THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 788/10

In the matter between:

NATIONAL LOTTERIES BOARD	**First Appellant**
TEBOGO MAITSE NO	**Second Appellant**
DORCAS JAFTA NO	**Third Appellant**

and

SOUTH AFRICAN EDUCATION AND ENVIRONMENT PROJECT	**First Respondent**
CLAREMONT METHODIST CHURCH SOCIAL IMPACT MINISTRY, SIKHULA SONKE	**Second Respondent**

Neutral citation: *National Lotteries Board v South African Education and Environment Project* (788/2010) [2011] ZASCA 154 (28 September 2011).

Coram: Brand, Van Heerden, Cachalia, Shongwe and Seriti JJA

Heard: **16 September 2011**

Delivered: **28 September 2011**

Summary: **Administrative action – guidelines not to be applied rigidly and inflexibly – duty to give reasons – not ordinarily open to a decision maker, who is required to give reasons, to respond to a challenge by offering new reasons in its answering affidavit.**

ORDER

On appeal from: Western Cape High Court, Cape Town (Gamble J sitting as court of first instance).

The following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

CACHALIA JA (Brand, Van Heerden, Shongwe and Seriti JJA concurring):

[1] This is an appeal, with leave of the Western Cape High Court (Gamble J), against an order reviewing and setting aside certain decisions of the National Lotteries Board (the board). The decisions relate to the board's refusal to approve three applications by two registered charities for financial grants from the National Lottery Distribution Trust Fund (the fund). The main issue in this appeal concerns whether or not the board was justified in declining the applications because they did not comply with the guidelines for the distribution of moneys from the fund.

[2] The fund was created under s 21 of the Lotteries Act 57 of 1997 (the Act) to receive moneys raised through national lottery competitions. The board, which is the first appellant, administers the fund primarily for the purpose of allocating

grants to socially worthy projects.[1] The South African Education and Environment Project, the first respondent, and the Claremont Methodist Church Social Impact Ministry, Sikhula Sonke, the second respondent, are the charities whose grant applications the board declined. It shall be convenient to refer to the first respondent by its acronym SAEP and to the second respondent by its abbreviated name, Sikhula Sonke.

[3] The two charities have, over a period of time, applied to the board for funding. The projects for which they seek funding support pre-school and educational facilities in deprived areas of Cape Town. SAEP operates in the Philippi area by supporting crèches started up by women in the Philippi community, providing extra-curricular programmes in under-resourced high schools; offering bridging courses for promising students in preparation for tertiary education and supporting university students. Sikhula Sonke offers 'educare' facilities to approximately 4000 children in 65 pre-schools in the Khayelitsha community.

[4] Distribution agencies, appointed by the Minister of Trade and Industry, facilitate the adjudication of funding applications and the distribution of funds to charities whose applications have been approved.[2] The agencies are not juristic persons in their own right, but sub-committees of the board. They perform their functions on the board's behalf. There are four such agencies of which only two concern us namely, the DA for Charities, represented by the second appellant, and the DA for Arts represented by the third appellant. The former is responsible for considering applications from organisations seeking funds earmarked for 'charitable expenditure':[3] The Minister of Trade and Industry has determined that not less than 45 per cent of the amounts available must be allocated for these purposes. The latter is similarly responsible for considering applications for 'arts, culture and the national historical, natural, cultural and architectural heritage'. In

[1] Section 26 of the Act.
[2] Sections 28(1) and 28(2) of the Act.
[3] Sections 26(3)(b) and 28 of the Act.

its case, not less than 28 per cent of the amounts available in the fund have to be paid to meet these objectives.[4]

[5] Despite the Minister's determinations and the overwhelming social need for these funds, the board and DAs have consistently failed to meet their targets. This has resulted in major under-expenditure of the moneys earmarked for allocation. According to the board's annual report, in 2008, it set itself the 'strategic objective' to 'disburse 85 per cent of the funds allocated', but made less than 50 per cent available for allocation. Of this reduced amount the DA for Charities managed to distribute 40 per cent and the DA for Arts only 29 per cent of the total amount allocated. This represented 32.5 per cent of the total amount available in the fund for distribution. In 2009, they fared even worse distributing only 42 per cent of the allocated funds, which represented only 15 per cent of the total amount in the fund available for distribution. Of this amount the DA for Charities distributed 37 per cent and the DA for Arts only 28 per cent. 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.

[6] In its founding affidavit SAEP initially sought to review seven of its failed funding applications under s 6 of the Promotion of Administrative Justice Act 3 of 2000. In Sikhula Sonke's case, two applications were put in issue. When the review was launched, SAEP was content to pursue its review only in respect of four of its unsuccessful applications. And, when the matter was called, SAEP abandoned one more leaving three remaining. Counsel for the board conceded the review in respect of two of these applications leaving only one in issue, which was identified in the papers as the seventh application. Sikhula Sonke's dispute related to the eighth and ninth applications. Three thus remained, SAEP's seventh application and Sikhula Sonke's eight and ninth applications.

[4] In terms of s 26(2) of the Act the Minister of Trade and Industry makes these allocations after consulting with the board. At the time that the applications under consideration were decided these percentages were determined by the Minister in terms of s 26(3) of the Act in GN 1468 of 2004, published in *GG* 27118, 15 December 2004. This determination is now contained in new regulations that applied from 30 July 2010, published in GN R645 in *GG* 33398, 20 July 2010.

[7] As I mentioned at the beginning, the disputes over the three applications all concern how the DAs applied the guidelines when declining them. The board submits that its guidelines are clear, not unduly burdensome and must be complied with to the letter. Counsel for the board urged us to have regard to the fact that because the board processes large numbers of applications, which is an onerous administrative responsibility, it cannot be expected to investigate every application that does not adhere strictly to the guidelines. Moreover, counsel for the board submitted, the board's staff establishment is limited and its employees are constrained to apply the guidelines strictly. The board thus contends that by refusing to consider the three applications here in issue, it was merely applying the guidelines. It is therefore necessary to consider the status of the guidelines issued by the DAs and how they are meant to be applied within the context of the Act's statutory framework.

[8] The board is listed as a public entity in Schedule 3 of the Public Finance Management Act 1 of 1999. It must therefore manage its finances properly by taking steps to prevent irregular expenditure and payments that do not comply with its operational policies.[5] The powers regulating the manner in which funding applications are made are provided for in the (Lotteries) Act and regulations. Under ss 28(2) and 30(2) of the Act, the Ministers of Trade and Industry and of Finance may issue directions (in the case of the former, after consulting with the Minister for Social Welfare or with the Ministers responsible for arts, culture, science, land technology and environmental affairs, as the case may be) regarding the allocation of funds by the DAs for Charities and Arts respectively. When the decisions regarding these allocations were made the directions were contained in regs 3 and 5 of the 'Allocation Regulations'.[6] In terms of s 32(3) of

[5] Sections 51(1)(a)(i) and 51(b)(ii) of the Public Finance Management Act 1 of 1999.

[6] 'Allocation of Money in National Lottery Distribution Trust Fund' ('Allocation Regulations'), published under GN R3446, *GG* 21619, 29 September 2000 – contained in annexure 'LJK 20', Vol 1 p 82-93. These regulations have subsequently been repealed and replaced (with effect from 30 July 2010) with the 'Regulations Relating to the Allocation on Money in National Lottery Distribution Trust Fund', published under RN R645, *GG* 33398, 20 July 2010. The applications in this case fall to be decided under the 'old' regulatory scheme applicable at the time that they were made – See *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National*

the Act the DAs must comply with directions by the Minister of Trade and Industry 'in determining the persons to whom, the purposes for which and the conditions subject to which that distributing agency is to allocate any amounts'. At the time that the applications under consideration were considered the Minister had not issued any such directions.[7] Regulation 10(2) of the 'Distributing Agencies' regulations prohibits the allocation of funds to organisations under legal administration, that are insolvent, or that have previously breached conditions of their grants.[8] The regulations require applications to be made on a prescribed form,[9] a matter which is relevant to SAEP's seventh application.

[9] So, the Act and the applicable regulations make it clear that the requirements for applications are to be found in the regulations. This does not mean that DAs may not develop guidelines of the sort here in issue to assist them in making their decisions. Indeed, because the grant or refusal of an application involves the exercise of a discretion, our courts have recognised that it is prudent for decision-makers to apply guidelines or general criteria to assist them with this task.[10] And, provided that these criteria are compatible with the enabling legislation, the only constraint is that they may not be applied rigidly or inflexibly in a particular case.[11] For if they are applied in this manner the decision-maker elevates the guideline to an immutable rule and thereby fetters its discretion, which it may not do.[12]

Transport Commission; *Transnet Ltd (Autonet Division) v Chairman, National Transport Commission* 1999 (4) SA 1 (SCA) para 15-19.

[7] Such directions are now contained in the 'Directions for the Distribution Agencies in Determining the Distribution of Funds from the National Lottery Distribution Trust Fund', published under GN R644,*GG* 33398, 20 July 2010 (which took effect from 30 July 2010).

[8] Published under GN R182, *GG* 22092, 22 February 2001, reg 10.

[9] The Regulations entitled 'Allocation of Money in National Lottery Distribution Trust Fund' are published under GN 3446, *GG* 21619, 29 September 2000. Regulation 7 provides for the funding applications to be submitted to the DA on a prescribed form.

[10] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 57.

[11] *MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil (Pty) Ltd* 2006 (5) SA 483 (SCA) para 19.

[12] *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs & Tourism: Branch Marine & Coastal Management* 2006 (2) SA 191 (SCA) para 9.

[10] At the same time decision-makers must be consistent, particularly when dealing with large numbers of applications, as the board does. There is therefore a tension between having to apply a guideline strictly and consistently when making multiple decisions, and applying it flexibly in a particular case. It is this anxiety that motivates the litigation on the board's part – a point counsel for the board sought to drive home by insisting that a strict application of the guidelines is unavoidable. But this problem is inherent with multiple decisions, and does not relieve an administrator of the duty to consider each application individually and justify every decision. The law requires nothing less. And it is no defence for the board to attempt to relieve itself of this duty by complaining that it has insufficient or inadequately trained staff to do this.

[11] That the guidelines in issue here in the main serve a useful purpose, and generally accord with the regulations, is not disputed. Their object is to ensure that moneys are disbursed only to grantees that are demonstrably capable of administering them for their intended purpose and also that applicants for funding are treated similarly. In addition they minimize the danger of fraud. When receiving an application 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. For it would be untenable to insist on this requirement for some organisations, but not for others. However, it is not entitled to treat every departure from its literal prescriptions as fatal. Not even statutory formalities are approached in this way. The real question a decision-maker must ask itself is whether the object of the guidelines has been achieved.[13] If it has, then insignificant or technical instances of non-compliance should generally be condoned.

[12] Against this background, it is convenient to deal first with Sikhula Sonke's two applications and then consider SAEP's application.

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[13] *Cf Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 22.

Sikhula Sonke's Eight Application

[13] This application for funding was made on 26 July 2007 and given the reference number 27999. The amount requested was R570 000. The DA for Charities declined the application on 27 August 2008, some 13 months later for two reasons: first, that on its application form and financial statements the organisation was named 'Sikhula Sonke' while its full name (Claremont Methodist Church Social Impact Ministry, Sikhula Sonke) appeared on other supporting documents; and secondly, that 'the management is not fully representative of the beneficiary community'.

[14] However, for reasons that do not appear from the record, the DA made another decision on 15 October 2008. Again the application was refused based on an 'inconsistency in names'. It informed Sikhula Sonke of its decision by letter on 22 October 2008 and gave the reason for refusing the application as:

'The inconsistency in names in that the application form and the financials are in the name of SIKHULA SONKE and the NPO Certificate, Articles of Association and the bank statements are in the name of CLAREMONT METHODIST CHURCH SOCIAL IMPACT MINISTRY, SIKHULA SONKE.'

[15] The board invited Sikhula Sonke to appeal if it so wished. It did so on 18 November 2008. The grounds of appeal indicated that Sikhula Sonke was clearly an abbreviation of the organisation's full name, employed to avoid repetitive and unwieldy references to the full name; it was also a 'trading name' used on all its stationery, letterheads, electronic communications and its website. Six months passed before Sikhula Sonke was informed on 5 May 2009 that the appeal had failed. It appears from the record that a 'Special Board Committee' considered the appeal and confirmed the DA's decision. The reasoning was based upon paragraph three of the 2007 Guidelines, which required applications to 'have exactly the **SAME NAME** throughout'.

[16] Before I consider whether the board's insistence on the strict application of this guideline constituted a lawful basis for refusing the application, I must mention that the second reason given initially – that Sikhula Sonke's management was not representative of the beneficiary community – was abandoned on the second occasion when the application was considered. It appears that the DA introduced this requirement in its public notice calling for funding applications. How it could have done so is difficult to understand. The Act requires only that charitable expenditure be made 'by any organisation or institution established for charitable, benevolent or philanthropic purposes . . . .'[14] There is no requirement for the organisation to be 'representative of the beneficiary community' before it may qualify for funding. There is a good reason for this: the unavoidable consequence of imposing such a condition would be to adversely impact on poor and vulnerable communities having access to sorely needed funds and services.

[17] The idea that an organisation may be precluded from obtaining public funding to assist such communities only because its racial composition apparently differs from the community it intends assisting is not new. It resembles the racially discriminatory welfare policy from our recent past. That policy promoted separate services for different race groups and separate boards of management of welfare organisations. Its effect was to deepen mass poverty and social inequality.[15] To repeat that error would be so inimical to the founding values of our Constitution – non-racialism, equality and human dignity (as it relates to ubuntu[16]) – that it is an unimaginable basis for public policy. In the

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[14] Section 1.
[15] See Leila Patel *Social Welfare and Social Development in South Africa* (2005) p 73-74.
[16] The concept of 'ubuntu' and its application to case law has been controversial. Here I use it in the limited and, I think, uncontroversial sense that Mahomed J did in *S v Makwanyane & another* 1995 (3) SA 391 (CC) para 263 where he said:
'[A] "need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization". "The need for ubuntu" expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it

absence of any suggestion that the Sikhula Sonke either employs persons or dispenses funds on a racially discriminatory basis, the board correctly abandoned this rationale for initially refusing the application.

[18] I turn to consider whether Sikhula Sonke's 'inconsistency in the use of names' was a proper basis for refusing to approve its funding application. The board's justification for adopting the guideline that the same name be used throughout the application is to prevent fraud, which could happen if funds are inadvertently paid to organisations for which they were not intended. Sikhula Sonke does not take issue with the purpose of the guideline. Its complaint is that the guideline was applied rigidly resulting in the decision to refuse the funding application being unreasonable or irrational.

[19] The undisputed facts support Sikhula Sonke's stance. It says that it did not understand the guideline to mean that it could not use abbreviations in its name. That 'Sikhula Sonke' was obviously an abbreviation appears from the following: first, its auditors used the abbreviated name in the annual financial statements; second, the annual reports accompanying the application, including the cover sheet and every page of the 2006 and 2007 annual reports bear a logo which reads 'Sikhula Sonke – We grow together', and the front cover bears the full name; third, the letterhead used in correspondence to the board includes the logo in the top right-hand corner of the page, with the full name in the top left-hand corner; fourth, the letterhead and application also confirms its registration numbers as a non-profit and public benefit organisation. The persons who processed the application entered these numbers into a database, which generated a printout that referred to the full name.

[20] There could thus have been no doubt that the abbreviated and full names referred to one and the same entity – more so after the full facts were placed

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engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.'

before the Special Board Committee. Yet, in its answering papers, the board insisted that the difference in names could lead to a reasonable suspicion of fraud. In their written submissions, counsel for the board submitted that it would have been unreasonable and unnecessarily onerous to expect the board to embark on an investigation to eliminate the possibility of fraud. This submission is utterly without merit. There was no need to embark on any investigation as all the facts were before it. And, if it remained unsure afterwards it could have clarified the matter with a single telephone call to Sikhula Sonke or its auditors. Instead, the official who declined the application for this reason applied the guideline rigidly and thoughtlessly, as did the Special Board Committee. It follows that the high court was correct to conclude that the board's refusal to consider the application fell to be reviewed and set aside.

Sikhula Sonke's Ninth Application

[21] This application was submitted on 13 November 2008 to the DA for Charities. The amount requested was R300 000 and a reference number 33667 allocated to it. The DA rejected the application seven months later, on 12 June 2009. On 2 July 2009, it furnished its reasons. These were that the 'Articles of Association' were submitted without a 'Memorandum of Association' outlining the organisation's objects; and that only one set of financial statements for the 2008 year were presented instead of two, as the guidelines required.

[22] The high court found that the facts relied on to support these reasons were demonstrably wrong. The board wisely does not call into question this finding on appeal. The board, however, sought to rely on a new reason, introduced for the first time in its answering papers in the high court. This was that the financial statements had not been signed by an independent accounting officer and that Sikhula Sonke had not provided proof of the officer's official registration.

[23] There is a factual dispute between the parties as to whether the application that was submitted by Sikhula Sonke to the board included signed statements. When the matter was argued before us, it was common cause that copies of both the signed financial statements were included in the bundle of documents before us, as was an unsigned copy. Assuming, in the board's favour, that the statements it received in support of this application were unsigned, I do not think it was reasonable for the board to reject the application for this reason. If it had any doubt regarding the efficacy of the statements, a phone call to the accountants would have clarified the matter – a simple exercise that would not have unduly burdened the board. Instead the guideline was applied rigidly without any justification. There is, therefore, no merit in the board's attempt to defend this decision on this basis.

[24] The high court dismissed this new ground on another basis; it was impermissible, the learned judge said, for the board to rely on new reasons for the first time in its answering affidavits. For this conclusion the high court relied on the decision of Cleaver J in *Jicama 17 (Pty) Ltd v West Coast District Municipality*,[17] which has an impressive English pedigree.[18]

[25] Counsel for the board, however, submitted that this was not a 'new reason' but one that appeared from the record. The question therefore, so the submission went, was whether, objectively viewed, it was reasonable for the decision-maker to have rejected the application. For this submission counsel relied on a judgment by the Labour Appeal Court in *Fidelity Cash Management Service v CCMA & others.*[19] That case involved a review of an arbitrator's award. The court held that an award of this nature may be set aside on review only if it is one that no reasonable decision-maker could reach. This question, the court said, must be determined by reference to all the evidence that was before the

[17] 2006 (1) SA 116 (C) para 11.
[18] *R (S) v Brent LBC* [2002] EWCA Civ 693 para 26 (Schieman L J); *R v Westminister City Council, Ex Parte Ermakov* [1996] 2 All ER 302 (CA) at 315h-316d; H W R Wade & Forsyth *Administrative Law* 10 ed at 441-442.
[19] [2008] 3 BLLR 197 (LAC) paras 102 and 103.

decision-maker. And, it did not matter if the decision-maker failed to identify good reasons for his decision; as long as the decision, viewed objectively, was reasonable, this was good enough.

[26] In my view reliance on *Fidelity Cash* is misplaced. The question here is not whether there were other reasons in the record that justified the board's decision, but whether it could give reasons other than those it gave initially for refusing the application.

[27] The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards – even if they show that the original decision may have been justified.[20] For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalization of a bad decision. Whether or not our law also demands the same approach as the English courts do is not a matter I need strictly decide.

[28] In the present matter the refusal of a funding application involves the exercise of a discretion. This means that the board could have exercised its discretion by waiving the requirement for signed statements in the guideline, or simply condoning the failure to comply strictly with it. It failed to exercise its discretion properly by applying the guideline dogmatically. The fact that it may have had other reasons for having come to that conclusion does not change the fact that the board exercised its discretion unlawfully when it made the decision. In fact, it exercised no discretion at all. This cannot be remedied by giving different reasons after the fact. The high court, in my respectful view, got it right.

SAEP's seventh application.

[20] See Wade & Forsyth (above n 18).

[29] This application, which was allocated the reference number 35663, was submitted on 30 January 2009 for funding from the DA for Arts. The amount applied for was R313 560. This was in response to an advertisement calling for applications. The applications had to be supported by documentation. Of importance in this regard was the requirement in the 2009 'Guidelines for Submission of Applications' (referred to below) that '[a]pplicants must ensure that their auditors are registered with recognised professional bodies eg Public Accountants and Auditors Board'. However, the advertisement calling for applications stated only that the application be accompanied by signed audited financial statements for the two most recent years prepared by a firm of registered auditors.

[30] The Record filed under Rule 53 of the Uniform Rules indicates that the application was rejected at a meeting on 28 May 2009 for two reasons: first, because both sets of financial statements were not 'audited' and secondly, since the auditors had not signed one of the sets of statements. However, when the decision was conveyed to SAEP on 15 July 2009, only the first of the reasons was given to justify the rejection.

[31] SAEP's application included its annual financial statements for the years ended 30 June 2007 and 30 June 2008. They included reports from an independent accounting officer, Mr Van der Rede, who is a registered member of the Chartered Institute of Management Accountants (CIMA). His report concludes that SAEP's financial statements accord with generally accepted accounting practice. The board's internal check list, which is used to capture the essential information pertaining to an application, indicates – with reference to Van der Rede – that it was satisfied with the 'auditor's current membership'. On the face of it, the application apparently complied both with Allocation regulation 5(5)(j), which requires an applicant for funding to keep proper accounting records, and with regulation 5(5)(k), which obliges it to furnish a written report regarding its finances.

[32] On this basis, SAEP's founding affidavit took issue with the board's reason – that both financial statements for both 2007 and 2008 were not audited – for declining its application. In its answering affidavit the board attempted to justify this reason by pointing out that Van der Rede's report attached to the 2007 statements refers to the 2006 statements (The 2008 statements were not placed in issue). The board now suggests that no financial statements were submitted at all for 2007. But this suggestion is disingenuous because all but one of the pages of the financial statements refers to 2007. The reference to '2006' on the offending page is clearly an error. Indeed the board had found the same error in a previous application and quite properly merely asked SAEP to correct it. The board then accepted the corrected version. It is incredulous that the deponent to the board's answering affidavit now attempts to make a case that this error amounted to 'material non-compliance' with the guideline when it did not do so previously.

[33] The board's answering affidavit also added that SAEP had not complied with the 2009 Guidelines in another respect; the financial statements had been signed off by Van der Rede, who is an 'accounting officer' and not an auditor whose qualifications the board recognises.

[34] At this stage it is convenient to deal with the 2009 Guidelines. Under the heading 'Signed Audited Financial Statements' in section 'F' the following is stated:

'It is compulsory for organizations to submit signed audited financial statements for the two most recent years. Organizations that submit only one set of signed, audited Financial Statements will not be considered.

The audited statements must be on a letterhead of the Audit Firm, must reflect the registration number of the Audit Firm and must be signed and dated.

Financial Statements must be for the most recent audits 2006/2007 and 2007/2008.

Applicants must ensure that their auditors are registered with recognized professional bodies e.g. Public Accountants and Auditors Board.

Financial Statements that have been reviewed by an Accounting Officer are not audited. Any application (sic) that submits such statements will be declined.' (Emphasis added).

An organization that does not have signed two-year audited financial statements may form a partnership with an organization that has the required financial statements (See Partnership Guidelines) . . . .'

[35] These guidelines require only that the applicants' auditors are registered with a recognised professional body. The Public Accountants and Auditors Board is cited as an example of such body. However, the prescribed form, referred to earlier, says that applicants must ensure that their auditors are registered with one of three professional bodies: the Public Accountants and Auditors Board, the Institute for Commercial and Financial Accountants, and the Institute for Certified Bookkeepers. The board submits that because CIMA, which recognises Van der Rede's qualifications, is not one of the professional bodies mentioned in the prescribed form, it was justified in declining the application on this ground.

[36] But the board has never before since the publication of the prescribed form with the regulations in 2000, insisted on recognition of only those professional bodies mentioned in it. The 2007 and 2008 Charities Sector Guidelines, for example, have a list of eight professional bodies with which an 'accounting officer' may be registered. CIMA is one of these. In the latest guidelines issued in 2010, seemingly in recognition of the undue formalism of the 2009 Guidelines, all first time applications for less than R750 000, need only be submitted by a bookkeeper, accountant, or accounting officer. No formal accreditation of their qualifications by any professional body is required. Also, in previous years, the board accepted financial statements prepared by Van der Rede without question. SAEP thus says that it reasonably relied on this practice when it submitted these financial statements.

[37] There is no dispute on the papers that Van der Rede conducted a proper audit and that he had the necessary qualifications and competence to conduct

audits into all financial entities except for public companies (SAEP is not a public company). The board has not raised any concern regarding SAEP's financial integrity. In these circumstances the board's submission that it acted reasonably when it declined the application because of Van der Rede's lack of accreditation by one of the bodies mentioned in the prescribed form, cannot withstand scrutiny. The high court also observed that DAs have applied the concept of 'auditing' inconsistently and that the board's dogged insistence upon 'audited' financial statements only by a recognised body this time was unreasonable and overly rigid. Here too, the high court was correct in its conclusion.

[38] To summarise: 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.

[39] I mentioned at the outset that the funds of the board are aimed at supporting socially worthy projects and, that for the years under review, the board failed to disburse R6 billion. The rigid and inconsistent application of the guidelines, at least partly, explains why this has happened. Equally distressing is that the board does not appear to understand its mandate properly. Mr Nevhutanda, the chairperson of the board and the deponent to its answering affidavit, seems to hold the view that grants given by the board are 'gratuities,' which are allocated at the board's discretion. He is wrong. 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.

[40] The appeal is dismissed with costs, including the costs of two counsel.

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A CACHALIA

JUDGE OF APPEAL

APPEARANCES

For 1st, 2nd and 3rd Appellant:	P Kennedy (with him F A Boda) Instructed by: Dockrat Inc Attorneys, Johannesburg Honey Attorneys, Bloemfontein
For 1st and 2nd Respondent:	D Borgström (with him L Ackermann) Instructed by: Edward Nathan Sonnenbergs, Cape Town Matsepes Inc, Bloemfontein