

AFFIDAVIT

I, the undersigned,

MATHEW JOHN CUTHBERT

hereby make oath and state that:

AD DEPONENT

1.

- 1.1 I am an adult **MALE** person of the above details and of full legal capacity, employed as **MEMBER OF PARLIAMENT** at **PARLIAMENT STREET, CAPE TOWN**, and residing in **JOHANNESBURG, GAUTENG**
- 1.2 Unless specifically indicated otherwise, the facts contained in this affidavit fall within my personal knowledge, and are to the best of my belief both true and correct.

AD PURPOSE

2.

- 2.1 This affidavit concerns possible criminal and/or statutory offences committed in terms of the *National Lotteries Act*, Act 57 of 1997 (hereafter referred to as the "**NLA**"), *Promotion of Access to Information Act*, Act 2 of 2000 (hereafter referred to as the "**PAIA**"), the *Protected Disclosures Act*, Act 26 of 2000 (hereafter referred to as the "**the Disclosures Act**"), the *Protection of Personal Information Act*, Act 4 of 2013 (hereafter referred to as the "**POPI**"), the *Promotion of Administrative Justice Act*, Act 3 of 2000 (hereafter referred to as the "**PAJA**"), or the Regulations relating to Distribution Agencies of 20012 (hereafter referred to as the "**the distribution agency regulations**") by Prof **Alfred Nevhutanda**, Chairperson of the National Lotteries Commission (hereafter referred to as the "**NLC**"), Ms **A Brown**, member of the NLC board, Ms **Doris Dondur**, member of the NLC board, Ms **Yaswant Narotham Gordhan**, member of the NLC board, Adv **William Elias Huma**,

member of the NLC board, Ms **Thabang Sophie Kekana**, member of the NLC board, Dr **Muthuhadini Alfred Madzivhandila**, member of the NLC board, and Mrs **Thabang Charlotte Mampane**, the commissioner of the NLC.

- 2.2 I depose this affidavit in my capacity as a concerned citizen, and as a Member of Parliament representing a sizable constituency that are directly affected by the incidents detailed hereunder.
- 2.3 It is my belief that the acts detailed hereunder warrant further investigation by the South African Police Services, with the view to prosecution.

AD BACKGROUND

3.

- 3.1 I will throughout my statement make reference to various pieces of communication between myself and, Mr. Duma Nkosi MP, the Chairperson of the portfolio committee on trade, industry and competition as well as the Minister of Trade, Industry and Competition, Mr. Ebrahim Patel, regarding the release of NLC grant beneficiaries for the financial years 2018-2019, 2019-2020 and the 2020 COVID-19 Relief Fund. In addition, I will make reference to several media articles which detail the events that provide reason why this charge is being laid.
- 3.2 The aforementioned documents reveal the following:
- 3.2.1 On the 10th of March the portfolio committee on trade, industry and competition received a presentation from the National Lotteries Commission (NLC) where they discussed their annual report.
- 3.2.2 This is the first instance where I requested a list of 2018-2019 and 2019-2020 NLC grant beneficiaries from the Chairperson of the portfolio committee, Duma Nkosi MP as well as the NLC Chairperson, Alfred Nevhutanda.
- 3.2.3 I raised the issue of several instances of alleged corruption that NLC had been implicated in media reports and Duma Nkosi MP told the NLC not to respond to my questions and issues raised.

- 3.2.4 However, Mr Nevhutanda responded that it was against the law to publish the list and that they feared criminals would target the beneficiaries despite them having made this information public for the preceding 17-18 years (See attached ANNEXURE A)
- 3.2.5 The next time I raised this issue was on Tuesday the 5th of May 2020 at a portfolio committee meeting in which I asked the Director-General of the DTIC, Mr Lionel October, if he could provide me with a list of the NLC COVID-19 Relief Fund beneficiaries.
- 3.2.6 It was agreed that he would send my request to the NLC and they would provide me with a response. However, in contravention of standard practice within our committee (of 7 days for written responses) I was only supplied with this response on the 25th of May 2020 (See attached ANNEXURE B)
- 3.2.7 These responses were inadequate and I requested a follow up from Duma Nkosi which was subsequently supplied by Duma Nkosi on the 8th of June 2020 (See attached) These responses too were inadequate and I then requested that Duma Nkosi summons the NLC before the committee, which was agreed upon in principle by members of the portfolio committee (See attached ANNEXURE C)
- 3.2.8 Moreover, the NLC informed the portfolio committee in its response that “The information requested is classified as grant information as defined in the Regulations of the Lotteries Act, No. 57 of 1997(Lotteries Act), as amended. The request has been assessed and is dealt with in strict accordance with Section 67 of the Lotteries Act, Regulation 8 and relevant legislation governing access to private information”.
- 3.2.9 Working under impression created at the committee meeting on the 8th of June 2020, we were led to believe that the NLC would be called before the committee during the 2nd term of this parliamentary session.
- 3.2.10 And when this issue was raised at the portfolio committee meetings in the following weeks we were continuously informed that the portfolio committee management committee was considering a response in this regard and would provide us with feedback.
- 3.2.11 However, to our surprise the committee was informed on the 24th of June 2020 that Duma Nkosi had requested a legal opinion on the 10th of June 2020 but had not informed the committee of his steps until 14 days later (See attached ANNEXURE D)

- 3.2.12 After which the DA decided to lodge a PAIA application to obtain the 2018-2019, 2019-2020 proactive grant fund beneficiaries list and COVID 19 Relief Fund Beneficiaries List (which is still within the 30-day period of response)
- 3.2.13 During the same time period, I asked Minister of Trade, Industry and Competition, Ebrahim Patel an oral question in which he agreed that the 2020 COVID 19 Relief Fund Beneficiaries would be released to the committee on the 17th of July 2020 (See attached ANNEXURE E)
- 3.2.14 Despite this information being provided by the Minister, Duma Nkosi MP continually stalled the discussion of this matter despite a couple pieces of correspondence to him by myself as we were informed that Parliament's Legal Services were still consulting with the NLC (See attached ANNEXURE F)
- 3.2.15 Considering his failure to address our concerns it was decided on the 7th of July 2020 that we would seek a legal opinion which dealt with the release all three requested documents (See attached ANNEXURE G)
- 3.2.16 When we tried to discuss this matter at our portfolio committee meeting on the 8th of July 2020, Duma Nkosi MP unilaterally decided to remove the NLC matter of the agenda despite it having been placed on the agenda prior to the meeting as we were informed that the NLC and Parliament's Legal Services had not agreed on a legal opinion as of yet and this informed that it would only be provided on the 15th of July 2020.

AD OFFENCES

4.

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) requires the board of the Commission to itself apply '*the principles of openness and transparency*' in exercising its functions. 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*'.

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.

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.

Section 12(1)(a) requires the board of the Commission to *'keep proper books and records in relation to receipts and payments'*. 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.

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'*.

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

4.2

Section 28(1), and section 34 - 44 of PAIA as provided for in **Annexure H** (see attached in ANNEXURE H)

4.3

Section 114 of POPI provides as follows:

Transitional arrangements

114. (1) All processing of personal information must within one year after the commencement of this section be made to conform to this Act.

(2) The period of one year referred to in subsection (1) may be extended by the Minister, on request or of his or her own accord and after consultation with the Regulator, by notice in the Gazette in respect of different class or classes of information and bodies by an additional period which period may not exceed three years.

(3) Section 58(2) does not apply to processing referred to in section 57, which is taking place on the date of commencement of this Act, until the Regulator determines otherwise by notice in Gazette.

(4) The South African Human Rights Commission must, in consultation with the Information Regulator, finalise or conclude its functions referred to in sections 83 and 84 of the Promotion of Access to Information Act, as soon as reasonably possible after the amendment of those sections in terms of this Act.

4.4

Regulations 8 of the Distribution Agency Regulations

'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.'

5.

It is my submission that the dealings of the NLC (represented by its board members and commissioner) should be thoroughly investigated to determine whether or not any offence has been committed in terms of the NLA, PAIA, the Disclosures Act, POPI, PAJA and/ or the distribution agency regulations, or in terms of any other relevant laws, including but not limited to:

5.1 I want the various lists of grant beneficiaries released so that parliament can scrutinize them and; ascertain whether or not money meant for the support of non-governmental organisations were misappropriated for the personal benefit of individuals instead of the intended recipients.

5.2 Moreover, it is incumbent upon the NLC to 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.

5.3 Failure by the Commission and the other bodies in the regulatory ecosystem created by the NLA to uphold their duties of transparency and propriety as well as the imposed specific reporting duties on the Commission

5.4 The dismissal of the use/ defense of section 67 of the NLA by the Commission as the NLA does not preclude the Commission from disclosing the names of grant beneficiaries to anyone, including Parliament. In addition, 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.

5.5 The names of grant beneficiaries are not '*information*' as envisaged in section 34 – 37 and section 39 – 44 of PAIA. 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. PAIA in any event does not affect the Commission's reporting obligations under the NLA; the Commission cannot rely on a ground of refusal in PAIA to justify non-compliance with its reporting obligations under the NLA. The Commission cannot rely on the Disclosures Act as

a reason not to disclose the names of Fund beneficiaries as it is directed at protecting whistle-blowers from victimisation. It must be noted that PAJA only provides for the granting of reasons for administrative action, but does not preclude the disclosure of information voluntarily or if required by another law. The Commission is unable to rely on section 114(1) of POPI to prevent the disclosure of the names of Fund beneficiaries, as the provision only becomes effective from 1 July 2021.

6.

It is further my submission that, during the course of an investigation, more offences and charges may be added, and persons other than those specified above, implicated.

CONCLUSION

11.

I herewith request that the matter be investigated, and the appropriate steps – whatsoever they may be - taken to see justice done and the rule of law upheld.

12.

This is all I can declare.

DEPONENT: M J Cuthbert

I CERTIFY THAT THIS AFFIDAVIT WAS SIGNED AND SWORN TO BEFORE ME AT _____ ON THIS _____ DAY OF _____ 2019. THE DEPONENT HAVING ACKNOWLEDGED THAT HE/SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT AND I CERTIFY THAT THE REGULATIONS IN TERMS OF SECTION 10 OF ACT 16 OF 1963, AS PUBLISHED UNDER GN. R1258 OF 21 JULY 1972 AS AMENDED BY GN. R1648 OF 1977 AND GN. R1428 OF 1980 AND GN. R773 OF 1982, HAVE BEEN COMPLIED WITH.

COMMISSIONER OF OATHS

FULL NAMES : _____
DESIGNATION : _____
AREA : _____
ADDRESS : _____