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RE: National Lotteries Commission Chairperson Selection Process - Democratic Alliance Legal Opinion

Dear Minister E. Patel and Chairperson D. Nkosi,

I write to you concerning the ongoing process to appoint a new chairperson of the Board at the National Lotteries Commission (NLC).

At face value it seemed as if the process followed to appoint a new NLC chairperson had complied with the relevant provisions as set out in the National Lotteries Act, of 1997 as well as good governance best practice. However, we reserved our right to request and present a legal opinion of our own on the matter.

Following the tabling of Adv. Adhikarie's legal opinion at our portfolio committee meeting on the 19th of November, we decided to exercise our right to seek a legal opinion pertaining to the above matter and I would like to share this with yourselves.

Our legal opinion was drafted by Mr. Werner Horn, MP, DA Deputy Chairperson of the Federal Legal Commission and is attached below;

Legal opinion – Process regarding the appointment of the Chairperson of the Board of the NLC

Start

I am in general agreement with the opinion of Parliament's legal adviser. Firstly, they are correct that in terms of the principle of legality any constitutional functionary is limited to performing only those functions allocated to it by the constitution or legislation enacted in terms of the constitution.

On this score it is already clear that the Minister has two functions: 1. To advertise and invite nominations and 2. To appoint a chairperson after taking advice from the PC.

The Minister does not, in terms of the Act, enjoy the right to do shortlisting despite having appointed an independent panel. This can however, not correct the fact that shortlisting as a process of limiting/identifying the applicants who will be considered for appointment does not fall within his purview.

One important consideration not addressed in the legal opinion, is the constitutional principle of separation of powers. This entails that in order to ensure the proper functioning of the state and to prevent abuse of power - and by extension to act as a check on possible corruption that may go hand in hand with abuse of power - certain functions are allocated to the legislature in respect of decisions to be taken by the executive.

Given the findings of the Constitutional Court (in respect of the Nkandla report) that Parliament failed to fulfil its constitutional duties I believe we should guard jealously against any encroachment of the executive on the domain of the legislature.

A simple reading of the legislative provision under discussion will show that Parliament (the PC) is to advise the Minister on some suitable candidate/suitable candidates after following a transparent process.

To my mind this must mean that the PC must consider all nominees and interview (some) nominees in order to be able to advise lawfully. If a large number of nominations have been received and a shortlist for interviews are to be set up such shortlisting is also to be done by the PC. This duty cannot be delegated to the Minister or so-called independent advisers in the absence of legislative authority to do so.

In respect of the way forward, I am of the view that the shortlist must be set aside by the PC and it must do shortlisting from scratch. The Minister did not have the authority to shortlist and Parliament would fail in its duty if it now simply endorses that shortlist and supplements it, given that Prof. Madonsela withdrew as a candidate.

The best practices around transparency, accountability and public involvement as developed by Parliament over the last years ordinarily entail that either the CV's of all candidates are

published on parliament's website or only those of the shortlisted candidates and the public is then asked for comments on the suitability of these candidates through newspaper advertisements.

Any comments about alleged impropriety are then canvassed with candidates during the interviews.

Lastly, my reading is that the Minister is not obliged to necessarily appoint the preferred candidate of the PC. The fact that he appoints after being advised is different to when he would have had to appoint "in consultation with" the PC.

However, he will have to be able to show that any decision to appoint a candidate other than the candidate ranked as the first choice by the PC is reasonable and justifiable based on all the relevant considerations.

End

In lieu of our legal opinion as set out in this letter, we argue that the process of appointing a new Chairperson of the NLC should be restarted from the beginning to ensure that there are no unresolved questions in terms of legality, process and procedure.

Failure to do so may lead to drawn out litigation between yourselves and unsuccessful candidates, civil society organisations and political parties respectively.

It is of the utmost importance that a fit for purpose chairperson is sought and ultimately appointed in order to turn around this failing institution that has been mired in corruption scandals and maladministration.

This is our collective opportunity to do things the right way, to prevent the selection process from being called into question and not to allow for the credibility of this institution to be diminished further.

I look forward to your response.

Yours sincerely,

Mat Cuthbert, MP

DA Shadow Deputy Minister of Trade, Industry and Competition

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