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LEGAL OPINION
[Confidential]

MEMORANDUM

TO: Chairperson, Portfolio Committee on Trade and Industry [Hon Dr D Nkosi, MP]

COPY: Acting Secretary to Parliament [Ms P N Tyawa]

FROM: Constitutional and Legal Services Office
[Adv Z Adhikarie, Chief Parliamentary Legal Adviser]

DATE: 18 November 2020

REF. NO.: 143/2020

RE: Whether the shortlisting process for the position of chairperson of the board of the National Lotteries Commission is the function of the Portfolio Committee on Trade and Industry or that of the Minister of Trade and Industry

Introduction

1. Our Office was requested to urgently advise the Portfolio Committee on Trade and Industry ("the Committee") on whether the shortlisting of candidates for the position of chairperson

of the board of the National Lotteries Commission (NLC) is the function of the Portfolio Committee on Trade and Industry or that of the Minister.

Background

2. On 12 November 2020, the Minister addressed a letter to the Speaker wherein he advised that a large number of nominations for the position of chairperson of the NLC were received. In the interests of transparency, he attached a list of the nominations to the letter.
3. The Minister advised that following consideration of the nominations, and following advice from an independent shortlisting panel, three persons have been identified from the nominations and the Minister attached their CV's to the above letter.
4. The Minister, in terms of section 3(3) of the Act, requested that the relevant committee of the National Assembly (in this case the Portfolio Committee on Trade and Industry) make recommendations to the Minister, regarding the suitability of any or all of the nominees for appointment as Chairperson of the NLC.
5. On 17 November 2020, the Committee received a letter from a member of the National Assembly regarding the process of appointing the chairperson of the board of the NLC and questioning the validity of the shortlisting process.

Regulatory framework

6. The principle of legality demands that the exercise of any public power must be conferred upon the functionary by law.¹ A public functionary can only perform those functions conferred upon a person or body by law.
7. Section 59 (1) of the Constitution provides that the National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees. The National Assembly must conduct its business in an open manner, and hold its sittings, and

¹ *Fedsure Life Assurance and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC); 1999 (1) SA 374 (CC) at paras. [56], [58] and [59] and *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) para [50].

those of its committees, in public, is the default position according to the Constitution and statutes.

8. Section 3(1) of the Lotteries Act, 57 of 1997 (the Act) states in relation to the composition of the board that —

“(1) Subject to subsection (3), the Minister shall appoint the members of the board, which shall consist of—

- (a) a chairperson, who shall be a person with applicable knowledge or experience with regard to matters connected with the functions of the board;
- (b) one member designated by the Minister; and
- (c) not more than five members who have proven business acumen or applicable knowledge or experience with regard to matters connected with the functions of the board, and of whom at least one should be a legal practitioner admitted to practise in the Republic and at least one a chartered accountant in the Republic.

(2) At least four members of the board shall be persons who are not in the service of any sphere of government.

(3) The member contemplated in paragraph (a) of subsection (1) shall be appointed only after the Minister has by notice in the *Gazette* and in not less than two newspapers circulating in every province invite interested parties to nominate persons suitable for appointment as chairperson **and the relevant committee of the National Assembly has made recommendations to the Minister in relation thereto after a transparent and open process of considering persons so nominated, having due regard to the functions of the board.**”

9. Section 195 of the Constitution sets out the basic values and principles governing public administration. It stipulates that:

“1. Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

a. A high standard of professional ethics must be promoted and maintained.

b. Efficient, economic and effective use of resources must be promoted.

c. Public administration must be development-oriented.

- d. Services must be provided impartially, fairly, equitably and without bias.*
- e. People's needs must be responded to, and the public must be encouraged to participate in policy-making.*
- f. Public administration must be accountable.*
- g. Transparency must be fostered by providing the public with timely, accessible and accurate information.*
- h. Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*
- i. Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.*

2. The above principles apply to

- a. administration in every sphere of government;*
- b. organs of state; and*
- c. public enterprises.”*

10. Rule 227 of the Rules of the National Assembly provides for the functions of portfolio committees in the performance of their oversight function. Rule 227(1)(b) provides that a portfolio committee must maintain oversight of the exercise of national executive authority and any executive organ of state falling within its portfolio, including the implementation of legislation. Rule 227(1)(c) goes on to say that a portfolio committee, “may monitor, investigate, enquire into and make recommendations concerning any such executive organ of state, rationalisation, restructuring, functioning, organisation, structure, staff and policies of such organ of state, institution or other body or institution.

Discussion

11. As previously advised in an earlier opinion to the committee, a purposeful interpretation

of the Lotteries Act together with Section 195 (g) show that a culture of openness and transparency is required. The general requirement under Section 195(g) of the Constitution, being that that openness and transparency must be fostered.

From the brief it appears that the committee has been provided with cursory information relating to the shortlisting process. The portfolio committee has no information relating to the criteria used for the shortlisting of nor does it have any information pertaining to the methodology used to assess the competency and skill of candidates.

The committee also has no information pertaining to the financial and security vetting conducted on shortlisted candidates, as well as character references and qualification checks.

12. There is no provision in the Act that empowers the Minister to appoint an 'independent shortlisting panel' nor does the Act give the Minister discretion to appoint such a panel.
13. The Act clearly stipulates that the member contemplated in paragraph (a) of subsection (1) i.e. the Chairperson, shall be appointed only after the Minister has by notice in the *Gazette* and in not less than two newspapers circulating in every province invited interested parties to nominate persons suitable for appointment as chairperson and the relevant committee of the National Assembly has made recommendations to the Minister in relation thereto after a transparent and open process of considering persons so nominated, having due regard to the functions of the board.
14. From the Act it appears that the shortlisting process, is the mandate of the Portfolio Committee on Trade and Industry. The requirements for openness and accountability further supports this interpretation; namely, that the relevant committee of the National Assembly should deliberate on the nominations to provide recommendations for appointment by the Minister.
15. The appointment of the chairperson that is inconsistent with the procedure as provided for in the Act can be challenged and a court can nullify the appointment.

Advice

16. The Committee should consider requesting the CV's of all nominated candidates so that the committee may proceed in terms of its own process as required by the Act.

SIGNED ELECTRONICALLY



Adv Z Adhikarie

Chief Parliamentary Legal Adviser