



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 11706/2021

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE 7 MAY 2021

SIGNATURE

In the matter between:

THE NATIONAL LOTTERIES COMMISSION

Applicant

and

**THE MINISTER OF TRADE, INDUSTRY
AND COMPETITION**

First Respondent

ZANDILE BROWN

Second Respondent

**THE PARLIAMENTARY PORTFOLIO
COMMITTEE ON TRADE AND INDUSTRY**

Third Respondent

J U D G M E N T

This matter has been heard by way of a virtual hearing and disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

- 1.1 This is the judgment in an urgent application for the review and setting aside of the appointment by the Minister of Trade and Industry (the Minister) of an acting chairperson of the National Lotteries Board (the board) on 30 November 2020 and any extension of her appointment beyond the initial expiry date thereof on 31 January 2021.
- 1.2 The attack was launched by the National Lotteries Commission (the NLC) as applicant, relying on a founding affidavit by the Commissioner of the NLC.
- 1.3 The Minister is the first respondent and the second respondent is Ms Zandile Brown, being the acting chairperson appointed by the Minister. Apart from her citation as second respondent, Ms brown took no part in the urgent application.
- 1.4 The third respondent, the Parliamentary Portfolio Committee on Trade and Industry (the PPC), has filed a notice to abide the decision of this court.
- 1.5 Apart from the impugned appointment, a further consideration is the continuance of payments in terms of the NLC's annual budget of 2020/2021. The parties all agree that pay-outs of expenditure and distribution of funds arising from this budget, should continue.

- 1.6 A last aspect for consideration, is what interim relief should be granted, if any, in the event that the appointment is set aside.

[2] The statutory provisions regarding the appointment of a chairperson of the Board of the National Lotteries Commission

- 2.1 All the relevant provisions regarding the appointment of a chairperson emanate from the Lotteries Act, 57 of 1997 (the Act). The NLC has been established by section 2 of the Act, which, in terms of section 2(2), is governed by a board.
- 2.2 The board, in consultation with the Minister, appoints a Commissioner of the NLC and the Commissioner, in turn, in consultation with the board, appoints senior executives of the NLC and other staff. This is done in terms of sections 2B and 2D of the Act.
- 2.3 In terms of section 3(1) of the Act the board comprises of a chairperson, one member designated by the Minister and not more than five other members “*who have proven business acumen or applicable knowledge or experience with regard to matters connected with the functions of the board*”. Of these members, one must be a practicing legal practitioner and at least four shall be persons who are not in the service of any sphere of government. The chairperson of the distribution agency created in the Act is also an *ex officio* member of the board, but with no voting rights.
- 2.4 The period for holding office by board members shall not exceed five years. Subject to section 3(3), casual vacancies which occur when a member vacates his or her position prior to the expiry thereof, may be filled by the appointment of another person for the remainder of the period for

which the person in respect of whom the vacancy arose, had been appointed.

- 2.5 Section 3(3) determines that 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 a person 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 ...*”.

[3] The appointment of Ms Brown

- 3.1 Until the Minister’s impugned appointment of Ms Brown as acting chairperson, she was a member of the board, having being designated as such by the Minister in terms of section 3(1)(b).
- 3.2 The previous chairperson of the board was Prof Nevuthanda, whose term expired on 30 November 2020.
- 3.3 The Minister stated in his answering affidavit that on 4 September 2020, “the Department” published a notice in the Government Gazette calling for nominations for the position of chairperson of the board. Nothing was said about publications in other newspapers but, as this point was not raised, it is, in his favour, assumed that the Minister had also caused such publications to take place.
- 3.4 After nominations had been received, the Minister employed his own screening process and on 12 November 2020, that is 18 days before the expiry of the period of office of the then incumbent chairperson, provided the PPC with the names of three candidates.

- 3.5 On 18 November 2020 the Chief Parliamentary Legal Advisor advised that the abovementioned procedure followed by the Minister was contrary to the Act, despite the fact that it may have been followed by his predecessor and the fact that such a process may have led to the appointment of Prof Nevuthanda.
- 3.6 Accordingly, the PPC was furnished with the complete list of 42 nominees together with their CV's. On 24 November 2020 the PPC deliberated on this list and the procedure to be followed by it in determining the recommendations to be made to the Minister. The minutes of the PPC meeting annexed to the papers and the extracts therefrom reveal divergent opinions, often split along political party lines. The only consensus was that no consensus on the recommendations would be reached by 30 November 2020.
- 3.7 The Minister then sought legal advice. He states that the advice he received was to the effect that, although the Act makes no provision for the power of the Minister to appoint an interim chairperson, the Act "... *ought to be interpreted to mean that [he] possesses an implied power to appoint an interim chairperson*". This prompted the Minister to, on 30 November 2020, inform the board that he intended appointing Ms Brown as interim chairperson. He invited the board to make representations in this regard. In the meantime, he went ahead and appointed Ms Brown as acting chairperson of the board with effect from 1 December 2020 to 31 January 2021.
- 3.8 Two weeks later, on 15 December 2020, four of the remaining members of the board advised the Minister that he had neither the express nor implied

power in terms of the Act to appoint an acting chairperson and if he were to appoint Ms Brown, he would be acting outside his powers.

- 3.9 Apparently and, despite opposition members of the board pressing for urgent resolution of the matter, the board adjourned for the Parliamentary recess.
- 3.10 The Minister reverted to the board on 1 February 2021 and sent a letter to the four members who previously objected, expressing his intention to forge ahead with the appointment of Ms Brown. He then extended her appointment to the end of March 2021. On 23 February 2021 the said members responded and repeated their objections, this time bolstered by legal advice obtained by them, copies of which they furnished to the Minister.
- 3.11 On 12 March 2021, the PPC resolved to forward the names of three nominees to Parliament, after which recommendations would be sent to the Minister for his consideration. Apparently, all this will take place sometime in the second half of May 2021.
- 3.12 On 28 March 2021, the Executive Committee of the NLC, through its attorneys, demanded the withdrawal of the appointment of Ms Brown as acting chairperson. On 29 March 2021, the Minister reiterated his stance that he had acted in terms of implied powers, derived from the Act.
- 3.13 A meeting between the Commissioner, the Minister and the Director-General of the Department of Trade and Industry was suggested by the Minister in an attempt to resolve the impasse. In the meantime, the extended period of Ms Brown's acting appointment was due to expire on 31 March 2021. On that day, the Minister appeared before the PPC to

solicit its views on the interregnum. The views were varied but the members broadly conceded that an extension of the interim appointment might be the only solution. The applicant's stance is that neither the Director General nor the PPC could ratify the appointment of Ms Brown, which was viewed as an illegality. The result of the PPC meeting, of which the applicant had received notice only by chance, was that the Minister extended Ms Brown's acting appointment to 31 May 2021.

3.14 The only apparent relevance of the meeting of 31 March 2021 is that, contrary to the position at the time when Ms Brown had initially been appointed by the Minister on 30 November 2020, he claimed that the extension of her appointment from 1 April 2021 to 31 May 2021 had been "endorsed" by the PPC.

3.15 So far the history and current position regarding the acting chairpersonship of Ms Brown.

[4] Was the Ministers' appointment of Ms Brown as acting chairperson of the board of the NLC lawful?

4.1 There is no dispute that the Act does not expressly provide for the power of the Minister to appoint an acting chairperson for the board.

4.2 Counsel for the Minister argued that such power must be inferred to have been implied in the Act.

4.3 Implied powers are generally inferred when their existence is necessary in order for a functionary to exercise his or her express powers. In this regard, the court was referred to the following example from Bloemfontein Town Council v Richter 1938 AD 195 where the learned judges of appeal held at 227 "*I have no hesitation in coming to the conclusion that ... without the*

right to remove the silt, the right and power of the Municipality [to supply the town of Bloemfontein with water] cannot be properly enjoyed or exercised". Hoexter in Administrative Law in South Africa, 2nd ed at 44, with reference to this case, adds the following example of necessity resulting in implied powers being inferred: "the power to make omelettes must necessarily include the power to break eggs".

- 4.4 In Chonco v Minister of Justice and Constitutional Development 2010 (4) SA 82 (CC), Langa CJ used the term "auxiliary powers" when he referred to unspecified powers "necessary" for the President in relation to section 84(1) of the Constitution to fulfill and discharge his functions as head of State and the National Executive.
- 4.5 In the present case, the power to appoint an acting chairperson is not "necessary" for the Minister to fulfill his obligations of appointing an actual chairperson to the board. Rather, so the Minister argued, the necessity is one for the functioning of the board who "needs" a chairperson. Without a chairperson, meetings cannot be called in terms of section 4(1) of the Act, the chairperson's casting vote in case of a deadlock as provided for in section 4(4) of the Act is lost and the functioning of the board as prescribed by section 10 of the act may become compromised.
- 4.6 While all the difficulties that the board may experience may be true, they are all temporary in nature. The Act clearly also did not envisage such temporary situation to arise as one would have expected the exercise of the express power to have been performed timeously and prior to the termination of the period of office of each successive chairperson.
- 4.7 Another factor which militates against the inferral of the implied or "auxiliary" powers is the fact that the express power provided to the

Minister to appoint a chairperson, is narrowly prescribed and provides for parliamentary oversight or, at least, participation. Hoexter (supra at 45) summarises the position in this regard as follows with reference to Winckler v Minister of Correctional Services 2001 (2) SA 747 (C) and Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC): *“A court will be more inclined to find an implied power where the express power is of a broad, discretionary nature – and less inclined where it is a narrow, closely circumscribed power”*.

- 4.8 Moving away from the issue of implied powers which are “necessary” to fulfill the express powers, it was argued that the power which the Minister claims, is an “ancillary” power. Reliance was placed in this regard on extracts of academic writings quoted in AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Constitutional Services and others (Media Monitoring Africa Trust and others as amici curiae) and a related matter 2021 (4) BCLR 349 (CC). However, the same author referred to above, Hoexter, also referred to in that judgment, explains that an ancillary power can be inferred *“... if the main purpose of the statute cannot be achieved without it”*. An example was the ancillary power of the Industrial Court to determine whether it has jurisdiction or not, without which power it could not otherwise function. See: Nouwens Carpets (Pty) Ltd v National Union of Textile Workers 1989 (2) SA 363 (N). In the present case, the Minister did not need any ancillary power without which he could not appoint an actual chairperson. He only claims the existence of an ancillary power as a result of a situation brought about by the PPC and himself.

- 4.9 A further factor that would militate against the inferral of the existence of such an ancillary powers, would be if such a power would contradict

express terms for the exercise of Ministerial power contained in a statute. See: City of Cape Town v Real People Housing (Pty) Ltd 2010 (5) SA 196 (SCA) at [14]. In the present case, the appointment of a chairperson, even in an acting capacity, without nationwide canvassing for nominations and without a “*transparent and open process of considering persons so nominated*” (as prescribed in section 3(3) of the Act), would not only be contrary to the express terms of the Act but would, in fact subvert it.

- 4.10 Approaching the matter on another tack, the argument on behalf of the Minister, was that the power to make an acting appointment “where a permanent appointment is impossible” would be a legitimately implied “primary” power of the Minister, derived from the Public Finance Management Act, 1 of 1999 (the PFMA). Schedule 3 of the PFMA lists the NLC as one of the “other public entities” referred to in Chapter 6 of the PFMA. Section 46 of the PFMA expressly makes the provisions of Chapter 6 applicable to such entities. This provides for accounting authorities, annual budgets and financial reporting. The section on which the argument for the Minister relied, was Section 63(2) of the PFMA which provides that “*The executive authority responsible for a public entity under the ownership control of the national or provincial executive must exercise that executive’s ownership control powers to ensure that the public entity complies with this Act and the financial policies of that executive*”. Section 63 falls in Chapter 7 and not Chapter 6. It primarily deals with the financial responsibility of executive authorities of departments who must perform their statutory functions within the limits of funds authorized by the fiscus in terms of Chapter 4. Insofar as this also extends to public entities under the ownership control of the national executive, “ownership control” is in itself defined in the PFMA as meaning: “*the ability ... to govern the financial and operating policies of the entity in order to obtain*

benefits from its activities” (my emphasis). The definition of control, is defined as further including the ability to appoint or remove all or the majority of the members of the board, to appoint or remove that entity’s chief executive officer, to cast all or the majority votes at meetings of the board or to control the voting rights at a general meeting of that entity.

4.11 Contrary hereto, the Act prescribes that at meetings of the board, the Minister shall have no right to vote (Section 4(5)); the board, and not the Minister, shall appoint the Commissioner (Section 2B(1)); it is the board, and not the Minister who may remove the Commissioner (or even appoint an Acting Commissioner) (Sections 2B(2) and 2C). The board is furthermore funded by allocations from monies contained in the National Lottery Distribution Fund as provided for in Chapter 3 of the Act. The net proceeds of the fund is distributed and allocated in terms of Section 26 of the Act, principally for charitable expenditure, charities and grants. There is no talk of “benefits” for the State as shareholder such as in the case of State Owned Entities as contemplated in Section 63 (2) of the PFMA. The need for “ownership control” as contemplated in that section of the PFMA is not only absent, but in fact the opposite is true, the NLC should be run by independent and impartial control. This much is clear from a reading of the Act as a whole and, in particular, Section 3 thereof referred to above. Insofar as the Minister has executive compliance oversight functions in relation to the NLC and its board, those are prescribed in the Act and not in the PFMA.

4.12 Insofar as Section 3(3) of the PFMA proclaims that, in the event of inconsistency between the PFMA and the Act, the PFMA prevails, there is no inconsistency in this case: the PFMA does not prescribe how members of boards of State Owned Entities or any of the constitutional institutions,

major public entities or “other public entities” listed in schedules 1, 2 and 3 of the PFMA are appointed and neither does it do so in respect of the NLC. A conflict would only arise if the sections relating to the finances of the NLC (Section 9) or the auditing of its accounts (Section 12) or distribution in terms of Chapter 3(2) of the Act were in conflict with the PFMA (which they aren’t).

- 4.13 The contention that the PFMA in general or Section 63(2) thereof in particular would by implication afford the Minister powers beyond that expressly provided for or otherwise limited in the Act, is therefore rejected.
- 4.14 As a last ditch attempt, the Minister argued that he had acted “in substantial compliance” with the Act when Ms Brown was appointed. This argument is not correct. None of the express terms set out in Section 3(3) (quoted in paragraph 2.5 above), ensuring a transparent and open process for the appointment of a chairperson have been followed. Insofar as the Minister seeks to rely on the endorsement of his actions by the PPC, that is also misplaced. He had appointed Ms Brown on 30 November 2020 before he had even received the PPC’s views on his intention to do so and the PPC’s reluctant endorsement of the extension of her appointment, only came on 31 March 2021. This could hardly amount to substantial compliance with the parliamentary oversight provisions contained in Section 3(3) of the Act.
- 4.15 I therefore find that the appointment of Ms Brown as acting chairperson by the Minister had been outside the provisions of the Act and beyond the powers of the Minister.
- 4.16 The consequence of the above finding, is that the “domino effect” contemplated as follows in Seale v Van Rooyen NO and Others; Provincial Government North West Province v Van Rooyen NO and Others 2008 (4)

SA 43 (SCA) at [13] comes into effect: “*I think it is clear from Oudekraal That if the first act is set aside, a second act that depends on its validity on the first act must be invalid as the legal foundation for its performance was non-existent ...*” (the reference is to Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)).

- 4.17 For the extensions of the acting appointment (on 31 January 2021 and 31 March 2021) to have had any validity, the initial appointment had to have been valid. Once the domino of the initial appointment toppled then so did the dominoes of the extensions. The fact that the last domino, being the extension from 31 March 2021 was “endorsed” by the PPC, does not detract from this is as “*a power that is exercised without authority cannot be ratified after the fact*”. See: AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another 2007 (1) SA 343 (CC) at [91].
- 4.18 Having elected to proceed with both parts A and B of the notice of motion, it follows from the above findings that the NLC is entitled to the primary relief sought, namely the review and setting aside of Ms Brown’s acting appointment and any extensions thereof.

[5] Appropriate remedy

- 5.1 The parties are in agreement that, should the above be the finding of this court, just and equitable relief such as that contemplated in *inter alia* Bengwenyama Minerals (Pty) Ltd and Others v General Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC), would be that prayer 4 of Part A of the NLC’s Notice of Motion be granted, authorizing the payouts of expenditure and distribution of funds to charitable organisations as contemplated in the NLC budget for 2020/2021 approved under the impugned chairpersonship of Ms Brown on 26 January 2021.

- 5.2 What the parties are not in agreement with each other, is whether such just and equitable relief should result in the suspension of the finding of invalidity of Ms Brown's acting appointment. The Minister argues that this should be ordered so as not to leave the NLC rudderless.
- 5.3 The order of suspension is discretionary and may be the use of a Court's "*remedial power under the Constitution to ensure that just and equitable constitutional relief is afforded to litigants*". See: Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others 2014 (3) SA 106 (CC).
- 5.4 Should a suspension of the determination of invalidity be granted as prayed for by the Minister, it would mean that the functioning of the board continues as if nothing untoward had happened. While it may be correct that this would not "rock the boat" of the board, the concerns regarding the captaining of its ship and the hand on the tiller raised by the NLC remain: the result would be that, contrary to the statutory prescripts contained in section 3(3) of the Act and the express intention of the Legislature that the person chairing the board should be one selected from the widest national pool as possible, a selection has been made by the Minister from the very limited pool of existing board members. This selection has further been limited by the Minister exercising it unilaterally and without the input of the PPC or without considering other members than the member designated by him.
- 5.5 The selection by the Minister of the member previously designated by him and appointed in terms of section 3(1)(b) of the Act, has its own problems. Contrary to the principle of impartiality and absence of conflicts of interests, the affidavits indicate that there is a danger of a blurring of roles and the existence of conflicting loyalties or perspectives. Not only will the

suspension result in a situation where a person in a position of potential conflict is left at the helm, but in a situation where such a potentially conflicted person even has a casting vote at board meetings. This could never have been what the Act intended. In circumstances where the Minister has himself extensively in his answering affidavit raised concerns about the running of the National Lottery, I find myself unable to agree that the proposed suspension would be just and equitable in these circumstances.

- 5.6 Furthermore, on the Minister's own papers, the consequence of the finding of invalidity of the acting appointment as far as it pertains to the running of the board would only endure for a short while. Within a matter of scant weeks from date of this judgment, the "relevant committee of the National Assembly" will make its recommendations as to a proposed chairperson known to the Minister whereafter the appointment contemplated in section 3(1)(a) of the Act can take place. In the meantime, the day to day operations of the NLC under the stewardship of the Commissioner will continue, expenditures will be paid and distributions will continue to be made.

[6] Costs

Having regard to the above findings and the considerations which led thereto, I find no reason why the customary rule that costs follow the event, should not apply.

[7] Order:

1. The decision of the Minister of Trade, Industry and Competition to appoint Ms Zandile Brown as acting chairperson of the National Lotteries Board with effect from 1 December 2020 and all extensions

of that appointment are declared invalid and are hereby reviewed and set aside.

2. The National Lotteries Commission is authorized to continue to effect payments for expenditures and the distribution of funds as contemplated in the annual budget of 2020/2021 approved on 26 January 2021.
3. The said Minister, cited in his capacity as such as first respondent, is ordered to pay the costs of the application, including the costs of two counsel.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 30 April 2021

Judgment delivered: 7 May 2021

APPEARANCES:

For the Applicant:	Adv E C Labuschagne SC together with Adv R Ferguson and Adv R More
Attorneys for the Applicant:	Maluleke Inc t/a Maluks Attorneys, Johannesburg c/o Hahn & Hahn, Pretoria
For the First Respondent:	Adv N H Maenetje SC together with Adv M Stubbs
Attorney for the First Respondent:	Cheadle Thompson & Haysom Inc., Pretoria