REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 19/31803

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

……4.xi.19….. DATE

…… SIGNATURE

In the matter between:

HCI INVEST 15 HOLDCO PROPRIETARY LIMITED First Applicant

HCI TREASURY PROPRIETARY LIMITED Second

Applicant

and

ITHUBA HOLDINGS PROPRIETARY LIMITED (RF) First Respondent

ZAMANI MARKETING AND MANAGEMENT Second Respondent

CONSULTANTS PROPRIETARY LIMITED

ZAMANI GAMING PROPRIETARY LIMITED Third Respondent

IMBHUMBHA MANAGEMENT PROPRIETARY LIMITED Fourth Respondent

KWABO HOLDINGS PROPRIETARY LIMITED Fifth Respondent

PAYTRONX SYSTEMS PROPRIETARY LIMITED Sixth Respondent

INHLANGANO MANAGEMENT PROPRIETARY LIMITED Seventh Respondent

NATIONAL EMPOWERMENT FUND TRUST Eighth Respondent

SOUTH AFRICAN POST OFFICE SOC LIMITED Ninth Respondent

THE NATIONAL LOTTERIES COMMISSION Tenth Respondent

JUDGMENT

UNTERHALTER J

INTRODUCTION

1. The Applicants (to whom I shall refer as HCI) bring an application to interdict the First Respondent, Ithuba Holdings Proprietary Limited (“Ithuba”) from making any further payments to the Second Respondent, Zamani Marketing and Management Consultants Proprietary Limited (“ Zamani”), in terms of the management agreement concluded between Ithuba and Zamani dated 1 November 2013 (“ the management agreement”). HCI seeks an order directing Ithuba to pay its monthly management fee to the attorneys Webber Wentzel to hold these monies in trust. I shall refer to this as the fee relief. HCI also seeks to interdict Ithuba from paying the salaries of employees of Ithuba, Zamani or any other entity in the Zamani group, and to require that the salaries of employees of Ithuba are paid by Zamani. I shall refer to this relief as the salary relief.
2. The fee relief and the salary relief are sought to operate with immediate effect, pending the final outcome of certain proceedings.

3. Ithuba holds the license to operate the national lottery. The third to ninth respondents, cited in these proceedings, are its shareholders. The third respondent, Zamani Gaming Proprietary Limited (“ Zamani Gaming”), holds a significant shareholding in Ithuba. Zamani, in terms of the management agreement, manages the business of Ithuba for a management fee.

4. Ithuba required funding in order to operate the national lottery. HCI was willing to fund Ithuba and did so in terms of a suite of agreements. Relevant to this matter, the following agreements were concluded. The Governing Agreement governs the funding provided to Ithuba. And on 8 April 2015, Ithuba, Zamani and HCI Invest 15 Holdco Proprietary Limited (the First Applicant “ HCI Invest “) , together with two trusts, entered into the first addendum to the management agreement (“ the First Addendum”) in terms of which HCI Invest became a party to the management agreement. HCI provided funding to Ithuba. Among the rights acquired by HCI Invest under these agreements is a step-in right to oversee the management of the business of Zamani and Ithuba upon the occurrence of a trigger event. Upon the trigger of the step -in right and the exercise of the right, HCI invest is entitled to a fee equivalent to 1 % of Ithuba’s gross monthly revenue (“ the 1% fee”)

5. Various disputes arose between the parties to these agreements. The disputes were referred to arbitration. One of the disputes was the claim of HCI Invest that it had exercised its management oversight rights in terms of the Governing Agreement read with the First Addendum, as a result of the occurrence of an early trigger event. Zamani denied the early trigger event had occurred.

6. The arbitrators made an award on 30 July 2019. The award, among other relief, declared that HCI Invest is entitled, and Ithuba and Zamani are directed, to afford HCI invest its right to management oversight. In relevant part the award reads as follows :

"(6) *It is declared that first claimant is entitled, and first and second respondents are directed, to afford the claimant its right to management oversight in accordance with clause 5A.3 of the Management Agreement.*

(7) First and second respondents are directed to take all such steps and do all such things as shall be necessary to assist in procuring the approval of the Minister of Trade and Industry and the National Lotteries Commission, for the purpose of the first claimant acquiring the new Preference Shares and/or existing its right to management oversight in accordance with clause 5A.3 of the Management Agreement.

(8) It is directed that second respondent make payment to the first claimant of an amount equivalent to 1% (one percent) of the second respondent's gross monthly revenue, per month, upon fulfilment of the following conditions:

(a) The consent of the Minister of Trade and Industry and the National Lotteries Commission to first claimant's rights to management oversight in accordance with clause 5A.3 of the Management Agreement.

(b) The approval, if necessary, of the Competition Commission, the Competition Tribunal or the Competition Appeal Court in terms of Act 89 of 1998, to first claimant's right to management oversight in accordance with clause 5A.3 of the Management Agreement.

(c) The exercise by first claimant of its right to management oversight in accordance with clause 5A.3 of the Management Agreement."

7. On 28 August 2019, HCI's attorneys wrote to Ithuba and Zamani. Referencing the award in their favour, HCI sought compliance with the Governing Agreement and Management agreement; asserted the validity of HCI Invest's exercise of oversight rights; and claimed an entitlement to the 1% fee. The letter raised two other matters relevant to the application before me. First, a detailed statement and debatement of account was demanded. In particular, an accounting as to the amounts Zamani has received from Ithuba; what amounts should have been received in terms of the management agreement; and what amounts Zamani is required to repay to Ithuba. HCI expressed the view that until this accounting was prepared, Zamani should receive no further payments from Ithuba. An undertaking was then sought in these terms.
8. Second, the letter states that it is evident from the award that Zamani has been recovering staff salaries from Ithuba which Zamani is obliged to pay. Undertakings were sought that Zamani will repay to Ithuba all amounts it received from Ithuba in respect of salaries and that Zamani will assume its obligation to pay the salaries of all Ithuba's staff.

9. The attorneys of Ithuba and Zamani replied to this letter on 4 September 2019. They declined to give the undertakings sought, save that under reservation of rights, it is recorded that Zamani has paid the salaries of all the Ithuba staff since the award was published. In sum, the position taken is that both as to the accounting sought by HCI and the payment of the 1 % fee, HCI could not exercise these rights because they are subject to regulatory approvals not yet secured; and , in addition, the 1% fee was not payable until the oversight right was exercised and the fee earned.

10. This exchange led HCI to launch the application now before me. It was launched as an urgent application. The matter has since come under case management in the Commercial Court. HCI joined Ithuba's shareholders, as the third to ninth respondents. The National Lotteries Commission ("NLC"), which oversees the national lottery, sought to intervene and has been joined as the tenth respondent.

THE SALARY RELIEF

11. I deal firstly with the salary relief. Zamani confirms in the answering affidavit that, since the award, Zamani has taken over payment of Ithuba's salaries and is not recovering the expense associated with these salaries from Ithuba.

12. That being so, the relief sought in prayers 3 and 4 of the Notice of Motion has fallen away. HCI's counsel confirmed this. The salary relief is forward looking. Zamani has

assumed the obligation to pay the Ithuba salaries and is doing so. Accordingly no orders need issue from this court.

13. HCI complains that Zamani has not repaid Ithuba for salaries paid by Ithuba prior to the publication of the award. But that is a matter HCI raises as part of its complaint that Zamani and Ithuba have mismanaged their businesses. It forms no part of the salary relief.

14. There is accordingly no need further to consider the salary relief.

THE FEE RELIEF

15. The fee relief, it will be recalled, seeks an interdict to prevent Ithuba from making further payments of the management fee to Zamani. The payment should rather be paid into trust. The amount to be transferred is framed in the alternative as either 4.67% or 3 % of Ithuba's gross monthly revenue. HCI also seeks Ithuba's monthly management accounts.

16. The case advanced in the founding affidavit for the fee relief is this. The arbitration award is valid and enforceable. HCI Invest has an interest to ensure that there is proper management of Ithuba and Zamani. These companies must provide a proper accounting which would reveal the extent to which Zamani has been overreaching in claiming management fees. It is alleged that Zamani has been receiving monthly management fees of 4.67 % of Ithuba's gross revenue(and even in excess

thereof), when it is only entitled to 3%. Furthermore, HCI Invest has a claim for past and future income, in respect of the 1% fee to which it is entitled for the exercise of its step-in right. These matters are somewhat tersely stated in the founding affidavit

17. In the replying affidavit rather more is said as to HCI's overreaching complaint and what are said to be irregularities that emerge from a consideration of the financial information provided in the answering affidavit. This led to Ithuba and Zamani filing a rejoinder (without opposition). And in the course of the hearing, I also received a supplementary affidavit from Ithuba and Zamani and an affidavit from HCI in response to a rule 35(12) notice that contains certain documents and explanations upon which HCI relies.

18. In their heads of argument, HCI founds the fee relief on three grounds. First, the refusal of Ithuba and Zamani to comply with the arbitration award. Second, a refusal to make management accounts available to HCI. Third, what is said to be wholesale financial manipulation.

19. The consideration of the fee relief must commence with this question: what right does HCI establish?

20. HCI submits that it enjoys a valid and enforceable award in its favour that recognizes HCI Invest's right of management oversight and the payment of the 1% fee. The award does indeed recognize these rights. The award however also recognizes that regulatory approvals are required before these rights may be exercised. In respect of the payment of the 1% fee, the award stipulates conditions that must be fulfilled

for payment to take place. The conditions are these: that the Minister approves the right to management oversight; the exercise of the right to management oversight by HCI Invest is in accordance with clause 5A.3 of the management agreement; and approval by the competition authorities of the right to management oversight (if necessary).

21. HCI complains that Ithuba and Zamani are being obstructive and frustrating the fulfillment of these conditions. .No relief is sought in these proceedings to secure the assistance of Ithuba and Zamani. There was some debate before me as to whether the Minister and the NLC had already given their consent to HCI Invest's right of management oversight, at the inception of the license. The Minister appears to have subsequently withdrawn that consent and the NLC and HCI have different positions as to the legal consequence of that withdrawal. Nothing ultimately turns on this aspect of the matter because HCI recognizes in its answer to the NLC's intervention that a fit and proper approval is required in respect of its management oversight right, and counsel for HCI in his replying submissions confirmed this and referenced the approval that is required from the Minister under the license conditions when there is a change of control.

22. I can thus approach this aspect of the matter on the following basis. First, HCI Invest cannot at present exercise its right of management oversight in terms of the award because it lacks the necessary approvals of the Minister and the NLC. Second, HCI Invest cannot at present claim payment of the 1% fee because no approval has been given by the competition authorities. In addition, HCI invest

cannot yet exercise its right to management oversight, and thus payment of the 1% fee is not yet due, as the award stipulates and clause 5A 3.6 of the first addendum to the management agreement dictates.

23. HCI submits that even if HCI Invest cannot yet exercise the right of management oversight, nor yet claim payment of the 1% fee, the award has recognized these rights. That is so. And HCI no doubt considers that it will ultimately secure the regulatory approvals that it requires – though little as to its prospects has been raised before me.

24. The first issue that arises is this. The 1% fee is not yet payable. It will be payable when HCI Invest is in a position to exercise its right of management oversight and chooses to do so. If and when that should happen, Ithuba will be paying to Zamani the management fee, as it is required to do under the management agreement. HCI Invest, having assumed management oversight, will then be able to secure its 1% of the management fee as an incident of its management. There is no suggestion that Ithuba will not be in a position to pay the management fee. On the contrary. HCI's concern is that Ithuba is paying too much.

25. In these circumstances, it is difficult to see how the risk of harm to HCI Invest comes about. When it assumes management oversight and the 1% fee becomes payable, it will be in a position to secure payment from Ithuba or Zamani. Before that happens, HCI Invest has no claim to be paid the 1% fee. Hence it has no claim to the management fees that Ithuba is presently paying to Zamani. And there is

accordingly no warrant, on this score, to prevent the management fees from being paid to Zamani and to place them in trust.

26. Counsel for HCI submitted that HCI Invest's claim to be paid the 1% fee is quasi-vindicatory and that the management fees that Ithuba is paying to Zamani constitute specific property which must be preserved so that HCI Invest can , in due course, vindicate its 1 % fee. I do not need to determine whether this characterization of the matter is correct (it was offered in HCI's replying oral submissions). Even if it is, there is no irreparable harm that is threatened that requires the preservation of the management fees in trust.[i] When the 1% fee is payable, HCI Invest will be in a position to secure its payment from Ithuba or Zamani.

27. It was submitted that HCI Invest has a claim for the 1 % fee that goes back to the time it first sought to invoke its right of management oversight. That case has not been made out, and it is at odds with the award and the terms of the first addendum.

28. Furthermore, Ithuba has secured a guarantee from Investec Bank in favour of HCI Invest in respect of the 1% fee. The guarantee has certain limitations as to amount and duration. But the guarantee secures payment of the 1 % fee over a reasonable future period during which HCI Invest might plausibly become able to exercise the right of management oversight. It obviates the need for the more drastic remedy proposed by HCI to sequester management fees in trust.

29. I find that since HCI Invest cannot presently exercise its right of management oversight, it has no claim to payment of the 1% fee and no claim upon the management fees that Ithuba is currently paying to Zamani. If and when HCI Invest is entitled to payment of the 1% fee, it will be in a position to secure payment. There is no need for the fee relief that is sought.

30. This finding, however, does not end my consideration of the fee relief that is claimed by HCI. HCI contends that its right of management oversight is recognized in the award. For the reasons that I have already traversed, that right, in terms of the award, can also not be exercised at present. Although the award does not render the right subject to the conditions specified in respect of the 1% fee, it is clear that the award plainly contemplates that the right of management oversight requires the approval of the Minister and the NLC. And counsel for HCI acknowledged that such approval is required. Until the approval is acquired, HCI Invest cannot exercise the right. And that is how HCI Invest is presently positioned.

31. HCI's case is that it has a right of management oversight; that Ithuba and Zamani are engaged upon acts of overreach and irregularity that HCI would want to be in a position to investigate, but which it cannot because it cannot exercise its right of management oversight. It has sought an accounting from Ithuba and Zamani. Ithuba and Zamani resist for a number of reasons, including that HCI Invest is not entitled to exercise its right under the award. The fee relief is required, so HCI contends, to preserve the management fees that Ithuba is paying Zamani, against the day that HCI can exercise its right of oversight. If this is not done, HCI Invest runs the risk

that should it need to restore to Ithuba fees that should not have been paid to Zamani, those fees will no longer be available so as to ensure restitution. HCI emphasizes that its right to management oversight carries with it a duty both to the shareholders of Ithuba and the public that there is no mismanagement of funds which ultimately are there to serve the charitable causes for which the lottery was established. And finally, HCI does recognize in its replying affidavit that the fee relief is too drastic as it is formulated in that Zamani must at least be able to secure funds sufficient to perform the services required of it under the nanagement agreement. In their replying affidavit, HCI state that they are prepared to amend the relief that is sought so that Zamani may receive management fees of R9 miilion per month, being its claimed monthly operating expenses.

32. Both in the heads of argument and in oral submissions, there was considerable attention given to the issue as to whether Zamani was being paid the correct management fee. HCI contends that Zamani is entitled to a fee of 3%, but is being paid 4.67 %, and perhaps more. This is said to be an overreach. Further, HCI contends that the financial statements and regulatory filings put up by Ithuba and Zamani do not support their claim that the fee payable and paid is 4.67%. HCI says there is evidence of irregularities in the management of Ithuba and Zamani, and hence the need for intervention by way of the fee remedy.

33. Ithuba , Zumani and the Ithuba shareholders say that these contentions are rashly made; that they have no basis; that they are unsupported in the founding affidavit, opportunistically pursued in the replying affidavit; that they are comprehensively

rebutted on the basis of evidence not surmise; and yet they are incautiously made the subject of submission before this court. This ,it is submitted, warrants a special order for costs.

34. The issues of overreach and irregularity, in sum, are these. HCI says that Ithuba is paying Zamani a fee of 4.67%, yet when HCI agreed to fund Ithuba and acceded to the management agreement, the representative of Ithuba and Zamani who negotiated the accession represented that the fee was 3%. The financial information disclosed in the answering affidavit indicates overpayment and irregularities; and the explanations offered in the affidavits are contradictory. This, taken together with the failure properly to disclose Ithuba's related party transactions and the failure by Zamani to repay Ithuba for past salary expenditure provides a prima facie case of overreach and irregularity.

35. Ithuba and Zamani set out a detailed account as to why these claims are false and the accusations are baseless and pernicious. First, the signed management agreement, framed in the usual way to be the whole agreement, varied only in writing signed by the parties, provides in appendix 2 for a fee of 4.67%. The First Addendum by which HCI invest became a party to the management agreement was entered into and signed by Mr Shaik, the deponent to HCI's affidavits in the application now before this court. The First Addendum refers throughout to the very management agreement of 1 November 2013 which stipulates for the fee of 4.67%. This, it is said, could hardly have escaped Mr Shaik's attention. The Governing Agreement, which forms part of the suite of agreements in terms of which HCI came to fund Ithuba, also references the management agreement. The signed and

binding management agreement is conclusive as to the fee, and Mr Shaik's knowledge of that agreement entails that HCI knew the position and could not have relied on any representations at variance with the clear terms of the management agreement.

36. Second, Mr du Pisanie , the group financial officer of the Zamani group, provides a detailed account of the financial statements and regulatory filings made to the NLC. His evidence explains, so it is contended, the anomalies that HCI has sought to rely upon. In summary, entries in the financial statements that HCI claimed to evidence overpayments to Zamani are simply aggregated figures that represent payments to numbers of service providers. The financial statements have been audited and there is no reason why they should not, together with Mr du Pisanie's explanations, be accepted.

37. In concluding submisions, HCI said that the financial model in the Governing Agreement, in terms of which Zamani is bound to discharge its managerial duties, stipulated a fee of 3 % . Reliance was placed on an affidavit deposed to by Mr Shaik, in response to a rule 35(12) notice, filed in the course of submissions before me, that made certain corrections and referenced income and expenses submitted as part of Ithuba's license bid that specified a fee of 3 % in year two. Ithuba and Zamani point out , in response , that in terms of the Governing Agreement, the base case financial model is defined as a model that is updated from time to time and the agreement stipulates that HCI Invest had received the updated model. The

Governing Agreement is not predicated upon the financial model that formed part of the original bid.

38. HCI's case for overreach and irregularity ranges across a number issues, with little regard for the conventional stricture that a case is to be made out in the founding affidavit. Although HCI harbours an apprehension that its inability to exercise managerial oversight permits Ithuba and Zamani to engage in serial irregularity, HCI's points of challenge have been met with clear refutations. HCI's case on these issues is left lacking compelling evidence.

39. Whether any further appraisal of this evidence is required must await two further enquiries. First, HCI contends for a right of management oversight. It cannot yet exercise this right, but apprehends that harm to managerial rectitude is occurring, while it seeks the permissions required to do so. The likelihood that HCI will secure these permissions is a matter, as I have observed, barely traversed. Assuming that HCI will in due course be able to exercise the right of management oversight, on what basis does the right asserted permit of the fee relief that is sought? The right of management oversight is not a vindicatory or quasi-vindicatory right. Outside the claim for the 1% fee issue (already canvassed), HCI is neither the owner nor the lawful possessor of the management fees paid by Ithubu to Zamani. On the contrary, HCI's apprehension is that Zamani is being paid management fees ,in excess of what is due, to the detriment of Ithuba. The right of management oversight does not give rise to a vindicatory or quasi vindicatory claim to the management fees.

40. It was submitted in counsel's opening address on behalf of HCI that HCI apprehends that absent the fee relief , Zamani does not have the assets that will

permit of repayment to Ithuba in due course, if HCI Invest, upon assuming management oversight, finds that there has been overreaching by Zamani. HCI submit in their heads that Zamani lacks a significant asset base and is not retaining the profits that accrue to it monthly. These submissions portend an anti-dissipation interdict.

41. However, HCI has made out no case for an anti-dissipation interdict. This interdict has the special feature that an applicant for such an interdict has no claim to the asset that is to be made subject to the interdict, but rather seeks to have the asset preserved. In *Knox D'Arcy*[1], the appeal court held that, save in exceptional circumstances, it is necessary to show that the respondent is getting rid of funds, or is likely to do so, with the intention of defeating the claims of creditors. HCI makes no such showing in respect of Zamani and the management fees it is paid by Ithuba. Counsel for HCI, in reply, rightly, made it clear that HCI does not seek an anti-dissipation interdict.

42. If that is so, it is hard to discern what claim HCI can justifiably make to prevent Ithuba from dealing with its own funds to effect payments to Zamani. HCI has no claim to the funds. HCI does seek to preserve the funds in trust. But HCI recognizes that it has not shown that Zamani is dissipating the management fees with intent to avoid repayment to Ithuba. Ithuba contends that the fees it has paid were owing. Zamani agrees. If Zamani is not retaining profits, there is no showing that it is doing so to avoid repaying fees to Ithuba. It has no belief that any repayment is due. There is no basis for the fee relief as an anti-dissipation order.

---

[1] *Knox D'Arcy Limited v Jamieson* 1996 4 SA 348 (A)

43. The fee relief has a further difficulty. It is trite that an applicant seeking an interim interdict , based on the establishment of a *prima facie* right ,must show a well-grounded apprehension of irreparable harm to the applicant, if the interim interdict is not granted and the applicant ultimately succeeds in establishing the right. An interim interdict is granted upon a consideration of what harm might occur if no order issues and the right is proven in the proceedings for final relief. The contemplated proceedings for final relief are an essential feature of the grant of an interim interdict. Those proceedings demarcate the extent of the harm that might be prevented and the prejudice that the respondent might be required to endure. They are also the means by which the applicant will finally determine its claim to the right it relies upon and in contemplation of which the court may assess whether the applicant has established a *prima facie* right.

44. HCI"s notice of motion seeks the fee relief pending the final outcome of the large merger under consideration by the Competition Commission, further proceedings to determine Zamani's entitlement to a management fee and proceedings to compel payment by Ithuba and / or Zamani of any amount due to HCI Invest.

45. This formulation of the final relief to be sought by HCI has the following difficulties. First, it is unclear what proceedings are contemplated to determine Zamani's entitlement to a management fee. The award has already declared HCI Invest's right of management oversight. If and when that right can be exercised, HCI Invest will be in a position to determine Zamani's entitlement to a management fee and take remedial steps. That falls within the remit of the right of management oversight. The

only proceedings that are required to permit of the exercise of that right are regulatory permissions and making the award an order of court.

46. The notice of motion makes no mention of proceedings to make the award an order of court. HCI sought to incorporate this relief in a draft order in the course of the hearing. There were objections raised and the draft order was abandoned.

47. The notice of motion also references the merger proceedings under consideration by the Competition Commission. It is however clear that it is proceedings before the Competition Tribunal that must determine the merger (and an appeal may lie to the Competition Appeal Court). No mention is made of the other regulatory permissions contemplated in the award, perhaps on the now abandoned premise that HCI already enjoyed these permissions. Curiously, the award does not make the right of management oversight subject to merger approval. Yet that is the final proceeding referenced in which final relief will be sought. Nor does the founding affidavit explain what prospects HCI has of obtaining merger approval and if so on what terms and over what period of time. All these are matters relevant to an assessment of whether an interim interdict should issue and what prejudice might come about as a result.

48. There is accordingly a failure to link the right of management oversight relied upon for interim releif to the final relief that is to be sought. That creates a fundamental difficulty in establishing the case for interim relief.

49. The fee relief suffers further from the following infirmities. It is relief that is neither vindicatory, nor predicated upon an anti-dissipation remedy. It rests upon a right to management oversight that is recognized in an award which requires and awaits

regularity permissions, the grant of which remain uncertain. And the award itself has yet to be made enforceable by an order of court, which entails yet further litigation between HCI, Ithuba and Zamani.

50. HCI has pressed the need for intervention on its claims of overreach and irregularity. But on the papers, these claims have been met with clear rebuttals. HCI has not been able to make a case beyond conjecture on this score. And, in particular, HCI has not shown that Zamani is not entitled to the 4.67% fee and has been paid in excess of that figure. The shareholders of Ithuba, who stand to lose from any fee overreach, make no complaint. Plainly the lawful operation of the national lottery is a matter of public importance, given its charitable objects. The NLC was reminded of its duty to take active steps of oversight to ensure probity and legality. This its counsel assured the court would take place. How Zamani comes to be entitled to a management fee of 4.67% on the gross revenue of Ithuba, when Zamani's operating expenses are modest by comparison, is a matter that warrants attention, but forms no part of this application.

51. The interim relief also seeks to have Ithuba furnish monthly management accounts to Webber Wentzel, presumably to hold in trust. HCI has emphasized the importance of securing an accounting from Ithuba and Zamani. But HCI Invest, as I have explained, does cannot yet exercise the right of management oversight, the accounting it seeks is an incident of that right. No case has been made as to why the management accounts must be furnished immediately, and held in trust, when HCI Invest cannot yet act on an accounting that is given. HCI will be in a position to see

these accounts, as and when it can exercise its right of management oversight. That time has not arrived. And this aspect of the interim interdict cannot thus be granted.

52. HCI apprehend that Ithuba and Zamani are attempting to frustrate their right of management oversight. Whether or not that is so, rather than seek intervention from this court by way of the fee relief, which entails a significant diversion of fee income from Zamani to which HCI has no immediate claim, HCI can take steps to render its right of management oversight enforceable. It will then be able to secure an accounting and take warranted measures that fall within the scope of its managerial remit. The disputes between the parties have now come under case management, and, as with this application, matters can be dealt with promptly. Ithuba's lottery license runs until June 2023. Ample time within which HCI may be able to enforce its rights, and, should there be reason to do so, given the extent of the monthly fee income that accrues to Zamani, Zamani will receive a flow of revenue sufficient to repay, over time , any past overpayments, including salaries that Ithuba has paid.

53. For these reasons, I find that the fee relief cannot be granted.

CONCLUSION AND COSTS

54. The interdicts sought by HCI must be dismissed. The salary relief is not required, and a case has not been made for the fee relief.
55. That leaves over for consideration questions of costs.
56. HCI sought relief against Ithuba and Zamani. Their opposition has prevailed, and these respondents are entitled to their costs. Given the complexity of the matter,

Ithuba and Zamani were justified in their employment of two counsel, and the costs of two counsel are warranted, where two counsel were utilized. Ithuba and Zamani seek a punitive costs order. They complain that HCI had no basis for the claims of overreach and irregularity, and perpetuated this folly by ever more exaggerated charges of unconscionable conduct in the papers and by way of submission. There is a regrettable predilection for hyperbole in litigation, but I cannot say that , in the round, HCI failed to raise issues that warranted a proper explanation. No special order for cost is made.

57. Certain of the shareholders, cited as respondents for their interest, opposed the application, filed affidavits and heads and made oral submissions. They did so, it was submitted, because they wished to place before the court that, as shareholders of Ithuba, they discerned no overreach or impropriety and wished to rebut HCI claims of complicity.
58. I am unpersuaded that such opposition was warranted. HCI's notice of motion sought no relief against the Ithuba shareholders. No allegations of complicity were levelled against the shareholders in the founding affidavit. The shareholders could have abided the decision of the court and filed brief affidavits setting out their position. HCI in its replying affidavit did made allegations of complicity. This was a regrettable escalation born of unnecessary opposition. The shareholders who opposed must bear their own costs.
59. HCI, for its part, sought costs if it was successful ,but sought immunity from costs if it failed on the basis that its application was brought both in its own interests and

those of the public. In seeking to vindicate the public interest , HCI submitted it should enjoy the qualified immunity under the *Biowatch* principle. I find no basis upon which HCI can seek this immunity. That the management of the national lottery is a matter of public interest ,I entertain no doubt. But HCI has brought this application to secure its commercial interests as a funder of Ithuba. There is no reason to think it would have acted in the public interest if it had no such commercial interests. HCI must suffer the usual consequences as to costs that flow from its application being dismissed.

60. As to the NLC, although there were sharp differences with HCI as to the legal status of past consents and the requirement for further permissions, it has been unnecessary to resolve these differences, not least because HCI now accepts that consent consequent upon a change of control is required. The NLC intervened ,but wisely sought no costs, and there the matter rests.

In the result, the following order is made:

1. The application is dismissed.
2. The Applicants shall pay the costs of the First and Second Respondents, including the costs of two counsel, where two counsel were utilized.

_____

Unterhalter J

Judge of the South Gauteng High Court

[i] *Fedsure Life Insurance Co Ltd v Worldwide African Investment Holdings (PTY) Ltd* 2003 3 SA 268 (W) at [27] and [28] affirms that the presumption of irreparable harm may be rebutted. Here it is so.