

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 31182/2020

In the matter between:

ZAKHENI MA AFRICA

Applicant

[REG NO: 191-334]

And



**MINISTER OF TRADE, INDUSTRY AND
COMPETITION**

First Respondent

NATIONAL LOTTERIES COMMISSION

Second Respondent

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE THAT the Applicant intends to make an urgent application to the above Honourable Court on **Tuesday the 28th July 2020 at 10H00** or soon thereafter as Counsel may be heard for an order in the following terms:

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 to immediately cease to request the Second Respondent to publish the personal details of the Applicant, including the personal names of the beneficiaries, the names of the projects undertaken by the Applicant, the amount of grants, funds, and allocations distributed to the Applicant, subject to the provisions of Regulation 8 (1) (c) of the National Lotteries Act 57 of 1997.
3. Ordering the Second Respondent not to execute the instruction(s) of the First Respondent, requesting the publication of personal details of its beneficiaries including, the names of the projects undertaken by the Applicant, the amount of grants, funds, and allocations distributed to the Applicant, subject to the provisions of Regulation 8 (1) (c) of the National Lotteries Act 57 of 1997.
4. Ordering the Second Respondent to refrain from disclosing the personal details of the Applicant, including the personal names of the beneficiaries, the names of the projects undertaken by the Applicant, the amount of grants, funds, and allocations distributed to the Applicant, subject to the provisions of Regulation 8 (1) (c) of the National Lotteries Act 57 of 1997.

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

6. Further and/or alternative relief

and that the accompanying affidavit of **Shaun Mpho Lanto** will be used in support thereof which contains annexures.

TAKE NOTICE FURTHER that if you intend 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 Friday, 17th July 2020;**
- b) To deliver your answering affidavit, if any, by no later than **16H00 on Tuesday, 21th July 2020**
- c) The Applicant to deliver its replying affidavit, if any, by no later than **12H00 of Thursday, 23rd July 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 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, **MUSHWANA INCORPORATED ATTORNEYS** set out below at which it will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER THAT the Applicant consents to and request service by email and request that you do the same.

DATED AT PRETORIA ON THIS THE 15TH DAY OF JULY 2020.

[sgd] M. MUSHWANA

MUSHWANA INC [PRETORIA]

[Signatory has the right of appearance
in accordance with Section 4 of 62 of 1995]

[PLAINTIFF'S ATTORNEYS]

23 BUREAU LANE

2ND FLOOR, CENTENARY BUILDING

P.O. BOX 2312

PRETORIA, 0001

TEL: (012) 323 1898

FAX: (012) 325 6165

E-mail: mandla@mushwanainc.co.za

REF: M. MUSHWANA/SM/CIV/Z0089/20

TO: REGISTRAR OF THE HIGH COURT
PRETORIA

AND TO:

MINISTER OF TRADE INDUSTRY AND COMPETITION

[First Respondent]

The DTI Campus

77 Meintjies Street, Sunnyside

Pretoria

0002

Email: MEbrahim@thedti.gov.za

AND TO:

NATIONAL LOTTERIES COMMISSION

[Second Respondent]

Hatfield Gardens, Block D

333 Grosvenor, Street

Hatfield, Pretoria

0001

Email: Thabang@nlcsa.org.za

Tsietsi@nlcsa.org.za

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FOUNDING AFFIDAVIT

I, the undersigned,

Shaun Mpho Lanto

1. I am an adult male person with identity numbers 9110275400081 with full legal capacity and employed as the Deputy Chairperson of the

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Applicant situated at number 211, 2nd Avenue Alexandra, Gauteng Province.

2. I am duly authorised to depose to this affidavit on behalf of the Applicant, by virtue of the Resolution taken by its representatives, to which this Honourable court is referred to marked *Annexure "SML 1"*.
3. The facts contained in this affidavit are, unless the context indicates otherwise, within my personal knowledge and are to the best of my knowledge and belief both true and correct.
4. Where I make legal submissions, I do so, on the advice of our legal representatives, advice of which I accept as correct.

PARTIES

5. The Applicant is **ZAKHENI MA AFRICA**, a Non profit (NPO) organization with its registration numbers 191-334 and its principal place business situated at number 11, 2nd avenue Alexandra, 2090, Gauteng Province. I attach the Applicant's Constitution and proof of registration hereto

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attached for the Honourable Court's attention marked as **Annexure "SML 2"**

6. The First Respondent is the Minister of Trade, Industry and competition (herein after referred to as "the Minister"). His offices are at The DTI Campus, number 77 Meintjies street Sunnyside Pretoria. The incumbent is Mr Ebrahim Patel cited herein in his official capacity as the minister that is responsible for the administration of the department, with email address Mernest@thedti.gov.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 info@nlcsa.org.za, Thabang@nlcsa.org.za .

JURISDICTION

8. The Applicant is a Non-Profit Organisation (NPO) in the Republic of South Africa, which operates, within the Jurisdiction of the above


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Honourable court and is a beneficiary of grants and allocations distributed by the Second Respondent.

JUST AND EQUITABLE RELIEF SOUGHT

9. The Applicant seeks the following in this application:

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

9.2. An order that the First Respondent be interdicted to request the Second Respondent to publish the personal details of the Applicant, including the personal names of the beneficiaries, the names of the projects undertaken by the Applicant, the amount of grants, funds and allocations distributed to the Applicant, subject to the provisions of Regulation 8 (1) (c) of the National Lotteries Act 57 of 1997.

9.3. An order that, the Second Respondent does not to execute any instruction(s) of the First Respondent, requesting the publication of

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personal details of its beneficiaries including, the names of the projects undertaken by the Applicant, the amount of grants, funds and allocations distributed to the Applicant, subject to the provisions of Regulation 8 (1) (c) of the National Lotteries Act 57 of 1997.

- 9.4. An order that the Second Respondent is Interdicted from disclosing the personal details of the Applicant, including the personal names of the beneficiaries, the names of the projects undertaken by the Applicant, the amount of grants, funds and allocations distributed to the Applicant, subject to the provisions of Regulation 8 (1) (c) of the National Lotteries Act 57 of 1997.
- 9.5. An order for the Respondents to pay the cost of this application in the event of opposition.

URGENCY

10. The fact that, this matter is by its nature urgent and it is further triggered by the Second Respondent has been under tremendous pressure as early as March 2020 from different media houses and the Minister to make public the details of its beneficiaries, including amounts of grants, funds and allocations distributed to them. There

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were even threats to place the board of the Second respondent under administration.

11. On the 29th June 2020 an article was published on News 24 with the heading “National lotteries Commission to reveal list of Covid-19 relief fund beneficiaries” The Honourable Court is referred to *Annexure “SML 3”* being a copy of this article. This being the time we become aware of the intentions and request of the First Respondent.
12. I also then learnt that the First Respondent had been writing letters to the Second Respondent requesting them to make public, the list of beneficiaries, together with the details of funding they received.
13. After becoming aware of the intentions of the Respondents through the media forum, I then approached my attorneys of record on the 10th July 2020, in view of consulting and seeking legal advice. After consultation, my attorneys caused an urgent letter to be sent to both the respondents. Copy of the letter which is hereto attached marked *“Annexure SML 4”*.

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14. The contents of our letter was to request that both parties should refrain from making public, the personal details of the applicant in relation to the grants and funds received from the second respondent, in line with the Regulations and National Lotteries Act No: 57 of 1997 (herein after referred to as "the Act").

15. The said communication was received by both the Respondents as notifications were received that the email was successfully sent and read. The Honourable court is referred to "**Annexure SML 5, 6 and 7**" being proof of service thereof.

16. On the 15th July 2020, a response was received from the Minister, who acknowledged our communication. The Honourable Court is referred to "**Annexure SML 8**", being a copy of the letter from the minister. In their response they raise an issue of short notice to respond but however fail to indicate when the minister would be in position to give his response.

17. I humbly submit that at the time of preparing this affidavit no response or acknowledgement of our letter was received from the Second respondent.

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18. A follow up correspondence by email was received from the minister on the 15th July 2020. A copy of this email is hereto attached and marked as "**ANNEXURE SML 9**".

19. I wish to point out that the Minister in the last email referred to above (*para 18 supra*), acknowledges that this is an important matter but still fails to indicate when, he will forward a formal response, despite only indicating on his first response that the Applicant we should not approach court hastily.

20. It is clear from above that if we continue delaying the bringing of this Application before the Honourable Court, I have no guarantee that the Respondents will not proceed to publish and or disclose my personal details as a beneficiary to the public domain, without due process being followed as envisaged in the Regulations to the Act.

21. The Applicant does not have any alternative remedy to pursue

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22. The First and Second Respondent must be ordered to observe, respect and give effect to the Constitutional right of the Applicant in enforcing the guidelines of the Act and Regulations.

23. There are strong rumors that the First Respondent is exerting tremendous pressure on the Second Respondent to proceed and make public the details of its beneficiaries and have written letters to this effect, the latest one being on the 13th July 2020.

24. An online article was published on the 15th July 2020 by an Non Profit Organisation called GroundUp, titled "Parliament to order National Lotteries Commission to hand over details of all its grants" by Raymond Joseph (erstwhile employee of National Lotteries Commission). The Honourable court is referred to the article hereto attached marked **"ANNEXURE SML 10"**.

25. The publication of such information will be unlawful, have a direct impact our right to privacy and would in particular undermine the integrity of the regulatory framework under the Lotteries Act and Regulations. This will remove all the legal protection we receive.

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26. The First Respondents intent to publish personal information of beneficiaries for public consumption without due process seems very imminent.

27. As a result of the foregoing I submit that the matter requires to be dealt with under Rule 6 (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.

28. It is my respectful submission if this matter is not heard on an urgent basis the Respondents will publish my personal without due process as envisaged in the Regulations of the Act. The publication thereof is not strictly prohibited but it's subject to compliance with Regulation 8(1)(c), PAIA,PAJA or PDA.

29. I am advised further that if this application were to proceed in the ordinary course, it would only be heard during 2021 and I respectfully submit that would not be in the interests of justice.

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30. I would be seriously prejudiced if our rights as enshrined in all the provisions referred to herein above, are trampled upon by the Respondents without the intervention and protection of this Honourable Court.
31. In these circumstances, I humbly request this Honourable Court to exercise its discretion and allow this matter to be heard on an urgent basis.

THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

32. The Lotteries Act, more specifically Section 67 read together with the regulations thereto, restricts the publication of 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).

32.1 Regulations 8 of Act provides as follows:

(1) Subject to the Constitution, the promotion of Access to information act No2 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 :-

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- 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 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;*
 - 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*

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a grant application or a itself authorised thereto in writing by the Minister of 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.

33. Any form of publication thereof will be in contravention of the Lotteries Act and Regulations thereof. The provisions of section 2 of the Protection of Personal Information Act, No. 4 of 2013 (POPI) one of its purposes is to give effect to the constitutional right to privacy in keeping with section 14 of the Constitution.

33.1 Information in the articles constitutes personal information as defined in section 1 of POPI, which provides that:

“personal information means information relating to any identifying number, symbol, email address, physical address, local information, online identifier or other particular assignment to the person” including but not limited to what is listed in subsections (a) to (h) of the definition.

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34. The Promotion of Access to Information Act 2 of 2000 (PAIA) allows access to any information held by the State, and any information held by private bodies that is required for the exercise and protection of any rights. Section 9 of PAIA recognises that the right of access to information is subject to certain justifiable limitations aimed at, amongst others:

(a) the reasonable protection of privacy;

(b) commercial confidentiality;

(c) effective, efficient and good governance.

FINAL INTERDICT

35. It is a requirement that the following should exist in order to obtain a final interdict:-

35.1. *A clear right;*

35.2. *An injury actually committed or reasonably apprehended
and*

35.3. *The absence of any other satisfactory remedy available.*

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36. By virtue of being of a beneficiary to grants issued by the Second Respondent, I enjoy a clear right. Such rights are provided for in terms of Regulation 8 (1) (c) read together with Section 67 of the Act.
37. The current imminent attempt by the Respondents to publish my personal details as a beneficiary of the Second Respondent in media and for public consumption, it will be in contravention of section 67 of the Lotteries Act as well as the Regulation 8 with all its provisions as listed in 8(1)(c).
38. I have not given my consent and or permission to publish my personal details in as far as it relates to grants, issued by the Second Respondent. I am also not aware of any court order granting permission to make any publication whatsoever in this regard.
39. There exist a reasonable apprehension that my right will be attacked and interfered with by the Respondents, whilst being aware that consent or an order of court is required before any publication of personal details of the beneficiaries.

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40. There are currently media articles being published with information of the Ministers insistence on the Second Respondents to make public information of the beneficiaries, more so some articles even have time frames when it should be done. The unlawful dissemination of information poses a real danger mainly for grant beneficiaries.

41. It is further reasonably apprehended, that with the mounting pressure on the Second Respondent from the First Respondent, there exists a possibility of publication of the personal details of the beneficiaries including the amount of grants and allocations distributed by the Second Respondent, how the grants and when those trenches of grants and allocation were made by the Second Respondent.

42. I respectfully submit that on these apprehensions a final interdict should be granted.

AD PREJUDICE

43. We obtain grants and donations from various stakeholders and try to benefit our organizational beneficiaries and other members of the community to the best of our capabilities

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44. It becomes a politicized agenda when our funding records are made public knowledge which leads to chaos and entitlement issues from some community members.
45. **Private Donors**: it could make some of our private donors nervous if we disclose other donor funds to the general public. Private donors may get the impression that their information will also be disclosed and that will jeopardize our fund-raising abilities in the foreseeable future.
46. **Protection of the beneficiary**: Disclosing donor funds could open up our organization to even bigger public scrutiny that could lead to beneficiary information being jeopardized. Our organization works with some of the most vulnerable members of society and it is always imperative to protect their identity and their information. Opening up our information for public scrutiny could lead to breaches in confidentiality between our organization and the beneficiaries we serve.
47. It is my humble submission that I cannot obtain adequate redress in some other form of ordinary relief, therefore there are no other satisfactory remedy available except to approach the above Honourable court.

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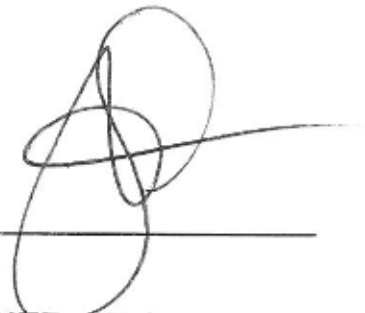
48. My right will continue to be at risk of being attacked or interfered with without following due process, I stand to suffer real and long lasting damage to the privacy of personal information, trampling of enshrined rights as per the Act and Regulations.
49. I do not have any alternative relief except to approach this Honourable court for a final interdict on an urgent basis.

I PRAY FOR THE ORDERS as per the Notice of Motion of which this Founding Affidavit is attached to.



DEPONENT

I hereby certify that the deponent has acknowledged that he knows and understand the contents of this Affidavit, which was signed and sworn before me at Pretoria on the 16th July 2020, the regulations contained in Government Notice no R1258 of 21 July 1972, as amended, and Government Notice no R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

NAME: **COMMISSIONER OF OATHS**

SHALTAH DIKOLUBE
Commissioner Of Oaths

ADDRESS: Ex Officio
Practising Attorney (RSA)
Office 402-403 Centenary Building
AREA: 23 Bureau Lane, Pretoria 0001

CAPACITY: _____