

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

CASE NO: 44498 /2021

In the matter between:

**PHILLEMON LETWABA**

Applicant

And

**NATIONAL LOTTERIES COMMISSION**

First Respondent

**SEKELA XABISO CA INC**

Second Respondent



**NOTICE OF APPLICATION**

**KINDLY TAKE NOTICE THAT** the abovenamed Applicant will, on the date of the hearing of the main application at 10h00 or soon thereafter as the Counsel for the Applicant may be heard, make an application to the Honourable Court for an order in the following terms:

1. That the Honourable Court condone non-compliance with the Rules relating to form, service and filling of applications, and that this application be dispensed with on an urgent basis as provided for in terms of Rule 6(12) of the Uniform Rules of Court.



2. That the decision of the First Respondent in terms of which the Second Respondent was appointed to conduct a forensic investigation be reviewed, declared unlawful and set-aside on account of non-compliance with the enabling legislation.
3. That the appointment of the Second Respondent be reviewed, declared unlawful and set-aside on account of non-compliance with the enabling legislation.
4. That the First Respondent, together with any Respondent that opposes the application, be directed to pay the costs of the application inclusive of costs consequent the employ of two Counsel.
5. That the Honourable Court grant such further and/or alternative relief.

**TAKE NOTICE FURTHER** that the accompanying affidavit of **PHILLEMONT LETWABA** together with the annexures thereto, as may be supplemented in terms of Uniform Rule of Court 53(4), will be used in support of the application.

**TAKE NOTICE FURTHER** that the First Respondent is called upon, in terms of Uniform Rule of Court 53, to show cause why the impugned decision(s) should not be reviewed and corrected or set aside.

**TAKE NOTICE FURTHER** that in terms of Rule 53(1)(b) of the Uniform Rules of Court, the First Respondent is required within fifteen (15) days after receipt hereof to dispatch to the Registrar of this Honourable Court the record of the decision sought to be reviewed and set aside (including all correspondence, reports, memoranda, documents, evidence, transcripts of recorded proceedings and other information serving before the First Respondent when the decision(s) were made) together with such reasons as they are by law required to give or desire to make, and to notify the Applicant that they have done so.

**TAKE NOTICE FURTHER** that within ten (10) days of receipt of the record from the Registrar, the Applicant may, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of their notice of motion and supplement their founding affidavit in terms of Rule 53(4) of the Rules of this Honourable Court.

**TAKE NOTICE FURTHER** that the Applicant has appointed **MANALA & CO**, whose full particulars appear hereunder as the address at which they will accept notice and service of all process in these proceedings.

**TAKE NOTICE FURTHER** that if any of the Respondents intend opposing this application, they are required to:

- (a) Within fifteen (15) days after receipt by them of the notice of motion or any amendment thereof, to deliver notice to the Applicant that they intend to oppose and in such notice to appoint an address within eight kilometer of the office of

the Registrar at which they will accept notice and service of all process in such proceedings; and

- (b) Within thirty (30) days after the expiry of the time referred to in Rule 53(4), to deliver any affidavits they may desire in answer to the allegations made by the Applicant.

**TAKE NOTICE FURTHER** that, if no such notice of intention to oppose be given, the application for the relief sought will be made at 10h00 on \_\_\_\_\_ of the month \_\_\_\_\_ 2021, or so soon thereafter as Counsel may be heard.

**DATED AT PRETORIA, ON THIS DAY THE 02<sup>ND</sup> DAY OF SEPTEMBER 2021**

*7 MANALA*

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**MANALA & Co. Incorporated**  
(Attorney for Applicant)  
210 AMARAND AVENUE  
PEGASUS BUILDING 1  
MENLYN MAINE  
WATERKLOOF GLEN EXT 2,  
PRETORIA

TEL: (012) 443 6438

EMAIL: Thato@manala-inc.co.za

REF: M&Co./ T Manala/ M0020

**TO : THE REGISTRAR OF THE GAUTENG DIVISION, PRETORIA**

**AND TO : NATIONAL LOTTERIES COMISSION**

(The First Respondent)

BLOCK D, HATFIELD GARDENS

333 GROSVENOR STREET

HATFIELD, PRETORIA

0083

**AND TO : SEKELA XABISO CA INC**

(The Second Respondent)

BUILDING 1, WAVERLEY OFFICE PARK

15 FOREST ROAD

BRAMELY, JOHANNESBURG

2018

**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

CASE NO: \_\_\_\_\_/2021

In the matter between:

**PHILLEMONT LETWABA**

Applicant

And

**NATIONAL LOTTERIES COMMISSION**

First Respondent

**SEKELA XABISO CA INC**

Second Respondent

APPLICANT: FOUNDING AFFIDAVIT

I, the undersigned

**PHILLEMONT LETWABA**

Do hereby state as follows, under oath:

1. I am an adult person with full legal capacity. I am employed as the Chief Operating Officer of the National Lotteries Commission. The facts deposed to herein are within my personal knowledge and are to the best of my belief both, true and correct. I am the Applicant in these proceedings.

2. The First Respondent is the **NATIONAL LOTTERIES COMMISSION**, a juristic entity established in terms of Section 2 of the Lotteries Act 57 of 1997 ("Lotteries Act"), and listed as a National Public Entity in Part A of Schedule 3 of the Public Finance Management Act 1 of 1999 ("PFMA"). The First Respondent conducts its principal business activities at 333 Grosvenor Street, in Hatfield, Gauteng Province.
  
3. The Second Respondent is **SEKELA XABISO CA INC**, an incorporated firm of chartered accountants, whose full and further particulars are unknown to me, save to mention that the Second Respondent conduct its primary business activities at Building 1, Waverley Office Park, 15 Forest Road, in Bramely, Gauteng Province.
  
4. This is an application for the judicial review of an administrative action in terms of the Section 1(c) of the Constitution alternatively in terms of Section 6 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").
  
5. The impugned administrative action comprises of decision to appoint the Second Respondent to conduct a forensic investigation into allegations of impropriety, levelled against me.
  
6. The aforesaid decision to appoint the Second Respondent was taken at an area over-which the Honourable Court exercises territorial jurisdiction and the Respondents conduct business operations at an area over-which the

Honourable Court exercises territorial jurisdiction. Against the foregoing background, I submit that the Honourable Court has jurisdiction to adjudicate the dispute presented in these proceedings.

## **FACTUAL BACKGROUND**

7. I was appointed as the Chief Operating Officer since 2017. In early January 2020, a few newspaper outlets ran a story alleging various instances of impropriety including that my wife had improperly received funding, of approximately R5 Million, in November 2017, from the National Lotteries Commission.
  
8. The allegations are untrue and I have no doubt that with the fullness of time the name will be cleared from the sting of the allegation. I may just mention, for present purposes, the following:
  - 8.1 **First**, decision making, in respect of the allocation of grants, is the absolute preserve of the Distribution Agency established in terms of Section 26A of the Lotteries Act, comprising of persons appointed by the Minister of Trade, Industry and Competition.
  
  - 8.2 **Second**, I have never been a member of the Distribution Agency, or appointed to the served in any capacity, related to the powers



conferred to the Distribution Agency in terms of Section 26B of the Lotteries Act.

8.3 **Third**, as I understand the operations of the National Lotteries Commission, and based on the information available from its records, funding is generally extended to Non-Profit Organisations and not to natural persons.

8.4 **Fourth**, I am recently married. My marriage relationship was solemnized in November 2020.

9. I have no doubt that the allegations against me are untrue and that an investigation will clear me due course. However, I am concerned that the pending investigation is palpably unlawful and that its unlawfulness will undermine the result of the investigation.

***Unlawfulness of the Second Respondent's appointment***

10. As I have already indicated, the First Respondent a juristic entity established in terms of Section 2 of the Lotteries Act and listed as a National Public Entity in Part A of Schedule 3 of the PFMA.

11. The First Respondent is bound by the stipulations of the PFMA. In this regard we refer to Section 3(1)(b) of the PFMA which provides that the Act applies to public entities listed in Schedule 2 or 3 thereof.
  
12. Section 76(4) of the PFMA authorises the Minister to promulgate Treasury Regulations and Instructions applicable to all institutions to which the PFMA applies concerning any matter that may prescribed for all institutions in terms of the PFMA and for the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.
  
13. On 15 March 2005, under the authority conferred in Section 76 of the PFMA, the Minister of Finance promulgated Treasury Regulations. The aforesaid Treasury Regulations apply to the First Respondent on account of the stipulation of Regulation 1.2.1(d) which provides that:

*These Treasury Regulations apply to all public entities listed in Schedules 3A and 3C, but only to the extent as indicated in paragraph 6.1.2, and Regulation 16, 16A, 24 to 28 and 30 to 33.*

14. In terms of the Regulation 16A of the aforesaid Regulations, the First Respondent is obliged to develop and implement an effective and efficient supply chain management systems for the acquisition of goods and services,

the disposal and letting of state assets, including the disposal of goods no longer required.

15. The supply chain management system must be fair, equitable, transparent, competitive and cost effective, consistent with the Preferential Procurement Policy Framework Act 5 of 2000 and the Broad Based Black Economic Empowerment Act 53 of 2003.
16. Pursuant the dictates of the Regulations, the procurement of goods or services must occur through either by way of quotations or through a bidding process, depending on the financial value of the services or the cost of the goods.
17. As I am advised, the procurement of services or goods in excess of R1 000 000-00 (One Million Rand) threshold must be conducted by way of competitive bidding.
18. The Second Respondent's appointment to conduct a forensic investigation into the aforementioned allegations against me, was not done by way of competitive bidding, despite that the value of the contract awarded to the Second Respondent far exceeds the R1 Million threshold.
19. On the information at my disposal, the First Respondent has already paid the Second Respondent an amount far in excess of R8 Million, for the forensic investigation of the allegations against me.

20. Regulation 16A, gives effect to Section 217 of the Constitution which directs that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
  
21. Section 2 of the Constitution proclaims that the Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.
  
22. On the available information, it is apparent that the First Respondent did not procure services of Second Respondent in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
  
23. The foregoing shortfall offends the stipulation of Section 217 of the Constitution and triggers the application of Section 2 of the Constitution with the consequence that the appointment of Second Respondent is invalid.
  
24. On the foregoing ground, alone, I submit that the appointment is liable for review and setting aside in terms of both the Constitution and Section 6 of the PAJA, on the basis that:

- 24.1 The First Respondent was not authorised to appoint the Second Respondent in the manner that the Second Respondent was appointed, as in the contemplation of Section 6(2)(a) of PAJA.
- 24.2 The appointment of the Second Respondent was executed in a manner inconsistent with the mandatory and material procedures prescribed by the PFMA, within the meaning of Section 6(2)(b) of PAJA.
- 24.3 The appointment of the Second Respondent was procedurally unfair in the contemplation of Section 6(2)(c) of PAJA.
- 24.4 The appointment of the Second Respondent contravenes law and is not authorised by the PFMA, as provided for in terms of Section 6(2)(f) of PAJA, and unconstitutional or unlawful within the meaning of Section 6(2)(l) of PAJA.

***Reasonable apprehension of bias***

25. I am deeply concerned that personal relationship between Mr William Huma, who is a member of board of the First Respondent, and the lead director of the Second Respondent, named Mr Abel Dlamini, will also undermine the result of an investigation.

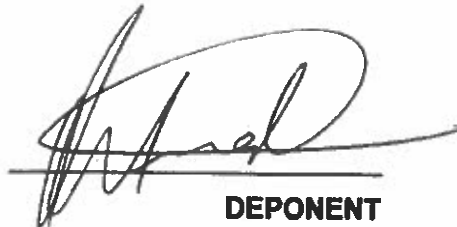
26. In this regard I submit that there exists a clear conflict of interest in the appointment of the Second Respondent.
27. I have also recently been made aware that Mr Abel Dlamini is closely associated with an organisation known as Ubuntu Institute for Young Social Entrepreneur NPC, and that the organisation received a grant from the First Respondent, through the pro-active funding model, in the total amount of R15 Million, immediately and/or soon after the impugned appointment of the Second Respondent.
28. I am concerned that the conspectus of the facts alluded to in this affidavit are such that will undermine the result of the investigation conducted by the Second Respondent.
29. For these reasons, I submit that the appointment of the Second Respondent is also unlawful, in the contemplation of Section 6(2)(e) of PAJA, because:
- 29.1 The appointment was made for an ulterior purpose or with an ulterior motive;
- 29.2 The appointment was made because of the unauthorised or unwarranted dictates of another person; and

29.3 The appointment was made in bad faith; and/or arbitrarily or capriciously.

## **CONCLUSION**

30. In the totality of the foregoing factors, I submit that the appointment of the Second Respondent is entirely unlawful and illegal.
31. The appointment is liable for review and setting aside in terms of the Constitution and in terms of the Section 6(2) of the Promotion of Administrative Justice Act.
32. In light of the seriousness of the transgressions mentioned in this affidavit, taken together with the continuation of the illegality and unlawfulness, I intended to approach the Office of the Registrar with a request for an allocation for hearing on the semi urgent basis, as soon as the pleadings are finalised.

**WHEREFORE**, I ask for an order in terms of the notice of motion to which this affidavit is attached as annexure.

  
**DEPONENT**

Signed before me at pretoria on 02 SEPTEMBER 2021, the deponent having sworn that the contents of this affidavit are true and correct, acknowledging that he knows and understands the contents, that he has no objection to taking the prescribed oath and that he considers the oath to be binding on his conscience.



  
COMMISSIONER OF OATHS

Full Name: Maryane BM

Designation: Police officer (Sgt)  
277 Johnny Claassen  
Street