



The Non-Profit Lawyer

NPO Legal Issues

Keeping an eye on non-profit laws

Volume 15:
Nov/Dec 2011

LOTTERIES JUDGEMENT

ABOUT NPO LEGAL ISSUES:

This is an electronic newsletter published by:
RICARDO WYNGAARD ATTORNEYS which is aimed at updating the non-profit sector on relevant legal issues.

IN THIS EDITION:

- **Implications of Lotteries Judgement**

By: *Ricardo Wyngaard & CMDS*

RICARDO WYNGAARD

ATTORNEYS is a law practice that specialises in rendering advice and assistance on non-profit law and governance.

SUBSCRIBE:

To subscribe free of charge send an email with NEWSLETTER typed in the subject-line to:
meagon@nonprofitlawyer.co.za

DETAILS:

Postal:

P.O. Box 214, Eerste River, 7103

Physical:

2137, Somerset Links, Reese Road, Somerset West, 7130

Tel: +27 21 852 7800

Fax: +27 86 538 8435

ricardo@nonprofitlawyer.co.za

www.nonprofitlawyer.co.za

At the end of this busy year, a difficult year for many, we have worked with CMDS to prepare an important newsletter about applications to the National Lotteries Board (“NLB”). We are also aware that a march is being planned in Johannesburg on 20 January 2012 to raise awareness and to protest about the operation of the NLB. As we approach the Christmas holiday, we believe that, if the NLB had fulfilled its mandate more fully, many destitute South Africans could have approached this festive season and the New Year with more hope for the future.



Tel: (021)797 6226
Email: cmds@cmds.org.za
Website: www.cmds.org.za

The Supreme Court of Appeal (“SCA”) recently dismissed an appeal by the National Lotteries Board (“NLB”) against a decision of the Western Cape High Court that 3 applications made to the NLB that were rejected must be reconsidered within 60 days. The judgement contains significant findings which both civil society and government should take note of.

Background

The applicants in the matter were 2 NGO’s that lodged an urgent application to the Western Cape High Court asking for instruction and direction on how to deal with rejected applications, given the history of the alleged institutional chaos at the NLB.

The original judgement

The Western Cape High Court found that the distribution agencies of the NLB had no statutory or regulatory power to make binding rules on applicants. Guidelines are non-legislative guiding policies and cannot override, amend or be in conflict with relevant legislative provisions, although they are useful in applying some measure of informality to the consideration of applications.

The decisions of the NLB were found to be reviewable, as the consideration of applications for funding by the NLB and the distribution agencies constitutes “*administrative action*”. The Court did not find sufficient material to conclude that institutional disarray exists at the NLB but set aside the NLB’s refusal to fund the relevant applications and ordered that they be reconsidered within 60 days of the order. The Court further ordered that, if any of the 3 applications should then be declined, reasons for the refusal should be communicated. The Court also ordered that the NLB should bear the costs.

The judgement regarding the appeal

General Considerations - The appeal by the NLB was dismissed by SCA on 30 September 2011 in a judgement which represents a serious indictment of the NLB and the distribution agencies. The SCA stated, amongst other points, that:

Lotteries Judgement/...

1. There was a failure to fulfil mandate:

The NLB and the distribution agencies have not been fulfilling their mandate in terms of the law. *“Despite the Minister’s determinations and the overwhelming social need for these funds, the [NLB] and [distribution agencies] have consistently failed to meet their targets.”* The SCA further found that - *“In total, in 2009, the fund had R6 billion in unallocated funds. For the years we are considering the fund had simply not fulfilled its mandate.”* R6 billion in funds could, for example, have provided 12,000 organisations with R500,000 each or 24,000 organisations with R250,000 each to help alleviate the plight of destitute South Africans.

2. There was apparent failure to understand mandate

Distressingly *“the board does not appear to understand its mandate properly.”* This is because the chairperson of the board seems to hold the view that *“grants given by the board are ‘gratuities’ which are allocated at the board’s discretion.”* The SCA dismissed this view as ‘wrong’ and confirmed that - *“The board holds public funds in trust for the purpose of allocating them to deserving projects. And it must ensure that these funds are allocated to those projects, provided of course that they meet the necessary requirements. The funds do not belong to the board to be disbursed as its largesse.”*

3. A single phone call could have brought clarity

On two occasions a *‘single phone call’* to the relevant NGO’s could have clarified matters. The SCA described it as *‘a simple exercise that would not have unduly burdened the board’*. In one matter, failure to do this simple task resulted in rigidity and thoughtlessness. The same conduct was followed by the self-appointed ‘Special Board Committee’ of the board.

4. There can be no shortcuts

The NLB is required to consider each application for funding individually and to justify each decision; insufficient, or inadequately trained, staff cannot be used as a defence for not doing this.

The judgement clearly has significant implications beyond the three matters which the SCA considered. The NLB’s failure to meet its mandate means that the poor and marginalised ultimately have to pay the price for the board’s inefficiency. We believe that the Minister of Trade and Industry should inspect the judgement closely to determine what steps are required to improve efficiency and understanding at the NLB and its distribution agencies - failure to do this would be neglectful in the face of the overwhelming social need for these funds.

Specific findings - The main question at hand for the SCA was whether the NLB was justified in declining the applications for funding based upon non-compliance with guidelines issued by the distribution agencies. The SCA found that:

1. It is prudent for decision-makers to issue guidelines that will assist them in making decisions.
2. Guidelines must be consistent with the enabling legislation, in this case the Lotteries Act and the Regulations promulgated in terms thereof.
3. Guidelines cannot be elevated to an absolute rule as it would restrain the discretion of the decision-maker.
4. Guidelines must be consistent, particularly when dealing with large numbers of applications.

Lotteries Judgement/...

The SCA found that the distribution agencies were entitled to issue guidelines which, in the current matter, served a useful purpose. However, the NLB did not comply with the above principles as the guidelines were applied too rigidly and, on one occasion, inconsistently. The SCA's decision was summarised as follow:

“.....in each of the three decisions under review, the board adopted a rigidly formulaic approach to the application of the guidelines, treating them as ‘peremptory requirements’ without exception: in the first, it rejected the application merely because it used the applicant’s abbreviated name instead of the same name throughout the application as the guidelines require; it declined the second on the ground that the financial statements were not signed; and it refused the third because of its dogmatic insistence that the ‘auditor’ be recognised by one of three professional bodies prescribed in the regulations despite the board not having previously adhered to this practice, and the guideline itself having not clearly required this.”

Implications for other organisations?

Organisations that claim that a decision has been made when the guidelines have been applied too rigidly by the NLB or the distribution agencies may, in terms of the Promotion of Administrative Justice Act (“the Act”) apply for the judicial review of that decision. In doing so, the requirements as laid down in the Act must be complied with.

During July 2010, the Minister of Trade and Industry published new regulations, which repealed earlier regulations, and a revised application form for grants. Although the NLB and the distribution agencies may issue new guidelines pursuant to the new regulations, such guidelines (and the application thereof) must comply with the requirements confirmed by the SCA.

International Legal Conference – Moscow, Russia

Ricardo attended the *International Legal Conference* on 1 and 2 December in Moscow, Russia as a Ford Foundation Fellow. The conference was hosted by the Russian Legal Information Agency (RAPS) and the Russian News Agency (RIANOVOSTI). The conference focused on *Law and Modernisation* and Ricardo was invited as a speaker to provide input on legal services in South Africa. Delegates discussed, amongst other, the role of the government, judicial system, lawyers and media agencies at improving citizens' understanding of the law.



© RICARDO WYNGAARD ATTORNEYS

Important Note: The information contained in this newsletter is general in nature and should not be interpreted or relied upon as legal advice. The information may not be applicable to specific circumstances. Professional assistance should be obtained before acting on any of the information provided in this newsletter.