REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT

PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 10307/12

17/5/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

17/05/2013
DATE

SIGNATURE

In the matter between:

SOMETHING MAGIC THEATRE ORGANISATION — APPLICANT

V

NATIONAL LOTTERIES BOARD — RESPONDENT

JUDGEMENT

MAKUME J

[1] In this application the applicant seeks an order in terms whereof the decision of the respondent to withdraw the allocation of a grant totalling some R24 million to the applicant be reviewed and set aside.

[2] The applicant is a non-profit organisation formed in 2006, with a primary view to provide arts, the culture and heritage training and extended services.

[3] Amongst its projects developed between 2008-2010 is a street kids programme as well as a training programme using drama and theatre to assist the rehabilitation activities of the Department of Correctional Services. This programme in particular empowers street kids to develop skills for survival in an environment that might otherwise lead to criminal activity.

[4] The applicant in carrying out its objects over the years has established professional relationship with well-established institutions such as the City of Tshwane, the University of Pretoria as well as the department of correctional services. The applicant says that these institutions have in fact supported the applicant's aforesaid primary mission.

[5] Like all non-governmental and non-profit organisations who seek to assist in the upliftment of the social living conditions of the poor in our country funding has always been a problem. It was for this reason amongst others that the government established the National Lotteries Board when it passed Act of parliament known as the Lotteries Act number 57 of 1997.(The Act)

[6] The respondent is a juristic person established under section2 of the Act. Section 21 of the Act created a National Lottery Distribution Trust Fund (The fund) into which all monies raised through National Lottery Competitions are paid. The board administers the fund primarily for purposes of allocating grants to socially worthy projects. There are a number of distribution

Agencies which are nothing but subcommittees of the board whose task is to facilitate the adjudication of funding applications and the distribution of funds to charities or organisations whose applications have been successful.

[7] In the year 2010 the applicant developed a concept around archiving Traditional Dance as a way to preserve culture and titled the project "MOVE MY SOUL. "On the 29th January 2010 the applicant lodged an application with the Respondent seeking funding over a period of three years for this project. The funding would be spread as follows:

(i) First year R25 145,220

(ii) Second year R27 659 742

(iii) Third year R30,425 716.20

[8] At the time when the applicant filed its application for funding the regulations governing the process and the adjudication of such applications had not as yet been put into operation. This was done only on the 30th July 2010.It is Regulation number 644 published in Government Gazette number 9340 dated the 20th July 2010. Section 3-9 of PART II of the regulations is applicable in this matter.

[8] A brief history of the dispute in this matter is that after the Distribution Agency for Arts and Culture had received the application it proceeded to asses and adjudicate on it.

[9] On the 20th September 2010 the Distribution Agency wrote to the applicant requiring the applicant to submit to the Agency proof of approval for change of financial year end. This was done and eventually on the 11th November 2010 the Arts Distribution Agency took a decision to allocate an amount of R24935 220-00 being funding for 1 year for the applicant's project "MOVE MY SOUL"

[10] The document by the Distribution Agency in which it approved funding was placed before the Chief Executive Officer for approval and to set in motion the preparation and signing of the grant agreement between the Board and the Applicant.

[11] When the Chief Executive Officer received the documents from the distribution Agency he instructed Mr Mvelisi Hlungulu the Compliance Manager to scrutinize the audited financial statements of the applicant as well as to do a site inspection and file a report on his findings.

[12] Mr Hlungulu's report appears on pages 261-270 and is dated May 2011.The report which is detailed mentions many disturbing features about the applicant including the fact that Mr Patrick Dlamini who prepared and signed the applicant's financials was not a qualified auditor.

[13] Having received the report of the Compliance Manager the Chief Executive Officer addressed a letter to the chairperson of the Arts Distribution Agency dated the 7th June 2011 in which he writes as follows:

"we request that allocation made to the following projects be formally withdrawn:

43413-ImbongiYesizwe Trust

42592-Something Magic Theatre

Investigations conducted by our compliance staff has indicated that the audited statements submitted by both these applicants have been fraudulently signed. The auditor whose signature is claimed to verify the audit has denied signing the financial statement and has stated that the letterhead of this company was fraudulently used."

[14] The Distributing Agency held a meeting between the 6th-14th June 2011 and having discussed the letter of the CEO as well as the report of the compliance Manager took a decision to withdraw the allocation made to the applicant in November 2010. A formal letter dated the 12th July 2011 was addressed to the applicant by the Board. The letter reads as follows:

"Please be advised that the allocation made to your organisation has been withdrawn by the Distributing Agency for Arts and Culture and National Heritage at their meeting of 6 to 14 June 2011 due to the fact that the audited statements submitted by you have been fraudulently signed. The Auditor whose signature is claimed to verify the audit has denied signing the financial statements and has stated that the letterhead of his company was fraudulently used".

[15] It is this decision as contained in that letter which the applicant seeks to be reviewed and set aside. The applicant is not asking the court that the respondent be ordered to pay the allocated amount of R24 million.

[17] I hasten to say that the mere setting aside of the decision will not automatically lead to the release of the R24 million to the applicant. I say this because the report of the Compliance Manager Mr Hlungulu is not only full of other irregularities it is recommended that the decision be reconsidered and also that legal advice be sought regarding the legality of accepting revised financial statement as well as the involvement of the applicants board member in the affairs of another organisation known as Shivava

[18] In paragraph 5.1.2 of the report Mr Hlungulu says the following under the heading "FINDING":

"We also noted the Malulekes mentioned in 5.1.1 above are also directors of author NLDTF funded project called Shivava Cultural Development(Project No:376170) that has been allocated R9784500-00 for the 2010 call. Our site

visit to this project(Shivava) revealed a number of serious concerns on the management of and expenditure on the NLTDF grant already paid(see Shivava site visit report also submitted with this report)

[19] Before dealing with the issues in this matter I deem it appropriate to quote in full some sections contained in PART II of the regulations relating to distribution of funds from the National Lottery Distribution Trust Fund.Section3 reads as follows:

"Upon receipt of an application for adjudication a Distribution Agency shall determine whether the application meets the criteria and the applicant has submitted all the mandatory documents in the application2010(1)and-

(a) If the application does not meet the criteria and contain all the mandatory documents such application will be declined on the basis that it does not meet the criteria or that it is an incomplete application and the applicant will be informed accordingly."

[20] Section7 reads as follows:

(a) A distribution Agency may approve a grant subject to the conditions that-

(b) The grant be paid after receipt of a positive pre-grant site inspection or visit.

THE ISSUES

[21] The first issue raised by the applicant is whether the respondent made a decision within the meaning of section1 of the Promotion of Administrative Justice Act 3 of 2000(PAJA) by approving the application for funding of "Move my soul" project.

[22] The respondent argues that the decision is not a reviewable decision within the meaning of section1 PAJA.I do not agree with that contention for purposes of PAJA "decision" means:

"Any decision of an administrative nature made or proposed to be made or required to be made as the case may be, under an empowering provision including a decision relating to making, suspending, revoking or refusing to make an order, award or determination".

[23] The Act read with section 3-7 of the regulations empowers the Distribution Agency on receipt of an application for funding to do certain things. Section 3 of PART II of the regulation speaks of determine whether the application meets the criteria and when the determination has been done that the application does or does not meet the criteria then take a decision to reject or approve the grant.

[24] I am satisfied that the decision taken by the Board on the 11 November 2010 granting the applicant the sum of R24 million is an administrative decision which is reviewable. However the applicant is not asking this Court to review the decision taken on the 11^{th} November 2010.The decision that the applicant seeks to have reviewed is the decision taken on the 12^{th} July 2011 in which the grant made was reversed.

[25] What is in issue as regards that second decision is whether it was administrative dealings which should be subjected to judicial to judicial review in terms of PAJA. The Applicant contends that it is an administrative decision that should be reviewed. The Respondent argues that the decision to withdraw the allocation is tantamount to declining the application due to the fact that the Audited Financial Statements of the Applicant were found to be fraudulent. The Respondent argues that the withdrawal is nothing but an advise to the applicant that the application is declined.

[26] When the Distribution Agency made the grant it was subject to approval by the CEO who is the delegated functionary having been duly delegated by the Board. The decision to grant was therefore not final as there was a suspensive condition as set out in the instructions given by the CEO to the Compliance Manager. Mr Hlungulu in his report on paragraph 1.2 says the following:

"A grant agreement was generated and as per NLB processes all the grant documentation had to be quality checked and signed by the NLB CEO who in April 2011 after reviewing the said documentation requested. Compliance Division to conduct a site visit(as a risk management intervention)on the organisation to verify, the project and organisational data, Governance and financial management system of the organisation, as the information provided on the application form on these was not comprehensive enough"

[27] When the CEO gave the instructions as he did to the compliance division he did so in accordance with Section 4 of the Regulations which reads as follows:

"When assessing the application a Distribution Agency may at any time request any additional information or documents other than mandatory documents in form 2010/1.

[28] The decision to allocate the grant was accordingly not final as the assessing body and the CEO still needed certain information before the grant agreement could be signed and money paid out to the Applicant.

[29] The Respondent argues that the withdrawal of the grant is because the applicant failed to furnish the Respondent with all the mandatory documents together with its application in that the financial statements were not signed by an auditor.

[30] Section E to the application form for a grant sets out the mandatory documents that must accompany the application form one of the documents

is the most recent annual financial statements of the organisation for two consecutive years signed and dated by a registered independent accounting officer or an Auditor.

[31] The undisputed evidence is that the audited financial statements that were attached to the Application for a grant were not prepared and signed by an auditor or an accounting officer

[32] The audited financial statements are mandatory documents and if they are missing the application of the applicant did not meet with the criteria and fell to be declined on that basis only.

[33] The problem in this matter is that when the Distribution Agency assesed and adjudicated on the application they were not aware that the application was defective for want of properly signed Audited financial reports. Had the Agency been aware at that time it would have there and then declined the application. However once it was brought to their attention that the application was defective the Distribution Agency acted in accordance with the provisions of section 3 of the Regulations.

[34] The withdrawal is not a decision within the meaning of PAJA and is accordingly not reviewable. What the Distribution Agency did was to follow the letter of the law and decline the application. The Applicant is not being shut out all it means is that the Applicant can file a fresh application with the correct documents for consideration. The fact that the applicant submitted new financial statements after it was brought to its attention that the original financial statements were defective does not cure the defect because by that time a decision to withdraw had already been made.

[35] The issue about proper and reliable financial statements is key to the whole issue of grants.Section3(h) is but one of the examples where reference is made that the Distribution Agency will proceed to assess the application in accordance with the requirement in regulation 3-6 of Regulation Relating to Allocation of Money in the National Lottery Distribution Trust Fund.

[36] Section 3 (9) is further evidence of the extent to which the Board takes this aspect serious it reads that if a grant is approved to an organisation such organisation shall comply with procedure and conditions stipulated in their notice to ensure that such further distribution conforms to the directives of the Minister and the requirements in regulation 3-6.Section 30(4) and (5) of the Act are further evidence on this aspect.

[37] The writer Cora Hoexter in the book titled ADMINISTRATIVE LAW IN SOUTH AFRICA Second Edition published December 2011 page 231 under the heading **"Direct Effect"** writes as follows:

*"As already noted, there is pre paja support for the idea that administrative decision should be final before they are reviewed. Finality was a significant factor in **PODLAS v Cohen and Bryden NNO** in relation to a decision to hold an enquiry in terms of section 152 of the Insolvency Act 24 of 1936 and to issue notices to persons to attend the enquiry. It also played a role in **PARK-**Ross v Director, Office for Serious Economic Offences in relation to a decision to recommend the prosecution of a person. In **Eastern Metropolitan Substructure v Peter Klein Investments Pty Ltd** a matter decided on exception the court reasoned that a local authorities' decision to recover money by means of legal proceedings lacked the finality required to attract rights to administrative Justice. The decision was a preliminary or interlocutory step having no determinate effect on the parties rights."*

[38] In the present matter the withdrawal of the grant does not have a final and determinate effect. It does not preclude or prevent the applicant from re-submitting the application with proper annexure as required by the rules.

[39] I am accordingly of the view that the decision to withdraw is not reviewable

[40] The last aspect raised in this matter is that concerning the audi-alteram partem rule. The applicant argues that before the decision to withdraw the grant the Respondent should have granted the applicant an opportunity to be heard.

[41] In principle it is correct. Procedural fairness in the form of Audi alteram partem is concerned with giving people an opportunity to participate in the decision that will affect them and be granted a chance of influencing the outcome of those decisions. However in **METRO PROJECTS CC VS KLERKSDORP MUNICIPALITY 2004(1) SA 16**,SCA Conradie JA said the following about fairness in the context of public procurement:

"Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender, it may be fair to allow a tenderer to correct an obvious mistake, it may particularly in a complex tender be fair to ask for a clarification or details required for its proper evaluation whatever is done may not cause the process to lose the attributes of fairness or in the local government sphere, the attributes of transparency, competitiveness and cost effectiveness".

[42] In this matter it is contended that when the CEO instructed the Distributing Agency to withdraw the grant based on the report of the Compliance Manager that there was a duty on the Distributing Agency to afford the applicant a hearing before the decision was taken, which was not done.

[43] A similar situation as in the present matter arose in the case of **THABO MOGUDI SECURITY VS RANDFONTEIN LOCAL MUNICIPALITY 2010 (4) ALL SA REPORTS 314 (GSJ).**In that matter after the adjudication committee of the municipality had recommended that a security services tender be awarded to the Applicant, The City Manager decided to withdraw the tender process and called for fresh tenders.The Applicant argued that it was never afforded an opportunity to address the defendant on whatever short comings had been found in the applicant's capability to fulfil the tender specification.

[44] In dealing with that matter, GAUTSCHI AJ said the following at page 324 paragraph 38:

"I nevertheless proceed to consider whether the applicant should have been afforded a hearing before the municipal manager decided to abort the tender

process and call for tenders afresh.It is well recognised that the right to audi alteram partem is dependent upon circumstances. It is contextual and relative, The right to make a representation will usually arise where a person may be adversely affected by a decision. It is also no answer to say that the person who would be adversely affected by a decision may have little or nothing to argue in regard thereto or that a fair hearing could have made no difference to the result. This is however not so much a case where nothing would be achieved by affording the applicant a hearing on the basis that the applicant could not conceivably have contributed anything but a case where the circumstances dictate that the applicant should not be afforded any opportunity to make representation. Although the decision to abort the process would adversely affect the applicant, it did not have the right to be awarded the contract in terms of the written rules of the bidding which the applicant initialled".

[45] The decision taken on the 11th November 2010 was subject to certain conditions being met that decision conferred no right on the applicant until the conditions were fulfilled. When the Distribution Agency received an adverse report and decided to withdraw it's decision it was not withdrawing any right that had already vested on the applicant. The applicant's request did not meet the mandatory specification and for that matter the grant was not awarded.

[46] The suggestion that the applicant should have been afforded a hearing will place an impossible burden upon the respondent who have to deal with hundreds of other applications.

[47] As was stated in the matter of **NATIONAL LOTTERY BOARD VS SA EDUCATION AND ENVIROMENT PROJECT 2012(4) SA 504** at page 509: that guidelines serve a useful purpose and generally accord with the regulation. Their object is to ensure that monies are disbursed only to grantees that are demonstrably capable of administering them for their intended purposes and also that applicants for funding are treated similarly. When receiving

applications for funding the decision maker's mind must be directed to these purposes. In doing so it is entitled to treat some aspects of the guidelines as peremptory requirements such as that the financial statements of grantees be audited."

[48] The applicant's application was scrutinized, assessed and was found to be defective. The guidelines read with the rules require that the application be declined.

[49] Accordingly I have come to the conclusion that:

(i)The application is dismissed

(ii)The applicant is ordered to pay costs.

Dated at Pretoria on this the ..17.. Day of ..MAY.. 2013.

MAKUME J

(JUDGE OF THE HIGH

COURT)