

*In re:* The National Lotteries Commission and the disclosure of the identity of grant recipients

*From:* Advocate Piet Olivier

*To:* The Democratic Alliance *on the instruction of* Minde Schapiro and Smith Inc.

*Date:* Wednesday, 8 July 2020

## OPINION

### I. INTRODUCTION

1. I have been asked to advise on whether the National Lotteries Commission may disclose the names of beneficiaries<sup>1</sup> of the National Lottery Distribution Trust Fund (**‘the Fund’**) to Parliament or members of the public and, if so, how this can take place.
2. I conclude that —
  - 2.1. the Lotteries Act 57 of 1997 does not preclude such disclosure;
  - 2.2. rather, the Lotteries Act probably *requires* the Commission to disclose the names of beneficiaries in its annual report to Parliament;
  - 2.3. the Commission must provide the names of beneficiaries to a member of the public if he or she makes a request in accordance with the Promotion of Access to Information Act 2 of 2000 (**‘PAIA’**) and PAIA requires disclosure; and

---

<sup>1</sup> In this opinion, where I refer to beneficiaries of the Fund, I am referring to entities receiving grants from the Fund, and not to winners of the National Lottery.

- 2.4. this position is not altered by the Protected Disclosures Act 26 of 2000 (**‘the Disclosures Act’**), the Protection of Personal Information Act 4 of 2013 (**‘POPI’**), the Promotion of Administrative Justice Act 3 of 2000 (**‘PAJA’**), or the Regulations relating to Distribution Agencies of 2001<sup>2</sup> (**‘the distribution agency regulations’**).
3. In drafting this opinion, I have had regard to the request for a legal opinion, written by Mr D Nkosi MP and dated 10 June 2020; the papers filed to date in the application by ‘United Civil Society in Action’ under case number 24775/20 (the **‘UCSA application’**); correspondence and parliamentary questions involving Mr MJ Cuthbert MP of the Democratic Alliance; and correspondence by the Minister of Trade, Industry and Competition to Mr Nkosi. Given that this opinion is required extremely urgently, it must of necessity be at a high level. I am available to discuss and elaborate if needed.

## II. THE LOTTERIES ACT AND DISCLOSURE

### (a) *Transparency and the Commission’s reporting obligations*

4. The Lotteries Act repeatedly imposes duties of transparency and propriety on the Commission and the other bodies in the regulatory ecosystem created by the Act:
- 4.1. Section 2A(1) provides that 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’*. Section 10(1)(o) imposes a duty upon the board of the Commission to *‘ensure that the Commission exercises its powers in accordance with the principles of transparency and accountability’*.

---

<sup>2</sup> Regulations relating to Distributing Agencies GNR 182 GG 22092 of 22 February 2001.

- 4.2. Section 10(1) requires the board of the Commission to itself apply *‘the principles of openness and transparency’* in exercising its functions.
- 4.3. Section 2A(2) requires the Commission to ensure that *‘the National Lottery ... [is] conducted with all due propriety and strictly in accordance with the Constitution, this Act, [and] all other applicable law’* and section 10(1)(b)(i) imposes a similar duty upon the Commission’s board.
- 4.4. Section 35 provides that *‘[e]very institution which in any way acts under or in terms of this Act, must comply strictly with section 195 of the Constitution’*, which, in turn, enshrines the principles that *‘[p]ublic administration must be accountable’* and that *‘[t]ransparency must be fostered by providing the public with timely, accessible and accurate information’* in public administration.<sup>3</sup>
5. This is unsurprising. As the Supreme Court of Appeal recognised in *National Lotteries Board v SA Education and Environment Project*:<sup>4</sup>
- ‘The board holds public funds in trust for the purpose of allocating them to deserving projects. And it must ensure that these funds are allocated to those projects, provided of course that they meet the necessary requirements. The funds do not belong to the board to be disbursed as its largesse.’*<sup>5</sup>
6. The Commission (in co-operation with distributing agencies) is responsible for allocating an enormous amount of money in this way. In 2019 alone, it paid R1.56bn to grant

---

<sup>3</sup> Sections 195(1)(f) and (g) of the Constitution.

<sup>4</sup> *National Lotteries Board v SA Education and Environment Project* [2012] 1 All SA 451 (SCA).

<sup>5</sup> *Id* para 39. See also section 10(1)(c) of the Lotteries Act: *‘The board shall in applying the principles of openness and transparency and in addition to its other functions in terms of this Act ... manage and administer the fund and hold it in trust’*.

beneficiaries.<sup>6</sup> The potential for misallocation – and worse, the temptation for graft – is evident. As such, the public has an interest in knowing how these funds are disbursed, and transparency on the part of the Commission serves this interest.<sup>7</sup>

7. As such, the Lotteries Act imposes specific reporting duties on the Commission. Section 12(1)(a) requires the board of the Commission to *'keep proper books and records in relation to receipts and payments'*.<sup>8</sup> Section 12(1)(b) requires the board to *'prepare a report of all the activities of the board, including financial statements, in respect of each financial year'*, and section 12(1)(c) requires that the board submit this report to Parliament annually.
8. Importantly, section 21(2) stipulates that this report must include *'financial reports in accordance with the provisions of the Public Finance Management Act ... in Parliament in respect of the distributed funds'*.<sup>9</sup> The phrase *'distributed funds'* must mean funds distributed to beneficiaries from the Fund, given that it is in section 21, which creates the Fund.
9. The question, thus, is whether the obligation to report annually to Parliament *'in respect of the distributed funds'* includes the obligation to disclose the names of Fund beneficiaries. On this score, the Act is not entirely clear. The obligation to report *'in respect of the distributed funds'* is vague. It is arguable that this obligation includes the obligation to disclose the names of Fund beneficiaries, but one could also argue that the

---

<sup>6</sup> NLC 2019 Annual Report p 97, available at [http://www.nlcsa.org.za/ir/ir2019/NLC\\_ir2019/downloads/nlc-full.pdf#view=Fit](http://www.nlcsa.org.za/ir/ir2019/NLC_ir2019/downloads/nlc-full.pdf#view=Fit), accessed on 7 July 2020.

<sup>7</sup> That transparency assists in the fight against corruption and maladministration is considered axiomatic by the courts. See, for example, *My Vote Counts NPC v Minister of Justice and Correctional Services* 2018 (5) SA 380 (CC) paras 45 – 52.

<sup>8</sup> Emphasis added.

<sup>9</sup> Emphasis added.

board can comply with this obligation by providing more general information, such as breaking down the distributed funds by category (charities; sport and recreation; arts, culture and national heritage; and so on).

10. On balance (and I must emphasise that this is not clear), I am of the opinion that the best interpretation of the board's section-21(2) duty is that it includes the duty to disclose the names of Fund beneficiaries.
11. The first reason for this is the duties of transparency and propriety imposed by the Lotteries Act. The disclosure of the names of grant beneficiaries is an obvious, and arguably necessary, means of fulfilling these duties. Parliament, the media and the public cannot determine whether the Fund is being put to good use without knowing who is being funded.
12. Armed with each beneficiary name, it can be investigated whether a beneficiary (a) met the minimum requirements for obtaining a grant, (b) was sufficiently deserving compared with other applicants to justify the award it received, and (c) is improperly connected to a board member, a member of a distributing agency or anyone else at the Commission. Without beneficiary names, these investigations are impossible.
13. Secondly, section 21(2) is the result of an amendment that took place in 2013. Comparing the current version of the section with the version it replaced indicates an intention to place more onerous reporting requirements on the board. The following is a quotation from the amendment Act,<sup>10</sup> with additions underlined and omissions **[in bold and bracketed]**:

---

<sup>10</sup> Lotteries Amendment Act 32 of 2013.

*'The board shall annually table [a report] financial reports in accordance with the provisions of the Public Finance Management Act ... in Parliament in respect of the [fund] distributed funds, which [may] financial report must form part of the report contemplated in section 12(1)(b).'<sup>11</sup>*

14. The move from 'a report' to 'financial reports in accordance with the provisions of [the PFMA]' indicates more detailed reporting. The move from 'fund' to 'distributed funds' implies a move from an obligation to reporting generally about the Fund to an obligation to report more specifically on how the Fund is being distributed.
15. Thirdly, in the years prior to the financial year ending in 2019, the Commission had always included the names of Fund beneficiaries in its annual report to Parliament, and Parliament had raised no issue with this practice. In *Marshall*,<sup>12</sup> the Constitutional Court held that if a statutory provision is ambiguous, it is possible that a practice that 'is evidence of an impartial application of a custom recognised by all concerned' can be used to interpret the provision.<sup>13</sup>
16. Fourthly, making the names of Fund beneficiaries public is unlikely to limit their right to privacy under section 14 of the Constitution or if it does, to limit it unjustifiably.<sup>14</sup> A person only has a right to privacy in respect of information if it is objectively reasonable to expect that the information will remain private.<sup>15</sup> When an entity applies for a grant

---

<sup>11</sup> *Id* section 21.

<sup>12</sup> *Marshall NO v Commissioner for the South African Revenue Service* 2018 (7) BCLR 830 (CC).

<sup>13</sup> *Id* para 10, although the Court also warned that a practice that is 'unilaterally established by one of the litigating parties' cannot be used for this purpose.

<sup>14</sup> Section 39(2) of the Constitution requires statutory interpretation to further 'the spirit, purport and objects of the Bill of Rights'.

<sup>15</sup> *Bernstein v Bester NNO* 1996 (2) SA 751 (CC) at para 75.

from the Fund, it is asking for a share in public money. It cannot reasonably expect to be insulated from at least some public scrutiny if its application is successful.

17. Because it is more likely than not that the Commission must (and it is certain that the Commission may) include the names of Fund beneficiaries in its annual report to Parliament, and because this report is a public document, members of Parliament have no obligation to keep these names confidential once they receive the Commission's report.

**(b) *Section 67 of the Lotteries Act***

18. The Commission appears to have concluded that section 67 of the Lotteries Act precludes it from disclosing the names of Fund beneficiaries. This conclusion is incorrect.
19. Section 67 provides as follows:

***'67. Access to information***

- (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.*<sup>16</sup>

20. Section 67 only applies to ‘*information submitted by any person in connection with any application for any licence, certificate or appointment under this Act*’ (subsection (1)(a)).<sup>17</sup> The name of a Fund beneficiary is not such information.
21. It is not information connected to an application for a ‘*licence*’. A Fund beneficiary does not obtain a licence of any sort from the Commission. Moreover, when the Lotteries Act refers to a ‘*licence*’ it is usually referring to the licence to conduct the National Lottery as contemplated in Chapter 2 of Part I<sup>18</sup> – or to a licence to conduct a sports pool,<sup>19</sup> a gambling licence,<sup>20</sup> or licenses under previous laws.<sup>21</sup> It must therefore be presumed that when section 67 refers to a ‘*licence*’, it is referring to one of these licenses, because it is presumed that language is used consistently throughout a statutory provision.<sup>22</sup>
22. The name of a Fund beneficiary is also not connected to an application for a certificate, as a Fund beneficiary is not applying for a ‘*certificate*’ from the Commission. Moreover, the Lotteries Act only uses the word ‘*certificate*’ in one sense – to refer to the certificate issued to a lottery manager in terms of sections 47 to 51. There is no indication that the Act is using the word in a different sense in section 67.
23. In its answering affidavit in the UCSA application, the Commission claims that the name of a grant beneficiary is connected to an application for an appointment:

---

<sup>16</sup> Emphasis added.

<sup>17</sup> Emphasis added.

<sup>18</sup> See Lotteries Act, sections 2A(2)(a), 2G(2), 3(8)(a), 3C(2), 10(1), section 40 and Chapter 2 of Part I.

<sup>19</sup> *Id* sections 3(8)(b) and 55.

<sup>20</sup> *Id* section 3(8)(d).

<sup>21</sup> *Id* section 64.

<sup>22</sup> *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC) para 74 (citing *Minister of the Interior v Machadodorp Investments (Pty) Ltd* 1957 (2) SA 395 (A) at 404).



*'Appointments under the Lotteries Act, as contemplated in section 67, are broad and varied. They include appointments as grant beneficiaries. Therefore, section 67 of the Lotteries Act covers such appointments.'*<sup>23</sup>

24. This is not a good argument. The word '*appointment*' is not defined in the Act, so it is permissible to use its dictionary definition as a point of departure:<sup>24</sup> '*an act of assigning a job or position to someone*'.<sup>25</sup> An application for a grant is not for '*appointment*' in this sense. A Fund beneficiary is not assigned a '*job*' for or a '*position*' at the Commission. A Fund beneficiary does not perform any services for the Commission at all. Rather, an application for a grant is an application to be given money from the Fund because the applicant constitutes a worthy cause.
25. This conclusion is supported by how the word '*appoint*' is used in the rest of the Act.<sup>26</sup> It is only used to refer to appointing a person (usually a natural person) to perform a service in relation to the National Lottery, including the appointment of the Commissioner by the board,<sup>27</sup> the appointment of the Commission's staff,<sup>28</sup> the appointment of the board itself,<sup>29</sup> the appointment of committees of the board,<sup>30</sup> the appointment of a distributing agency,<sup>31</sup> the appointment of a person by the National Lottery licensee to perform functions on its behalf,<sup>32</sup> the appointment of an organ of state

---

<sup>23</sup> UCSA application, Commission answering affidavit ('**Commission AA**') para 21.

<sup>24</sup> In interpreting statutes, resort may be had to dictionary definitions – see *Fundstrust (Pty) Ltd v Van Deventer* 1997 (1) SA 710 (A) at 726 – 727.

<sup>25</sup> Oxford University Press *Oxford Dictionary of English* ('*appointment*') [iOS].

<sup>26</sup> See *Dladla* above n 22 para 74.

<sup>27</sup> Lotteries Act, section 2B.

<sup>28</sup> *Id* section 2D.

<sup>29</sup> *Id* section 3.

<sup>30</sup> *Id* section 5.

<sup>31</sup> *Id* section 26A.

<sup>32</sup> *Id* section 13.

to run the National Lottery,<sup>33</sup> and the appointment of members of a distributing agency.<sup>34</sup>

A Fund beneficiary is not '*appointed*' in anything approaching this sense.

26. There are three additional reasons for this interpretation (that section 67 does not apply to the names of Fund beneficiaries):

26.1. First, not all Fund beneficiaries are beneficiaries because of an application for grant money. The Lotteries Act permits so-called '*pro-active funding*' – funding of causes without an application, as a result of research conducted by the Commission.<sup>35</sup> Section 67 cannot apply to the names of the beneficiaries of pro-active funding, because such a beneficiary never *applied* for funding. But if the Commission's interpretation were accepted, this would have the absurd result that the names of the beneficiaries of pro-active funding could be disclosed, but that the names of other Fund beneficiaries could not. An interpretation that results in an absurdity is to be avoided.<sup>36</sup>

26.2. Secondly, section 67(2) stipulates that the violation of section 67(1) is a criminal offence. Penal provisions must be interpreted restrictively.<sup>37</sup>

26.3. Thirdly, interpreting section 67 to prohibit the disclosure of the names of grant beneficiaries would undermine the Act's repeated emphasis on transparency and propriety, as explained in paragraphs 4 to 12 above.

---

<sup>33</sup> *Id* section 13A(4).

<sup>34</sup> *Id* section 26B(3).

<sup>35</sup> *Id* section 2A(3).

<sup>36</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

<sup>37</sup> *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) ('*DA v ANC*') paras 127 – 131 and the authorities cited there.

27. By way of conclusion: the Lotteries Act does not preclude the Commission from disclosing the names of grant beneficiaries to anyone, including Parliament. Indeed, the best interpretation of the Act is that the Commission is required to disclose this information to Parliament each year in its annual report.

### III. PAIA

28. The Commission is a *'public body'* under PAIA, as it is *'exercising a public power or performing a public function in terms of ... legislation'*<sup>38</sup> when it administers the Fund.<sup>39</sup>

This means that the Fund *must* grant a PAIA request (by a member of the public or anyone else) for a list of Fund beneficiaries, provided the request complies with PAIA's procedural requirements and none of the grounds of refusal in Chapter 4 of Part 2 of PAIA exist.<sup>40</sup>

29. Such a ground of refusal is generally unlikely to exist. The names of grant beneficiaries are not *'personal information'* as envisaged in section 34 of PAIA, as such information comprises only private information of a natural person, such as his or her ID number of contact details, biometric information, or personal opinions, views, or preferences.<sup>41</sup> They do not constitute tax information held by the South African Revenue Service (section 35 of PAIA), confidential commercial information (section 36), confidential information as envisaged in section 37, information pertaining to criminal prosecutions or legal proceedings (section 39), privileged information (section 40), confidential information relating to national security or international relations (section 41),

---

<sup>38</sup> PAIA, section 1 (definition of *'public body'*).

<sup>39</sup> The public nature of this function was recognised in *National Lotteries Board v SA Education and Environment Project* above n 4 para 39.

<sup>40</sup> PAIA, section 11(1).

<sup>41</sup> *Id* section 1 (including as amended by section 110 of POPI).

information likely to jeopardise South Africa's economic interests (section 42), research information (section 43), or information relating to the internal proceedings of a public body (section 44).

30. One of the justifications the Commission has offered for ending its practice of releasing the names of Fund beneficiaries is the claim that some Fund beneficiaries have been subjected to threats and extortion.<sup>42</sup> Section 38 of PAIA requires a public body to '*refuse a request for access to a record of the body if its disclosure could reasonably be expected to endanger the life or physical safety of an individual*'.
31. It is possible that section 38 could justify the refusal to disclose the name of a specific Fund beneficiary, but only if there is some evidence that disclosure could reasonably be expected to endanger the life or physical safety of a specific individual related to that beneficiary. The Commission certainly cannot rely on section 38 as justification for a blanket refusal of all requests for the names of Fund beneficiaries. Moreover, if section 38 only applies to one or some of the names of Fund beneficiaries sought in a request, then section 28(1) would require the Commission to redact or sever those names and release the rest.<sup>43</sup>
32. PAIA in any event does not affect the Commission's reporting obligations under the Lotteries Act. PAIA merely generates a conditional obligation on the part of a public

---

<sup>42</sup> Commission AA para 67:

*'The unlawful dissemination of information poses a real danger mainly for grant beneficiaries as well as, to an extent, NLC officials. The NLC has had to deal with and advise many beneficiaries to open criminal cases resulting from threats from unknown individuals. These individuals probably obtained access to the victims' details and other personal information from inter alia the type of publications in issue in this application.'*

<sup>43</sup> Section 28(1) of PAIA provides as follows:

*'If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which (a) does not contain; and (b) can reasonably be severed from any part that contains, any such information must, despite any other provision of this Act, be disclosed.'*

body to grant access to records on request. It does not preclude the release of information voluntarily, or in compliance with a reporting obligation imposed by another law. Put differently, the Commission cannot rely on a ground of refusal in PAIA to justify non-compliance with its reporting obligations under the Lotteries Act.

#### **IV. THE DISCLOSURES ACT, PAJA AND POPI**

33. The Commission has also relied upon the Disclosures Act, PAJA and POPI as justifications for not disclosing the names of Fund beneficiaries. But none of these laws could possibly justify the Commission's refusal.
34. No part of the Disclosures Act prohibits the disclosure of information. All that the Act does is protect whistle-blowers (workers who publicise evidence of wrongdoing at their organisations) from victimisation. The Commission therefore cannot rely on the Disclosures Act as a reason not to disclose the names of Fund beneficiaries.
35. PAJA, similarly, does not preclude the disclosure of information. It provides for the granting of reasons for administrative action,<sup>44</sup> but does not preclude the disclosure of information voluntarily or if required by another law.
36. POPI, on the other hand, does preclude the disclosure, in certain circumstances, of '*personal information*' as defined in section 1 of POPI. But its substantive provisions were only brought into effect by the President on 1 July 2020, and section 114(1) provides that compliance is only required one year after commencement (in other words, from 1 July 2021). As such, even if it is assumed for the sake of argument that the substantive provisions of POPI prevent the disclosure of the names of Fund beneficiaries,

---

<sup>44</sup> PAJA, section 5.

they can only do so from 1 July 2021, and cannot justify the Commission's past and present failure to do so.

37. As a result, and given the urgency with which this opinion is required, I do not give a firm opinion on whether the substantive provisions of POPI will preclude the disclosure of names of Fund beneficiaries when they come into effect – except to point out that section 11(1)(e) permits the disclosure of personal information without the consent of the data subject if it would be *'necessary for the proper performance of a public-law duty by a public body'* (provided the other requirements for the lawful processing of personal information are also met). This section would include the Commission's reporting duties under the Lotteries Act. More detailed advice on POPI can be given at a later stage, if required.

## V. REGULATION 8 OF THE DISTRIBUTION AGENCY REGULATIONS

38. Finally, the Commission relies upon regulation 8 of the distribution agency regulations to justify its failure to disclose the names of Fund beneficiaries. It provides as follows:

### ***'8. Security of information***

- (1) *Subject to the Constitution, [PAIA], [PAJA] and [the Disclosures Act], 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.'*

39. Regulation 8(1)(a) is exceedingly broadly worded: *'no person may in any way ... disclose any information in connection with any grant application or a grant itself'*. On its face, this is broad enough to preclude any disclosure by the Commission of the names of Fund beneficiaries.

40. Regulation 8(1)(b), moreover, precludes the disclosure of *'the contents of a report contemplated in regulation 6(1)'*. Regulation 6(1) requires a distributing agency regularly to submit a written report to the board of the Commission which must contain *inter alia* *'details in respect of ... the number of grant applications approved by the agency, the juristic person in respect of whom a grant has been approved and the amount*

*of every approved grant*'.<sup>45</sup> The contents of a regulation-6(1) report would therefore include the names of Fund beneficiaries, and regulation 8(1)(b) would thus, again on its face, prohibit their disclosure.

41. Regulation 8(1)(c) contains a series of exceptions,<sup>46</sup> but only to the further publication of information obtained in contravention of sub-regulations 8(1)(a) and (b). They do not constitute exceptions to the prohibitions in those sub-regulations.
42. But this *ex facie* interpretation of regulation 8 – an absolute prohibition on disclosure by anyone of any information in relation to a grant – is untenable given the regulation's context.<sup>47</sup> Most importantly, and as explained above, the Lotteries Act appears to require the Commission to disclose the names of Fund beneficiaries to Parliament. Regulation 8 cannot be used to interpret away this statutory obligation (because a regulation cannot be used to interpret its parent statute).<sup>48</sup> Rather, regulation 8 should be interpreted to be consistent with the transparency obligations in the Lotteries Act, if this is possible.

---

<sup>45</sup> Distribution agency regulations, reg 6(2)(b).

<sup>46</sup> Regulation 8(1)(c) provides that —

*'no person may in any way ... 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.'*

<sup>47</sup> A statutory provision, including a regulation, must be interpreted contextually – see *Endumeni* above n 36 para 18:

*'Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.'*

<sup>48</sup> *National Lotteries Board v Bruss* NO 2009 (4) SA 362 (SCA) para 37.



43. It is possible. Regulation 8, while broadly worded, is not without exception, including two that are express and two that are implied. The express exception is that regulation 8(1) is subject '*to the Constitution*'. This would include the principles of accountability and transparency in sections 195(1)(f) and (g) of the Constitution, which are incorporated as duties by section 35 of the Lotteries Act and particularised in the Act's reporting requirements. Thus, the fact that regulation 8(1) is subject '*to the Constitution*' probably means that it does not preclude disclosure by the Commission of the names of Fund beneficiaries to Parliament.
44. Similarly, regulation 8(1) is expressly subject to PAIA. Thus, if a valid PAIA request demands disclosure, regulation 8(1) does not purport to prevent this.
45. The implied exceptions can be found elsewhere in the regulations. Sub-regulations 8(1) and (2) cannot be read to preclude all disclosure of all Fund-beneficiary details, because regulation 6(1) read with regulation 6(2)(b)<sup>49</sup> requires a distributing agency to disclose *precisely these types of details* to the board of the Commission. Moreover, regulation 9 requires a distributing agency to notify the board when it approves a grant application so that the board can pay the beneficiary in accordance with the grant. This notification would have to include the name of the beneficiary.
46. In any event, it is arguable that regulation 8 only applies to the disclosure of grant information while it is being processed by a distributing agency, or to information held by an agency, for the following reasons:
- 46.1. First, the distribution agency regulations are almost completely aimed at distribution agencies. They are entitled '*Regulations relating to Distributing*

---

<sup>49</sup> Quoted in paragraph 40 above.

*Agencies*'. Regulations 1, 2 and 3 deal with the staff of distribution agencies, their remuneration, and expenses at distribution agencies. Regulation 4 deals with the requirements to be eligible to be a member of an agency. Regulation 5 governs meetings of an agency. Regulation 6 governs an agency's reporting obligations. Regulation 9 regulates how an agency and the Commission must co-operate to ensure that grants are paid. Regulation 10 prohibits certain types of grants, and regulation 12 requires an agency to ensure that no province gets less than 5% of that agency's grant-distribution budget.

- 46.2. Were regulation 8 to apply to disclosures unrelated to the work of a distribution agency, it would be out of place. Its meaning must be coloured by the meaning of the provisions around it.<sup>50</sup>
- 46.3. Secondly, regulation 8 is headed '*Security of information*'. This implies that the regulation is not aimed imposing country-wide confidentiality obligations over grant information, regardless of where it goes or who holds it, but rather that it is aimed at ensuring that agencies prevent unauthorised access to grant information in their possession.<sup>51</sup>
- 46.4. Thirdly, regulation 8(3) provides that violating the rest of regulation 8 is an offence that can attract a prison sentence. As explained above,<sup>52</sup> this is a reason to interpret regulation 8 restrictively.<sup>53</sup>

---

<sup>50</sup> *Independent Institute of Education (Pty) Ltd v Kwazulu-Natal Law Society* 2020 (2) SA 325 (CC) para 42 and *DA v ANC* above n 37 paras 136 – 141.

<sup>51</sup> Headings may be used in the interpretation of a statutory provision if the meaning of the provision is doubtful – see *Mzalisi NO v Ochogwu* 2020 (3) SA 83 (SCA) para 32.

<sup>52</sup> Paragraph 26.2 above.

<sup>53</sup> *DA v ANC* above n 37 paras 127 – 131 and the authorities cited there.

47. Finally, to the extent that regulation 8 prohibits the Commission from disclosing the names of grant beneficiaries to Parliament, it is *ultra vires* the Lotteries Act.<sup>54</sup> This is for two reasons:

47.1. First, it would purport to prevent the Commission from complying with its reporting obligations under the Act.

47.2. Secondly, the distribution agency regulations were made by the Minister of Trade, Industry and Competition in the exercise of his regulation-making powers under section 60 of the Lotteries Act. No part of section 60 specifically empowers the Minister to impose expansive secrecy obligations over all beneficiary information. Section 60(1)(a)(ix) permits regulations regarding ‘*in general any ... matter which may be necessary or expedient to prescribe in order to achieve or promote the objects of Part I of this Act*’ (Part I governs the National Lottery) and section 60(1)(d) permits regulations regarding ‘*any other process that facilitates the efficient and effective application for grants and the distribution thereof*’.

47.3. I do not think that a prohibition on the publication of the names of grant beneficiaries could fall within these general empowering provisions. It seems unlikely to me that legitimate applicants would be, to a significant degree, deterred from applying for grants by having their names published in an annual

---

<sup>54</sup> See *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 50 (footnotes omitted):

*‘In exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the empowering provisions of the Medicines Act. If, in making regulations, the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the Minister acts ultra vires (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted ultra vires is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been ultra vires under common law by reason of a functionary exceeding his or her powers is now invalid under the Constitution as an infringement of the principle of legality.’*

report to Parliament. This may deter illegitimate applicants, but regulation-making to coddle such applicants would fall outside sub-sections 60(1)(a)(ix) and 60(1)(d).<sup>55</sup>

## VI. CONCLUSION

48. It is clear that the Lotteries Act does not preclude the disclosure by the Commission to Parliament of the names of Fund beneficiaries. It is more likely than not that the Act requires it. This position is not changed by the Disclosures Act, PAIA, PAJA or regulation 8 of the distribution agency regulations.
49. This means that if the Commission refuses to disclose the names of Fund beneficiaries to Parliament on the basis that it is *prohibited* from doing so, it has acted unlawfully because it has committed an error of law. This is so even if it is assumed that my interpretation of the Lotteries Act is incorrect and the Commission is *permitted* to not disclose this information to Parliament.<sup>56</sup>
50. I advise accordingly.

**PIET OLIVIER**  
Chambers, Cape Town

---

<sup>55</sup> *Id* para 119.

<sup>56</sup> See *United Democratic Movement v Speaker of the National Assembly* 2017 (5) SA 300 (CC).