

Acting on the allegations involving the National Lotteries Commission and restoring it to clean administration

**Presentation to the
Portfolio Committee on Trade, Industry and Competition**

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the dtic

Department
Trade, Industry and Competition
REPUBLIC OF SOUTH AFRICA

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Overview

What will be covered by the Reports today:

- The journey that led to the SIU Report
- The findings in the SIU interim Report – the SIU
- Action taken to date – the SIU, the dtic and new NLC Board
- Further action to be taken – NLC Board

Overview

What the reports show:

- That the funds of the NLC, meant for the most vulnerable communities and projects (old-age homes, drug rehab centres and centres for young children), were cynically and brazenly stolen by an organised syndicate of persons
- That the institutions of the democracy are able, when brought into action, to collect the evidence of wrong-doing and ensure that implicated persons are identified and held to account.

Overview

- Syndicates responsible for looting public funds were able to rely on a network of professional firms that enabled the monies to be redirected; and that the syndicates had sophisticated methods to cover up their actions and deflect attention
- Courageous individuals, ranging from whistle-blowers to journalists and investigators, were essential to uncovering wrong-doing and showing the channels through which monies flowed between the NLC and recipients, by-passing the intended community beneficiaries.

Journey to the SIU Report – and dtic interventions

Role of the NLC

The NLC was established in terms of the Lotteries Act (No.57 of 1997), as amended to regulate the National Lottery, sports pools as well as other lotteries, including society lotteries to raise funds. The NLC is the sole regulator for lotteries and sports pools in South Africa.

The legislative mandate is to:

- ensure that the National Lottery and sports pools are conducted with all due propriety and strictly in accordance with the Constitution, the Act, and all other applicable laws and the licence for the National Lottery, together with any agreement pertaining to that licence and that the interests of every participant in the National Lottery are adequately protected.
- conduct research on worthy causes that may be funded without lodging an application prescribed in terms of the Lotteries Act, upon request by the Minister, Board or on its own initiative in consultation with the Board.
- invite applications for grants from worthy causes in the prescribed manner, upon request by the Minister, Board or its own initiative in consultation with the Board.
- Promote public knowledge and awareness, developing and implementing educational and informational measures to instruct the public on the lotteries and provisions of the Lotteries Act and educating the public by detailing the process, requirements and qualifications relating to the application for grants in terms of the Act.

Background to SIU investigation

5th Administration – addressing allegations in the public domain

1. Allegations of corruption involving the NLC 'Pro-Active funding' programme stretched over a number of years, from pre-2017.
2. In March 2018, the previous Minister of Trade and Industry wrote to the Board requesting that it set up an investigation into allegations involving a Limpopo 'pro-active' project. This was followed up with further requests in early 2019 when additional allegations were made.

6th Administration

1. By the start of the new Administration in June 2019, no progress had been made in the investigations.
2. The Board and Commission of the NLC were able to rely on the interpretation of the PFMA that investigations must be conducted by the Accounting Authority, ie the Board itself and the Ministry had no role other than to refer matters to the Board for investigation.
3. There was evidence of the Board not fulfilling its governance function to investigate corruption allegations properly. This needed to be addressed. However, it became clear that attempts to directly intervene by the Department and Ministry would result in a drawn-out legal battle over untested Ministerial powers and this had inherent risks in insulating the NLC from oversight; and thus the Board needed to be placed on formal terms to fulfil its responsibility, and should it fail, the Ministry would have compelling grounds to intervene.

Three pillars to address corruption

The Approach of the Department to root out corruption, had 3 pillars:

- First, to enable a full and **independent investigation** to be conducted and successfully concluded, without it being subject to a successful court interdict
- Second, to **ensure transparency in reporting** by the NLC on beneficiary information in Annual Reports and in response to parliamentary questions
- Third, to **address the governance issues** through the appointment of a person of integrity as Board Chairperson, act against Board members based on evidence secured and appoint new Board members where warranted.

Pillar 1: The investigation

Pillar 1: Investigation

- Setting the basis for action by the Ministry:
 - Board placed under formal terms in August 2019 to finalise the forensic investigations, recover the funds for the Denzhe project and provide the Ministry with a list of all pro-active funding projects approved to date; further correspondence on investigation of the COO and in November 2019, on the uncompleted forensic investigation.
 - In August 2019 the Minister requested **the dtic** internal audit to conduct a site visit of the Denzhe project.
- Failure of Board to comply; and the outcome of the site visit and work of internal audit:
 - This provided a basis for the Minister to request a formal independent forensic investigation, commenced by Nexia SAB&T in March 2020, covering initially four projects: (Denzhe, Life For Impact, I Am Made For God's Glory and Zibsimazi), which resulted in interim findings

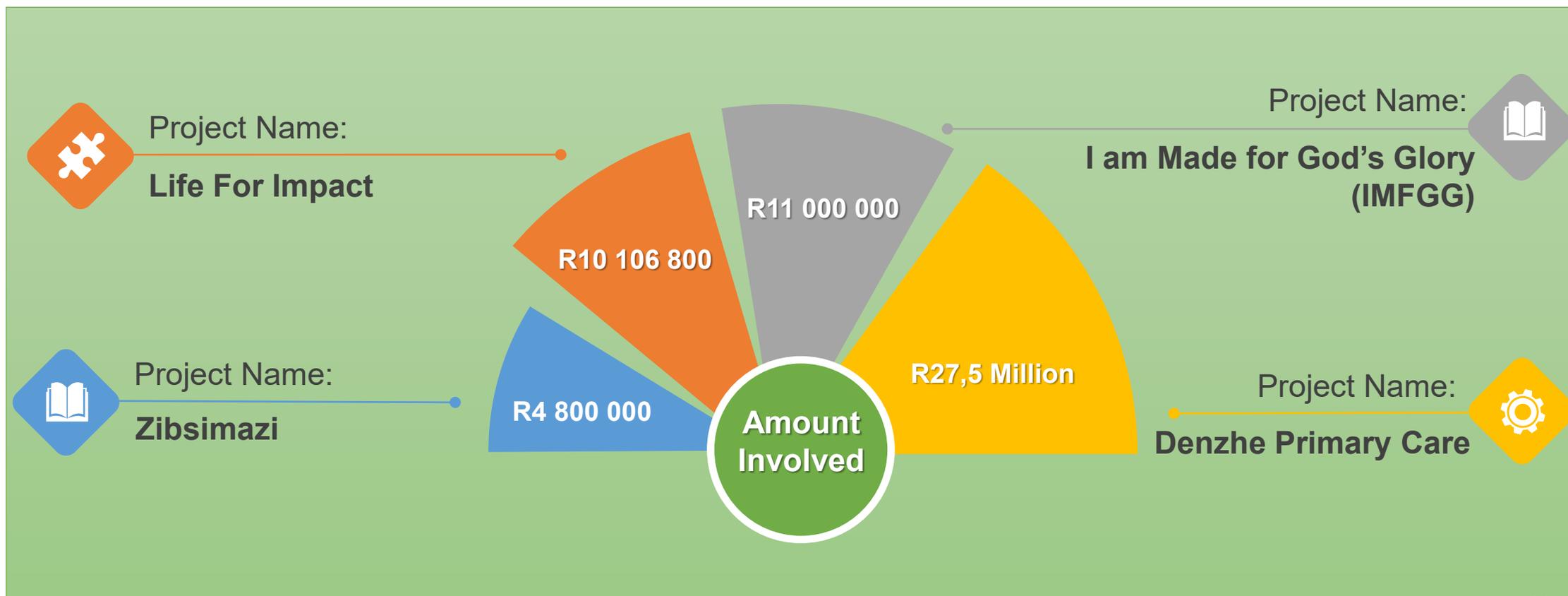
Pillar 1: The investigation

Pillar 1: Investigation

- Subsequent to interim findings:
 - The Minister wrote to the President on 19 May 2020 in support of the appointment of the SIU to investigate allegations of serious maladministration in the affairs of the NLC.
 - The Minister requested that the Department should lay criminal charges at SAPS in September 2020 (48/09/2020) as more information came to light
 - The President appointed the SIU in November 2020
 - Further criminal charges were laid in December 2020 (281/12/2020; 282/12/2020 and 283/12/2020)
 - The forensic investigation scope was extended to add 2 projects ie SA Youth Movement and Inqaba Yokulinda NPO

Independent forensic investigation

Four (4) NLC Proactive Funding Projects allegedly linked to the COO, his friends and relatives:



Independent forensic investigation

□ The allegations:

- **Denzhe Primary Care:** It was alleged that funds were improperly distributed to a hijacked non-profit organisation, “Denzhe Primary Care” (Denzhe) through a Proactive Funding transfer. Denzhe received funding to build a new drug rehabilitation centre and the facility was still incomplete;
- **Zibsimazi:** It was alleged that the Director of Zibsimazi was related to an employee of the NLC. It was also alleged that the company was set up in May 2017 and awarded the funding in November 2017;
- **Life for Impact:** It was alleged that the NPO had 1 common director with Zibsimazi. It was alleged that a shelf company was created and awarded the NLC funding 6 weeks after it was created;
- **I am Made for God’s Glory:** The NPO received R11m and it was alleged that R2m of that was paid to a private company owned by a person related to an employee of the NLC.

Independent forensic investigation

NAME OF NPO	FINDINGS
Denzhe Primary Care	<ul style="list-style-type: none"> ❑ Certain individuals falsified the NGO documents when they applied for the funding. ❑ The amount of R27 585 625.29 was awarded and was supposed to be used for the construction of the drug rehabilitation facility. Majority of funds were not used for the intended purpose and matter was reported to SAPS for criminal investigation.
Zibsimazi	<ul style="list-style-type: none"> ❑ The NGO was sold as a shelf non-profit organization in 2017. Application for funding was made in 2017 and an amount of R4 800 000 was paid to sponsor a soccer tournament that would have taken place in Phalaborwa in December 2017.
I am Made for God's Glory	<ul style="list-style-type: none"> • During 2017 application for construction of a sport stadium and sport facilities was made using falsified documents. R11 375 000 was paid in two tranches during 2017. • Funds were not used for the intended purposes as the sport stadium was built around 2007 by the local municipality. The stadium was just repainted.

Independent forensic investigation

NAME OF NPO	FINDINGS
Life for Impact	<ul style="list-style-type: none">• During 2017 certain individuals approached 2 of the NPO founding members to ask to take over the NPO. Founding members agreed and new members applied for funding during June 2016 using the original application which was initially submitted by the original founding members. New members purported to be the genuine members and opened a new bank account and NLC paid R10 106 800.• The funds were supposed to be used for hosting of NYDA on 30 March 2017, however NYDA confirmed that they utilized their own funds and no external sponsors contributed to the event.

- All four cases were reported to SAPS for criminal investigation
- The results of the forensic investigation was shared with the SIU to investigate further, given the powers available to the SIU

Special Investigations Unit

Presidential Proclamation on NLC

Empowered the SIU to investigate as contemplated in the Act, any alleged:

- (a) serious maladministration in connection with the affairs of the NLC;
- (b) improper or unlawful conduct by employees or officials of the NLC;
- (c) unlawful appropriation or expenditure of public money or property;
- (d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;
- (e) intentional or negligent loss of public money or damage to public property;
- (f) offence referred to in Parts 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), and which offences were committed in connection with the affairs of the NLC; or
- (g) unlawful or improper conduct by any person, which has caused or may cause serious harm to the interests of the public or any category thereof



Pillar 2: Protecting transparency

Pillar 2: Transparency

The NLC and a number of external bodies sought to prevent the disclosure of information on the recipients of NLC monies. The Ministry in turn took steps to require the NLC to make information available. These included the following:

- The decision to oppose pressure and litigation that sought to prevent publication of beneficiary information
- Correspondence with the Board setting out the reasons why the Board and NLC was obliged to provide the names of all beneficiaries in its Annual Reports and to parliament
- Advising attorneys to agree to transparency requests made by the legal representatives of the SA National Editors Forum
- Instructing the NLC to respond to all Parliamentary Questions that requested information

Protecting transparency – an example

A significant part of the fight against corruption is to maintain the flow of information on beneficiaries of public funding.

The NLC Board relied on a view that they were not required nor entitled to release information on the identity of beneficiaries, citing Regulation 8 issued under the Lotteries Act.

The following correspondence from the Ministry challenged that interpretation and requested the NLC to make available the information on beneficiary details.

The information was subsequently published by the NLC



Protecting transparency – a court decision

In November 2020, the NLC took the decision of the Minister to appoint an independent forensic investigation on review. The matter was set down as **NLC vs Minister of Trade, Industry & Competition (63115/20)**

The court refused the application by the NLC to set aside the Minister's actions.

The judgment merits careful scrutiny as it highlights the manner in which the NLC failed to investigate corruption and failed to cooperate with the DTIC's endeavours to do so.

The judge found that the Minister had the power to appoint independent investigators under the PFMA. In coming to this conclusion, the court made the following findings about the conduct of the NLC -

- It had absolved itself of responsibility to investigate the use of funding by beneficiary organisations;
- It refused to cooperate with the investigators appointed by the Minister;
- It refused to account for its action.

Despite the clear terms of the judgment, the NLC opted to apply for leave to appeal against the judgement which the High Court refused. They also petitioned the Supreme Court for leave for appeal, which application was dismissed with costs.

This illustrates the extent to which the previous Board and Commissioner used the resources of the NLC to resist attempts to uncover corruption.

Protecting transparency – from court judgement

The following paragraphs from the judgment are relevant

- “Interestingly enough, the NLC Commissioner’s response (to a question by the Parliamentary Portfolio Committee concerning pro-active funding) was that the NLC had commissioned its own investigation into the Denzhe matter, and that the outcome thereof was that the NLC had “*absolved*” itself from any responsibility in the matter as: “...*the relationship between Denzhe and House Generation or any other entity employed by the beneficiary remains independent from the relationship of the NLC and the funded organisation.*” (para 5)
- “However, this application had been launched 6 days earlier and so the letter (by the NLC attorneys) sent to Nexis was simply an obfuscation as the NLC quite clearly had absolutely no intention of co-operating with Nexis given the relief to set aside its appointment. (para 8)
- Where the Board itself refuses to account for its actions, it is difficult to imagine how, bearing in mind his obligations under the Lotteries Act and PFMA, and his oversight functions as afforded to him in terms of both, the Minister has no obligation, or would have no teeth to act. Furthermore, any action without an investigation has its own inherent issues. (Para 33)
- It is Minister Patel’s position that the report is a preliminary one and has yet to be finalised, largely due to the complete lack of co-operation by the members of the NLC as evidenced by their attorney’s letter of 7 December 2020. (Para 44) “

Pillar 3: Addressing governance

Pillar : Governance

The measures taken to address the return to clean administration included the following:

- Resisting the request for extension of previous chairperson term of office for a full 5 year period (until July 2022) and instead fixing the termination date to 30 November 2020
- Appointing an acting chairperson from 1 December 2020 when the process of appointing a new Chairperson was delayed in Parliament and defending the subsequent court case brought by the NLC
- Advertising for a Permanent Chairperson, providing Parliament initially with three shortlisted names of South Africans of high integrity; and thereafter with the full list of applicants
- Commencing action against Board Member Adv Huma, following information received by SIU, resulting in his resignation
- Commencing action against other Board members, based on charge of negligence in performance of duties, with their term of office ending prior to the finalisation of disciplinary action

Pillar 3: Addressing governance

- Previous Board
 - Adv Huma resigned following investigation
 - Dr Madzivhandila passed away
 - Zandile Brown resigned to dissociate herself from Board
 - Gordhan and Dondur was subject of disciplinary process underway at time of expiry of their term of office
- Appointment of new Board members
 - Dr Cassius Lubisi, former Cabinet Secretary
 - Precious Mvulane, Chartered Accountant
 - Willie Hofmeyr, former Asset Forfeiture Unit and NPA
 - Beryl Ferguson, former MP
- Appointment of new Board Chairperson
 - Initial shortlist provided by Minister: Adv Thuli Madonsela; Dr Barney Pityana and Dr Frank Chikane
 - Portfolio Committee revised list: Terry Tselane; Dr Barney Pityana, Dr Frank Chikane and Temba Dlamini
 - Appointment made by the Minister: Dr Barney Pityana

The fightback by NLC and external bodies

Addressing governance reform and the 'fightback'

1. The replacement of the Board was a matter that had been considered in 2020, given the failure by the Board to complete the investigations that had been requested in the previous Administration
2. The NLC itself had prepared a legal defense to challenge Ministerial power to remove Board members and had obtained a legal opinion in 2019 that relied on section 49(2)(b) of the PFMA for its view that the Board, rather than the Ministry, had the power to deal with all matters relating to financial management
3. The Ministry sought legal advice in 2020 on the circumstances in law that would justify the removal of the Board. The advice indicated that it was necessary to have a scrupulous adherence to due process to avoid Ministerial action from being interdicted or set aside by the courts and it concluded that there were not sufficient grounds at the time for the removal of the Board.

The fightback – examples

When it was apparent that the Department was serious about acting against corruption, various measures were put in place by third parties and individuals in the NLC to frustrate the Department. These included

- A large number of persons were bused in at great expense to protest at the Minister's office against disclosure of information about identity of individual beneficiaries, in March 2020
- Threats of legal action and/or letters from attorneys, which appeared to be orchestrated and required detailed responses to be formulated
- Cases launched at the High Court and in one matter, a petition to the Supreme Court of Appeal
- Reports of arson, tampering with vehicles and action against whistle-blowers
- Numerous anonymous 'leaks' and slanderous attacks in the print and social media against inter alia an investigative journalist and the Ministry and its motives for seeking to investigate the allegations of corruption.

Fightback – the use of Lawfare

Strategy: tie the Ministry down through a number of threatened and actual court cases

- **Action 1:** In 2019, a legal opinion was provided by the ex-Chairperson, setting out his grounds for challenging the period of his appointment and contending he was entitled in law to be retained in office until August 2022.
- **Action 2:** In 2019, a legal opinion by the NLC, setting out why the information of beneficiaries could not be made available in Annual reports
- **Action 3:** In 2019, a legal opinion by NLC setting out the basis to challenge attempts by the Minister to remove the Board
- **Action 4:** On 2 March 2020, a letter from a law firm, Popela Maake Attorneys on behalf of UCSA demanding that the Minister desists from requesting the NLC to release beneficiary information.
- **Action 5:** On 10 July 2020, *Zakheni Ma Afrika v Minister and NLC 31182/20* – an application to prevent publication of beneficiary's details; NLC did not oppose. Ministry gave notice of intention to oppose and provided grounds for opposing the application. The application was subsequently withdrawn.

Fightback – the use of Lawfare

Strategy: tie the Ministry down through a number of threatened and actual court cases

- **Action 6:** On 9 November 2020 a court application by African Liberty Movement against the NLC and the Chair of the Parliamentary Portfolio Committee seeking to interdict the NLC from releasing beneficiary information and the PC from forcing the NLC to do so. NLC did not oppose which would have resulted in a Court ruling that it could not disclose beneficiary information. The Ministry applied to be joined to proceedings and opposed the application. The case was dismissed on grounds of a lack of urgency
- **Action 7:** In December 2020, a legal challenge was launched by the NLC on the power of the Minister to authorise a forensic investigation and an order to compel that the draft report of the forensic investigation be made available to the NLC. This court application was dismissed, and leave to appeal by the NLC was refused by the Supreme Court of Appeal
- **Action 8:** March 2021, legal challenge launched by the NLC on the power of the Minister to appoint the acting Chairperson of the NLC, with the NLC Board contending it, not the Minister, was entitled to appoint an acting Chairperson. The court upheld the NLC application.
- **Action 9:** March 2022, legal challenge launched by NLC Commissioner to compel the Minister to extend the term of remaining Board members or appoint new Board. This application was withdrawn.

The case of the COO

- In 2019/20, the DTIC queried the role of the COO Mr Letwaba and proposed he be suspended pending an investigation
- He was finally charged as a result of a referral by the SIU in October 2021 indicating he had improperly received R15 million of funds from grant beneficiaries and that members of his family had also received funding unlawfully
- He was found not guilty but there were numerous shortcomings in how the hearing was conducted by the NLC:
 - The NLC were represented in the hearing by attorneys who had represented it in resisting investigations into maladministration and corruption
 - The NLC failed to lead evidence as to what its policies were in respect of employees, the immediate family members and business associates receiving benefits from grant beneficiaries. This was a dereliction of its duties as an employer
 - The Advocate who chaired the hearing was not a specialist labour lawyer as required by the NLC disciplinary procedure
- The Minister has received a legal opinion that the evidence collected by the SIU was sufficient for the COO to be dismissed.
- The new Board charged the COO with receiving benefits in breach of section 2G(2) of the Lotteries Act. This section prohibits employees, immediate family and business associates from doing business with grant beneficiaries
- The responsibility for enforcing this restraint rests with the Board and the previous Board had failed to enforce its provisions
- The charges relied on the evidence previously obtained by the SIU as well as additional information
- The COO raised the defense of double jeopardy but ultimately resigned prior to the commencement of the disciplinary hearing

Reporting to the Auditor General

- The legal framework to detect corruption includes the work done by the Auditor General of SA. Notwithstanding information in the public domain on alleged corruption involving NLC monies, the NLC continued to receive unqualified audit opinions from the AGSA for a number of years.
- Following a referral letter by the SIU to the Minister in August 2021 containing details of findings involving an NLC Board member and an official, the Minister requested that the Auditor General be advised of the contents thereof; which was done in September 2021.
- The Auditor General's subsequent audit identified serious shortcomings in adherence to proper financial policies and the audit report was qualified.
- The audit report provides a basis for further action by the new Board.

Conclusion

- The previous Commissioner resigned – the Board is in the process of appointing a new Commissioner; in the interim, an acting Commissioner has been appointed
- The COO resigned following the decision to commence with disciplinary action
- There is compelling evidence now available that can result in criminal charges, and recovery of money. Resignations do not absolve any implicated party from civil and criminal prosecution – the Board will be able to provide oversight of actions
- The new board is able to play the role of governance and oversight – Board Chairperson will outline the steps taken and to be taken to deal with the corruption, address wrongdoing and assist to ensure that implicated persons are held to account in both criminal investigations and full recovery of monies
- DTIC decision on anti-corruption/forensic unit will be implemented.

Additional steps based on investigations

Further follow-ups

A number of additional steps for consideration by the Board could include:

1. Actions by the Board on the SIU findings to date, to complement the work of the law enforcement agencies, including integrity measures involving staff, recipients and Board members of the NLC
2. Review the pro-active funding programme thoroughly before any further approvals are made
3. Initiate a wider investigation beyond the pro-active funding projects, to include all contracts by the NLC and all channels through which payments were made by or on behalf of the NLC
4. Investigations into the activities of the regions of the NLC
5. Review all previous forensic and internal reports and consider recommendations for systemic changes to avoid opportunities for corruption

Further follow-ups

A number of additional steps for consideration by the Board could include:

6. Review findings of Auditor General in management reports
7. Support for whistle-blowers who were threatened or dismissed
8. Addressing the position of communities or NGOs who were deprived of the support for which the NLC funding was designed
9. Promoting transparency: consider publication of monthly reports on beneficiaries with details of project geo-location
10. Oversight visits to project sites by NLC Board