that the NLC is also seeking to rely on the Protection of Personal Information Act 4 of 2013 ("the POPI") as a basis for not disclosing the names of beneficiaries, I am advised that POPI is not yet in effect and, in any event, would not prevent the publication of this information.

The classification of the list of pro-actively funded projects as "SECRET" is not warranted by any legislation and is in clear breach of the obligation of the NLC.

It is my considered view that the NLC has adopted an interpretation of Regulation 8 that is incorrect. The names of beneficiaries are not information about a grant or grant application as contemplated by Regulation 8. Regulation 8 does not justify altering the long-held practice of publishing the names of beneficiaries in the Annual Report. The publication of such a list is consistent with the clear requirements of the Act for open and transparent governance as referred to above.

I therefore, call upon the NLC to resume the practice of publishing the names of beneficiaries and that such information include those who receive funds for pro-actively funded projects.

Yours faithfully



EBRAHIM PATEL

MINISTER OF TRADE, INDUSTRY AND COMPETITION



MINISTER
TRADE, INDUSTRY AND COMPETITION
REPUBLIC OF SOUTH AFRICA

Private Bag X84, PRETORIA, 0001, the dtic Campus, 77 Meintjies Street, Sunnyside, 0002, Tel: (012) 394 1480, Fax: +27 12 394 0337
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22 June 2020

Prof NA Nevhutanda

The Chairperson: National Lotteries Commission
Block B, Hatfield Gardens
333 Grosvenor Street
Hatfield
0083

Dear Prof Nevhutanda

Publication of beneficiary information

I refer to the various requests by Members of Parliament for information relating to the beneficiaries of various monies administered by the National Lotteries Commission, and to the NLC's view on confidentiality of information.

The purpose of this letter is to record my disagreement with the approach adopted by the National Lotteries Commission to the publication of beneficiary information by the Commission and to request to have a change effected in the current practice of the NLC.

This issue arises out of the interpretation of Regulation 8 of the Regulations Relating to Distribution Agencies made in terms of section 60 of the Lotteries Act 57 of 1997 ("the Act") in February 2001. Regulation 8 provides that –

"8. Security Information –

(1) Subject to the Constitution, the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), the Promotion of Administration Justice Act, 2000 (Act No. 3 of 2000) and the Protected Disclosure Act, 2000 (Act No. 26 of 2000), no person may in any way–

(a) disclose any information in connection with any grant application or a grant itself;

(b) *disclose the contents of a report contemplated in regulation 6(1); or*

(c) *publish any information obtained in contravention of paragraph (a) or (b); unless-*

(i) *ordered to do so by a court of law;*

(ii) *making a bona fide confidential disclosure or publication to the Minister, the Public Protector, Parliament or a committee designated by Parliament, a member of the South African Police Service or the national prosecuting authority;*

(iii) *the juristic person who made a grant application and the board consent thereto in writing prior to that disclosure or publication; or*

(iv) *provided for in these regulations.*

(2) *An agency, a person appointed to an agency or any person rendering services to an agency in whatever capacity may not in any way disclose any information in respect of or comment upon a grant application or a grant itself unless authorised thereto in writing by the Minister or the chairperson of the board.*

(3) *Any person who contravened subregulation (1) or (2) shall be guilty of an offence and liable to a fine or to imprisonment or to both a fine and imprisonment."*

The NLC has adopted the view that Regulation 8 prohibits the sharing of information relating to beneficiaries including their names, NPO numbers, grant amounts allocated to them including the dates when tranches in which respect of these amounts are paid. It advised the Parliamentary Portfolio Committee that it had received a legal opinion from its attorneys adopting this approach and circulated a copy of this opinion to the Committee in February 2020.

I have taken legal advice on this issue and disagree with this conclusion.

CL
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Firstly, this approach is in clear conflict with the emphasis that the Act places on the importance of the principles of openness and transparency in the administration of the National Lottery.

Section 2A(1) of the Act provides –

“(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.”

Similarly, Section 10 deals with the functions of the Board stating that the Board must ensure that the Commission applies the principles of openness and transparency when performing its functions.

The prohibition on disclosure in Regulation 8 is drafted in similar terms to section 67 of the Act. Section 67 applies to the disclosure of any information in connection with an application for any license, certificate or appointment under this Act. It is evident that Regulation 8 was enacted to extend the approach of section 67 to the disclosure of information concerning grants and grant applications.

The rationale given for the interpretation of Regulation 8 is that the names of beneficiaries should not be disclosed to protect beneficiaries from the prospects of extortion or other criminal activities. In addition, the opinion received by the NLC refers to the publication of defamatory statements concerning the NLC and beneficiaries of grants in relation to the pro-active funding activities of the NLC.

In my view, neither the possibility of certain beneficiaries being exposed to criminal threats nor press reporting, whether defamatory or not, justifies a prohibition on the naming of beneficiaries. There are numerous other legal remedies available to deal with these eventualities.

A similar approach to the Regulations is adopted in memorandum to me by the United Civil Society in Action received, 5 March 2020, who suggest that the naming of NLC beneficiaries is illegal. They write as follows –

“Our personal information is protected by this Act, and the National Lotteries Commission and the Minister of Trade and Industry have to comply with the requisite of this Act in full, that for private information to be disclosed publicly should be done so only after following the Act, which unfortunately have not been followed.”

The effect of this argument is that the identity of a beneficiary under the Act cannot be publicly disclosed, unless the beneficiary consents thereto or a court has ordered disclosure.

A list of beneficiaries was previously included in the NLC's Annual Reports. However, with effect from the 2018/19 financial year, the NLC stopped including beneficiary information in its Annual Report on the basis that this would amount to a breach of Regulation 8. It is perturbing the NLC has altered its interpretation of Regulation 8.

In my view, Regulation 8 does not prohibit the disclosure of the identity of the beneficiaries. The names of beneficiaries do not constitute a part of a grant application or a grant. Had the Minister who published the regulations intended for Regulation 8 to prohibit the disclosure of the identity of beneficiaries of public funds, one would have certainly expected that such a prohibition would have been explicit in the Regulation.

While I accept that the practice of listing beneficiaries were named in Annual Reports for many years does not amount to a legal precedent, the fact that this interpretation was assumed by all stake- holders to be correct for almost 20 years is an indication of how tortured the revised interpretation of Regulation 8 adopted by the NLC is.

The absurdity of this construction is also revealed when it is applied to the language of section 67. Section 67 would have to be interpreted as meaning that the name of an applicant for a licence, certificate or appointment in terms of the Act could only be named with its consent.

In response to a request by the Director-General to receive a list of pro-actively funded projects for 2016-2018, the Commissioner disclosed the list to the Minister in terms of Regulation 8. However, in the letter dated 31 January 2020, the Commissioner stated

"It is noteworthy that the information provided is classified as SECRET in line with the NLC's Information Classification and Management Policy. The contents of the information provided are deemed to be beneficiary information and the NLC, as the custodian of this information, are obliged to ensure that information shall not be reproduced, used or disclosed in any manner in accordance with applicable legislation".

The letter goes on to quote the text of Regulation 8 of the Distribution Agencies Regulations as the basis for this approach.

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To the extent that the NLC is also seeking to rely on the Protection of Personal Information Act 4 of 2013 ("the POPI") as a basis for not disclosing the names of beneficiaries, I am advised that POPI is not yet in effect and, in any event, would not prevent the publication of this information.

The classification of the list of pro-actively funded projects as "SECRET" is not warranted by any legislation and is in clear breach of the obligation of the NLC.

It is my considered view that the NLC has adopted an interpretation of Regulation 8 that is incorrect. The names of beneficiaries are not information about a grant or grant application as contemplated by Regulation 8. Regulation 8 does not justify altering the long-held practice of publishing the names of beneficiaries in the Annual Report. The publication of such a list is consistent with the clear requirements of the Act for open and transparent governance as referred to above.

I therefore, call upon the NLC to resume the practice of publishing the names of beneficiaries and that such information include those who receive funds for pro-actively funded projects.

Yours faithfully



EBRAHIM PATEL
MINISTER OF TRADE, INDUSTRY AND COMPETITION

CL
NL



19 October 2020

Mr Duma Nkosi

Portfolio Committee on Department of Trade and Industry
Parliament Street
Cape Ton
8000

Email: nkosiduma@gmail.com / ahermans@parliament.gov.za / tmadima@parliament.gov.za

Attention: - **The Chairperson of the Portfolio Committee on Trade and Industry**

And To: -

The Minister of Trade and Industry
Mr Ebrahim Patel

Email: ministry@economic.gov.za / Kmotlhabi@economic.gov.za /
TMasoga@thedti.gov.za

Attention: - **The Chairperson of the Portfolio Committee on Trade and Industry**

And To:

National Lotteries Commission
Prof Alfred Nevhutanda

Email: profnevh@gmail.com

Attention: - **The Chairperson of the National Lotteries Commission**

Dear Mr Nkosi, Minister Ebrahim Patel and Prof Alfred Nevhutanda,

CL
ML



RE: PUBLISHING OF THE NATIONAL LOTTERIES COMMISSION BENEFICIARIES

1. We refer to your instruction to the National Lotteries Commission to to disclose all beneficiaries it funded in 2018/19 financial year published on the 16 July 2020.
2. We are African Liberty Movement, a non-profit organisation that seeks to advance and pioneer the interest of black and previously disadvantaged South Africans.
3. We address this letter to you Honourable Minister and Chairperson, in accordance with our mandate as derived in terms of section 38 of the Constitution of the Republic of South Africa and acting in the interests we have already mentioned and on behalf of our members.
4. We would like to bring to your attention chairperson Regulation 8 of the Regulations Relating to Distributing Agencies published in Government Gazette No. 22092 of 22 February 2001 (“**Regulation 8**”), which provides protections regarding information that is submitted by applicants for grant and those granted grants under the Lotteries Act read with the Regulations. It provides as follows:

8. Security of information —

(1) Subject to the Constitution, the Promotion of Access to Information Act, 2000 (Act 2 of 2000), the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) and the Protected Disclosures Act, 2000 (Act 26 of 2000), no person may in any way—

- (a) disclose any information in connection with any grant application or a grant itself;*
- (b) disclose the contents of a report contemplated in regulation 6 (1); or*
- (c) publish any information obtained in contravention of paragraph (a) or (b); unless—*
 - (i) ordered to do so by a court of law;*

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(ii) making a bona fide confidential disclosure or publication to the Minister, the Public Protector, Parliament or a committee designated by Parliament, a member of the South African Police Service or the national prosecuting authority;

(iii) the juristic person who made a grant application and the board consent thereto in writing prior to that disclosure or publication; or

(iv) provided for in these regulations.

(2) An agency, a person appointed to an agency or any person rendering services to an agency in whatever capacity may not in any way disclose any information in respect of or comment upon a grant application or a grant itself unless authorised thereto in writing by the Minister or the chairperson of the board.

(3) Any person who contravenes subregulation (1) or (2) shall be guilty of an offence and liable to a fine or to imprisonment or to both a fine and imprisonment."

5. Mr. Chairperson and Honorable Minister in terms of the above Regulation it is unlawful to publish the information of the NLC Beneficiaries unless such information is provided to the persons and offices mentioned in Regulation 8.
6. We further would like to bring to your attention a pending court case relating the above-mentioned Regulation. The purpose of the court case is to request for an order to declare the Regulation 8 unconstitutional. For ease of reference, the case number is 32127/20 due to be heard in the High Court of South Africa Gauteng Division, Pretoria.
7. Chairperson, we think it would be prudent that we all await for the judgement of the above case prior to the publication of the beneficiaries as requested in your address to the National Lotteries Commission ("NLC")
8. Moreover, we would like to bring to your attention the Public Servant Commission Republic of South Africa Circular 1 of 2020: Reference Number 7/3/P, which deals with employees acting on unlawful instructions from Executive Authorities or senior managers.

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- 9. The purpose of the Circular is to advise Executive Authorities s and Heads of Departments, as well as all public servants, regarding their responsibility to perform their duties within the confines of the legislative framework and to report irregularities as well as unlawful instructions to the relevant authorities.
- 10. It is our considered view that the instruction by the Portfolio Committee of Trade and Industry is unlawful and the NLC would be acting unlawfully should they carry out such an instruction.
- 11. Chairperson, Honorable Minister and the Chairperson of the NLC, in light of the above we therefore request the following:
 - a. The defer the instruction by the Portfolio Committee on Trade and Industry to the NLC to publish the information of the beneficiary pending the outcome of the above-mentioned court case; and
 - b. the NLC provide an undertaking that the information of the beneficiaries will not be published pending the outcome of the above-mentioned court case.
- 12. Chairperson, Honorable Minister and the Chairperson of the NLC should our request not be attended to within a period of five (5) days of receipt of this letter, we will be left with no choice but to approach a court of law.
- 13. In conclusion, we would like to raise our concern and displeasure with the actions of the Minister of Trade, Industry and Competition on his unlawful embark of publicly disclosing the beneficiaries of the NLC.
- 14. Our rights are fully and strictly reserved.

Yours Sincerely

ADV. CHRISTOPHER L. SHABANGU

CEO: AFRICAN LIBERTY MOVEMENT NPC.

CL
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19 October 2020

Mr Duma Nkosi

Portfolio Committee on Department of Trade and Industry
Parliament Street
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