

National Lotteries Commission vs GroundUp

Complaint 8942

Ruling by the Deputy Press Ombud

Date of article: 9 April 2021
Headline of publication: “NLC Commissioner misleads Parliament – again”
Author: Raymond Joseph

Particulars

1. The ruling is based on written representations by Thabang Mampane (“Mampane”), Commissioner of the National Lotteries Commission (NLC), and Nathan Geffen (“Geffen”), editor of GroundUp.
2. There was a considerable delay in the finalisation of the complaint as the NLC did not reply timeously to GroundUp’s response. I have considered the representations by the NLC pertaining to the delay and am satisfied that the reply should be taken into account in adjudicating this matter.

Complaint

3. The NLC, through representations penned by Mampane, complains about an article that stated Mampane “misled Parliament – again”. The article revolves around two written parliamentary responses Mampane provided in 2020 and 2021 respectively.
4. GroundUp reported that Mampane “misled” Parliament by stating in 2020 that attorney Lesley Ramulifho of Ramulifho Inc last conducted business with the NLC “around 2014”, while her answer in 2021 indicated that Ramulifho Inc was paid by the NLC much later than that. The reference to “again” is derived from an earlier GroundUp report which stated that Mampane said in a parliamentary response that a museum that is funded by the NLC is already open while this was reportedly not the case.
5. Mampane insists that she did not mislead Parliament. She says GroundUp is misunderstanding the nature of the two parliamentary questions and her responses to them.

6. According to the NLC, GroundUp breached two clauses of the Press Code, being 1.8. (failure to obtain comment from a subject of critical reportage) and 3 (dignity and privacy).

The parliamentary questions and answers

7. The major dispute between GroundUp and the NLC is the interpretation of the questions and answers. To this end, it is helpful to reproduce the questions and answers to some extent from the official parliamentary documents which I was provided with.
8. Question 1355 was posed in 2020 by DA-MP M.J. Cuthbert. He asked the Minister of Trade, Industry and Competition (with my underlining for emphasis):

“(1) Whether he will furnish Mr M J Cuthbert with a list of legal service providers who have rendered legal services on a consultancy and/or other basis to the National Lotteries Commission (NLC) over the past five financial years; if not, why not; if so, what are the relevant details; (2) whether he will furnish Mr M J Cuthbert with a list of lawyers and/or law firms that are part of the NLC’s selection panel of legal practitioners that are regularly used for legal matters involving the NLC; if not, why not; if so, what are the relevant details; (3) whether [Ramulifho Inc or Mr Lesley Ramulifho] has ever rendered services to the NLC in any of the above specified capacities; if not, what is the position in this regard; if so, what are the relevant details?”

9. The Minister deferred to Mampane, who provided the following response:

“(1) The panels for the past financial years (2015/16 to date) were established following a supply chain process as prescribed by the Public Finance Management Act (No.1 of 1999 as amended) (“PFMA”), National Treasury Regulations- Practice Notes, Instructions, Circulars and Letters, Preferential Procurement Policy Framework Act (No. 5 of 2000) (“PPPFA”) and Regulations, 2011, Broad Based Black Economic Empowerment Amendment Act (No. 46 of 2013, amongst other

legislation, as well as NLC's Supply Chain Management Policy. The NLC's panel of attorneys list for the past financial years (2015/16 to date) are detailed as below. The NLC did not have a panel prior to the years depicted herein."

10. The list of panel attorneys is provided in section (2) of the reply. Ramulifho Inc is not part of the list.

11. Mampane answered question (3) as follows:

"Ramulifho Inc. or Lesley Ramulifho is not on the NLC panel of attorneys. Ramulifho Inc. has rendered legal services for labour related issues to the then National Lotteries Board now the NLC. This was approximately around 2014, prior to the advent of the panel of legal service providers."

12. Fast-forward a few months to question 695 of 2021, which was published on 5 March 2021. The same DA-MP asked (again underlined for emphasis):

"What (a) is the total amount that the National Lotteries Commission paid in legal expenses to outside service providers (i) in the (i) 2016-17, (ii) 2017-18, (iii) 2018-19 and (iv) 2019-20 financial years, (b) is the budget forecast for the 2020-21 financial year and (c) is the (i) breakdown of law firms that were used and (ii) total amount that was paid to each of law firm?"

13. Mampane responded comprehensively. The relevant answer is in sub-section (c), in which she stated:

"The following provides a total amount spent for law firms over the past four financial years, services procured in line with Public Finance Management Act prescripts."

14. Ramulifho Inc Attorneys is listed as a service provider who had been paid some R5.4 million.

The different interpretations

15. The paragraphs in GroundUp's report that form the subject of this complaint, summarises the publication's interpretation:

“In July last year, Commissioner Thabang Mampane said in her response to a question posed by DA MP Mat Cuthbert: “Ramulifho Inc. or Lesley Ramulifho is not on the NLC panel of attorneys. Ramulifho Inc. has rendered legal services for labour related issues to the then National Lotteries Board now the NLC. This was approximately around 2014, prior to the advent of the panel of legal service providers.”

But Mampane contradicts herself in a response in March this year to a second series of questions posed by Cuthbert. His questions included requesting details of all lawyers and legal firms, and payments they received, for work done for the NLC in the 2016/17, 2017/18, 2018/19 and 2019/20 financial years.”

16. The NLC says “the Parliamentary Question of 13 July 2020...related to, *inter alia*, whether Ramulifho Inc was on the NLC’s panel of legal service providers.”
17. The complaint continues: “In response thereto, the Commissioner indicted that Ramulifho Inc was not on the NLC’s panel of attorneys and had rendered legal services for labour related matters to the then National Lotteries Board during 2014, prior to the NLC making provision for a panel of legal service providers.”
18. It is apposite to note at this juncture that I do not think these statements are supported by the official documents. The 2020 question was not (only) whether Ramulifho Inc was on the NLC’s panel of legal service providers. The question was (1) who the NLC’s legal service providers were on a consultancy or other basis for the past five financial years, (2) who the panel attorneys are, and (3) whether Ramulifho Inc “has ever rendered services to the NLC in any of the above specified capacities” in plural– i.e. as a panel attorney, a consultant or on any other basis.
19. This reading is supported by Mampane’s own parliamentary answer. Although the majority of her answer dwelled on who the attorneys on the panel are, she answers question (3) about Ramulifho by stating that the firm rendered legal services around 2014 even though he was not an attorney on the panel for the panel did not exist in 2014.

20. If the 2020 parliamentary question was merely “whether Ramulifho Inc was on the NLC’s panel of legal service providers”, as the NLC contends in its complaint, Mampane’s answer to question (3) would simply have been: “No, Ramulifho Inc has never been on the NLC’s panel of legal service providers”. Instead, Mampane correctly interpreted the 2020 question to be much broader than whether Ramulifho Inc “was on the NLC’s panel of legal service providers”.
21. On the 2021 question, the NLC says in its complaint:
- “GroundUp would have established that in the Parliamentary Question of 5 March 2021, the Commissioner provided a list of legal service providers, which included Ramulifho Inc, which had been paid by the NLC for legal expenses on the historical ongoing labour related matters. The Commissioner did not specifically list legal service providers who were on the NLC’s panel. Clearly, the 2021 question was different from the one which was posed to the Commissioner in 2020.”
22. It is true that the Commissioner did not, in her parliamentary reply, state that the service providers were on the NLC’s panel. However, in my view it is a red herring. Both parties agree that the Commissioner was asked for a list of law firms that have been paid for services in the past four financial years – whether they were on a panel of attorneys or not.
23. It must also be noted that the Commissioner’s parliamentary response made no mention of payments made for “historical matters”. This apparently seeks to introduce another confusing dimension that is irrelevant.
24. In the original complaint, the NLC stated:
- “Ramulifho Inc was providing legal services to the NLB during 2014 in a matter involving the NLC and this matter has been ongoing and as expected, legal fees would be incurred until the matter is finalised.
25. It is therefore the NLC’s case that Ramulifho Inc continued to render services – albeit on existing matters. In an amplification of the written complaint, the NLC stated:

“(The two paragraphs in the GroundUp report quoted above) was intended to mean and was understood to mean or at the very least, to suggest that Ramulifho was still rendering services to the NLC on new matters beyond 2014 for which he had been recently paid. This is false and cannot be read-in from the Commissioner’s responses.”

26. Firstly, there is no innuendo in the article that Ramulifho was rendering services on “new matters”. The article simply states that the payments were reportedly made for work done in the past four financial years. Secondly, nothing turns on this. It appears to be common cause that Ramulifho rendered services to the NLC in the past four financial years and did not stop rendering services around 2014.

“Again”

27. In typical online style, the article contains several hyperlinks. The intro starts off by saying, “The Commissioner of the NLC has misled Parliament once again”.

28. “Once again” is hyperlinked to a GroundUp article of 11 January 2021 which was headlined, “Lottery boss misled Parliament”. The article pertains to a parliamentary reply about a minstrel museum funded by the NLC. Mampane reportedly stated in a parliamentary answer that the museum officially opened on 24 September 2016 and was operating from a rented premises in Wetton, Cape Town. GroundUp reported there was no sign of an operational museum at the given address by February 2020.

29. The reasonable reader reads articles in context, including direct references to earlier articles.

30. In this complaint, GroundUp says the NLC does “not take issue with the content of the January article, which stated that the NLC and Mampane misled Parliament in another answer to a question given to Parliament. The facts of the January article must therefore be accepted as true.”

31. The NLC says this is “opportunistic”. “The fact that the NLC did not lodge a complaint against GroundUp for the January 2021 article wherein GroundUp states that the Commissioner of misleading Parliament does not make the allegations therein true.” (sic)

32. This may be so. However, a bald allegation that the January 2021 article is also “false” will not suffice. Absent any concrete indications of why the January article should be impugned, I must accept that the reference to “again” is justified.

Dignity

33. The NLC says the article “involves the dignity and reputation of the Commissioner in that it specifically states that she misled Parliament, thus casting aspersions on the Commissioner.” It appears as if NLC also claims the right to dignity and reputation for the commission itself.

34. GroundUp argues that the NLC is an organ of state. Geffen cites two well-known court cases¹ to argue that an organ of state “does not have dignity and its reputation does not justify protection from the law”.

35. The NLC says the reliance on **Die Spoorbond** case is misplaced. I fully agree. The cases cited concerned the question on whether an organ of state should have standing to sue for defamation. This office is not a court of law and the complaint is not a defamation action. The Press Council’s procedure is there to hold the media to account for ethical standards that are voluntarily assumed. It would be contrary to the spirit and purpose of the Press Code if organs of state were to be excluded from complaining about alleged breaches of reputation and dignity. In any event, this office has long accepted complaints from a variety of government departments, Parliament, and organs of state.

36. I am further satisfied that Mampane may assert her right to reputation. Although she is not an official complainant, she is the author of the NLC’s submissions and GroundUp itself stated that it is treating the “Commissioner as a co-complainant”. There is therefore compliance with the jurisdictional requirements to claim a personal right as elaborated on in **Leigh-Ann Mathys vs EWN (27 July 2021)**.

¹ Die Spoorbond and Another v South African Railways: van Heerden and Others Appellants v South African Railways 1946 AD 999 at 1012 and 1013; Bitou Municipality and Another v Booyesen and Another 2011 (5) SA 31 (WCC) [17] to [20]

37. Clause 3.3. of the Press Code states:

“(The media shall) exercise care and consideration in matters involving dignity and reputation, which may be overridden only if it is in the public interest and if:

3.3.1. the facts reported are true or substantially true; or

...

3.3.3. the reportage amounts to a fair and accurate report of court proceedings, Parliamentary proceedings or the proceedings of any quasi-judicial tribunal or forum; or

3.3.4. it was reasonable for the information to be communicated because it was prepared in accordance with acceptable principles of journalistic conduct; ...”

38. It is uncontroversial that the subject matter is in the public interest. In its reply, the NLC confirms that the Commissioner is a public official:

“The Commissioner does not dispute that her reputation must stand up to close public scrutiny.”

39. The financial dealings of the NLC, an organ of state, is of immense public interest – especially where there are allegations of impropriety.

40. I am satisfied that one or more of the exceptions listed above is applicable to this case:

- a. The offensive statement is that the Commissioner “contradicted” herself and therefore “misled” Parliament. For the reasons I already provided, I am of the view that the statement of a “contradiction” is true or reasonably true. The deduction that this amounted to misleading Parliament is dealt with below.
- b. For reasons that will follow below, I am also of the view that the article amounted to fair reportage of parliamentary proceedings.
- c. Even if I am incorrect on the above-mentioned grounds and the reportage went further than reporting on privileged proceedings, I take into account that the reporting in the disputed two paragraphs was exclusively based on quotes from public documents. It is standard journalistic practice to quote from public documents and to interpret its

contents for readers. I have already found that it was not unreasonable to state that the Commissioner's two responses "contradicted" one another.

41. Consequently, the complaint about an infringement of the NLC's and/or Commissioner's reputation must fail.

No comment

42. It is common cause that GroundUp did not approach the NLC or the Commissioner for comment prior to the publication of the article.

43. The NLC alleges a breach of Clause 1.8. of the Press Code, which states:

"(The media shall) seek, if practicable, the views of the subject of critical reportage in advance of publication, except when they might be prevented from reporting, or evidence destroyed, or sources intimidated..."

44. I would be remiss if I did not deal with some of the submissions made on behalf of GroundUp. The publication provided a detailed history of the relationship between GroundUp and the NLC which include High Court litigation. Geffen then says:

"In summary, the relationship between GroundUp and the NLC is:

- one where requests for comment are generally answered with hostility, otherwise obfuscation, or often silence;
- replete with examples of actual legal action or threats of legal action, following publication of articles

"The practicality of asking comment in the circumstances, in an article which is based solely on a written, public, and privileged record, must be viewed in this context."

45. Insofar as this submission might suggest that it is not practicable to seek comment prior to publication when the publication perceives such attempts as futile or overly onerous, it should be repudiated. There is no suggestion that the NLC would have tried to prevent publication if approached for comment.

46. More often than not, journalists face extreme challenges to get any meaningful comment or co-operation from role-players. It is their jobs. This cannot be justification for not trying. In **Mthembu vs News24 (26 August 2021)**, I made the following observation that is equally applicable to cases where journalists may feel it is futile to seek pre-publication comment:
- “The *audi alteram partem* rule is sacrosanct in journalism. It is not (only) for the journalist’s benefit to obtain or verify information, but for the reader of the article to hear the other side and decide for themselves – regardless of how inadequate the journalist thinks the response may be.”
47. With that said, there is merit in GroundUp’s submissions about the practicability of seeking comment on parliamentary proceedings. In **Gama vs Sunday Times (21 June 2021)** I held that Clause 1.8. is not applicable when the reportage is a fair and accurate reflection of privileged proceedings.
48. One of the pillars of this conclusion was the ruling of **Forensic Data Analysts, Keith Keating vs Daily Maverick (1 June 2018)**, in which the then Ombud said:
- “When a journalist reports on Parliamentary processes...the report’s only task is to truthfully and fairly reflect what was said (as is also the case with court cases) – without:
- Being obliged to ask people for their views; and
 - Having to verify any statement made during such processes.”
49. If GroundUp’s article is found to be a fair and accurate reflection of parliamentary proceedings, there was no obligation to seek comment from the NLC or Mampane.
50. The circumstances of the current case is not quite as straight-forward as **Gama** and **Forensic Data Analysts**. In those cases, the journalists merely reported actual statements made during privileged occasions.
51. The nub of the difficulty is whether GroundUp only reported on parliamentary processes. It is trite that the privilege attaches to the occasion itself and not to any statement made outside of the proceedings.
52. The NLC is adamant that “the reportage went beyond merely reporting on Parliamentary proceedings and makes various statements about the Commissioner having misled Parliament. This was not an issue before

Parliament and as such Parliamentary privilege does not arise in relation thereto. These allegations were not made during a fair and accurate report of the proceedings of Parliament.”

53. The difficulty in drawing the line between mere reporting and drawing inferences from the proceedings is illustrated in the case of **Parliament vs Daily Maverick and Notes from the House (3 April 2019)**. In that case, two journalists reported from Parliament’s financial statements and other public documents of Parliament that performance bonuses were awarded to some senior managers. Parliament denied that this was the case and argued that the journalists showed a “misapprehension” of public documents. On the criticism raised by journalists based on parliamentary documents, the then Ombud said:

“These statements (based on the interpretation of the public documents) made Parliament the subject of critical reportage, which is why (the journalist) should have contacted its spokesperson for comment.”

54. What is clear from the above-mentioned case, is that the line between reporting on privileged proceedings and documents and adding additional “analysis” or interpretation that might not be protected by privilege is not always clear.

55. The NLC is indeed correct to say that no one but GroundUp made the allegation, let alone finding, of Mampane misleading parliament.

56. GroundUp states: “Insofar as conclusions are drawn by GroundUp, arising from the published written answers provided by Mampane, they are logical conclusions based on fact. No comment sought could change or explain the discrepancies in Mampane’s answers. The answers are objectively misleading.”

57. In my view, the publication sails close to the wind, especially with the submission that no comment could “explain the discrepancies”. The publication plainly could not know that. There is indeed an explanation – with or without merit – for the discrepancy. Mampane allegedly understood the first question to relate solely to the attorneys’ panel and therefore does not view her initial answer to have been misleading. There could, theoretically, be other explanations, such as a *bona fide* errors.

58. With that said, a journalist's role can never be to mechanically report what was said during proceedings or published in a public document without interpreting it for his or her readers. There is bound to be a measure of logical inference and subjective observations in the reportage of privileged proceedings that would not make it an unfair or inaccurate account of the proceedings. For example, journalists often make observations about a court witness' demeanour. Summaries of proceedings is a necessity in journalism, even though summaries are invariably shaped by subjective perceptions of relevance and importance. It would be unrealistic to expect no interpretation from privileged proceedings – especially when it is plain for all to see or the only logical inference to be drawn. If a witness in a criminal trial testifies about a “white” getaway car, only to state a few minutes later that the car was in fact “green”, it would make no journalistic sense to merely repeat those facts without pointing out that the witness changed his version, even when nobody in the proceedings pointed it out.
59. What distinguishes the current case from **Parliament** cited above, is that the journalists in the latter made inferences and provided interpretations from the public documents that could not be justified. In **Parliament**, the journalists made secondary inferences that is not a mere “description” of the public documents' contents.
60. In the current case, the journalist clinically and accurately detailed the two relevant questions and Mampane's answer to both.
61. Put differently: It would make little difference if GroundUp did not use the word “contradicted” and “misled”. The report could have merely said a) Mampane answered “X” in 2020, but “Y” in 2021 and the reasonable reader would see “X” and “Y” contradicts one another.
62. Placed together, the answers were objectively contradictory and the fact that this was stated for the readers does not, in my view, defeat the privilege.
63. It is worth noting that the NLC does not attack the logical validity of GroundUp's inference that Mampane misled Parliament. The NLC attacks the inference on the basis that the facts used by GroundUp to draw the inference was allegedly wrong – i.e. that there was no contradiction as Mampane was only asked in the first question whether Ramalifho was on the panel of attorneys. If it is objectively found that there was a contradiction, which I

accept, the validity of the inference that Parliament was misled by the contradiction is not seriously disputed.

64. In the premises, GroundUp was not obliged to seek Mampane's comment prior to publication.

Conclusion

65. The complaint is **dismissed**.

Appeal

The Complaints Procedures lay down that within seven working days of receipt of this decision, either party may apply for leave to appeal to the Chairperson of the SA Press Appeals Panel, Judge Bernard Ngoepe, fully setting out the grounds of appeal. He can be contacted at Khanyim@ombudsman.org.za.

Herman Scholtz

Deputy Press Ombud

11 October 2021