

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 81420/2014

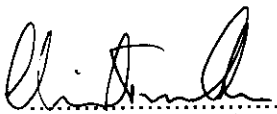
In the matter between:

9/12/2014

GIDANI (PTY) LIMITED

Applicant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
	09/12/14 DATE	 SIGNATURE

MINISTER OF TRADE AND INDUSTRY

First Respondent

NATIONAL LOTTERIES BOARD

Second Respondent

ITHUBA HOLDINGS (PTY) LIMITED

Third Respondent

MZANSI GAMES (PTY) LIMITED

Fourth Respondent

GRAND LOTTERY (PTY) LIMITED

Fifth Respondent

JUDGMENT

Tuchten J:

- 1 The applicant (Gidani) is the current operator of the South African national lottery (the lottery). Its license to operate the lottery expires on 31 May 2015. The first respondent (the Minister) is empowered under s 13(1) of the Lotteries Act, 57 of 1997, to appoint the operator

of the lottery.¹ One of the functions of the second respondent (the Board) is to advise the Minister in relation to the appointment of an operator. The Minister must exercise the power of appointment in consultation with the Board. No procedure is prescribed for the manner in which the Minister must approach the appointment. He must therefore follow a procedure which is fair, having regard to constitutional values and the Lotteries Act.

2 The Lotteries Act² itself provides, in relevant part, as follows:

13 Licence to conduct National Lottery

(1) The Minister may, after consultation with the board, issue one licence at one time authorising a person to conduct the National Lottery, which for purposes of section 57 will constitute a lottery, in accordance with the provisions of this Act.

(2) Before a licence is granted under this section-

(a) the Minister shall by notice in the Gazette and in not less than two newspapers circulating in every province invite interested parties to apply in writing for a copy of a request for proposal or any other document which may be made

¹ A lottery, as defined in s 1 of the Lotteries Act, includes any game, scheme, arrangement, system, plan, promotional competition or device for distributing prizes by lot or chance.

² The Lotteries Act has been extensively amended by the Lotteries Amendment Act, 32 of 2013, but this measure has not yet been put in force. The Amendment Act was touched on during argument before me but on the view I take, its provisions need not be considered.

public, and the board shall require payment for any such documents;

(b) the Minister shall be satisfied that-

(i) the applicant for the licence contemplated in subsection (1) has sufficient appropriate knowledge or experience to conduct the National Lottery, or has unconstrained and continuous access thereto, and will be able to conduct the National Lottery strictly in accordance with this Act, the licence of the National Lottery and any agreement pertaining to the licence;

(ii) the applicant has the necessary financial and other resources to conduct the National Lottery;

(iii) the applicant will for the duration of the licence show a clear and continuous commitment to the social responsibility programme contemplated in section 10 (g) and to the advancement, upliftment and economic empowerment of persons or groups or categories of persons disadvantaged by unfair discrimination; and

(iv) no political party in the Republic or political office-bearer has any direct financial interest in the applicant or a shareholder of the applicant.

(3) In considering whether to grant the licence, the Minister shall take into account-

(a) whether any person who appears to the Minister to be likely to manage the business or any part of the business of the National Lottery under the licence, is a fit and proper person to do so;

(b) whether any person for whose benefit that business is likely to be conducted, is a fit and proper person to benefit from it; and

(c) whether any person who is likely to manage the business or any part of the business of the National Lottery under the licence or a sports pool, will do so-

(i) with all due propriety and strictly in accordance with the Constitution, this Act, all other applicable law and the licence for the National Lottery together with any agreement pertaining to the licence;

(ii) so that the interests of every participant in the National Lottery and sports pools are adequately protected; and

(iii) subject to subparagraphs (i) and (ii), so that the net proceeds of the National Lottery and sports pools are as large as possible.

(4) A licence granted under this section shall include the conditions contemplated in section 14.

(5) The licence contemplated in subsection (1) may allow the licensee to appoint another person to conduct certain lotteries of the National Lottery on behalf of the licensee only with the written approval of the Minister.

(6) In considering whether to grant the licence contemplated in subsection (1), the Minister and the board shall not favour an applicant solely because the applicant or a shareholder or partner of that applicant is an organ of the State.

14 Requirements and conditions of licence

(1) A licence granted in terms of section 13 shall be in writing, shall specify the conditions attached to it and shall be granted for a minimum period of five years or a maximum period of eight years: Provided that the Minister may, after consultation with the board, in a case where the licence has been granted for less than eight years, and at least one year before the expiry of that licence, extend that licence for such further period as would, together with the initial period for which that licence was granted, not exceed eight years: Provided further that the licensee shall have no rights or legitimate expectations in respect of an extension of the period of validity of the licence other than the rights afforded by this subsection.

(2) The conditions contemplated in subsection (1) shall include such conditions as the Minister shall determine, after consultation with the board, and shall in particular include conditions requiring the licensee-

(a) to obtain the consent of the board before doing anything specified in the licence;

(b) to refer specified matters to the Minister or to the board, as the case may be, for approval;

(c) to ensure that such requirements as the Minister or the board may from time to time determine or approve in terms of the licence are complied with, including the imposition of penalties in the event of the licensee not complying with any provision of this Act or the licence;

(d) to provide the Minister and the board at times specified by the Minister or the board with such information as the Minister or the board may require;

(e) to make such arrangements as may be specified in the licence for the payment of such sums out of the proceeds of the National Lottery as may be so specified to the fund or to the board, as the case may be, at such times as may be so specified;

(f) to do such things in terms of the licence, including the transfer of property or any rights, excluding intellectual property rights or proprietary software, as the board may require, upon the expiration of the licence;

(g) to obtain the approval of the Minister for any lottery and the rules thereof before that lottery is conducted under the licence for the National Lottery;

(h) to allow the board or anyone designated by it to enter any premises or facility belonging to or under the control of the licensee or a member of the management of the licensee, or premises to which the licensee has a right of access, at any reasonable time, if such entry is necessary for the protection of the integrity of the National Lottery, and to-

(i) examine or inspect any thing, machine, document or data captured in any form, excluding proprietary software, found on or in the premises or facility, and make copies of or make extracts from that thing, machine, document or data;

(ii) seize, for the purpose of further examination or securing information, any thing, machine, document or data, excluding proprietary software, on or in such premises or facility which has a bearing on the conduct of the National Lottery;

(iii) seal or otherwise secure any such premises, facility, thing or machine on or in which any document or data which has a bearing on the conduct of the National Lottery is stored or captured; and

(iv) take such steps as may be reasonably necessary to protect the integrity and conduct of the National Lottery; and

(i) to secure a valid and enforceable undertaking in writing from-

(i) the person controlling the licensee in any way whatsoever not to change that control of the licensee for the duration of the licence without the consent of the Minister;

(ii) the person controlling the licensee in any way whatsoever not to transfer, cede or in any other way encumber the licence to another person; and

(iii) the licensee not to permit, require or compel any of its employees or agents knowingly to sell a ticket, or to award or to pay any prize to a director of the licensee or a member of the board.

(3) On-

(a) requesting a copy of any document in terms of section 13(2)(a);

(b) applying for the licence to be issued in terms of section 13(1); or

(c) the granting of a licence under section 13,

the person requesting a copy of a document, the applicant or the licensee, as the case may be, shall pay to the board the prescribed fee.

15 Variation of conditions of licence

(1) The Minister or the board may vary any condition in the licence granted under section 13-

(a) to the extent provided for in the provisos to section 14(1);
or

(b) other than a condition contemplated in paragraph (a),
only if the licensee consents to that variation, or if the licensee does not consent to that variation, only if-

(i) that variation is provided for in this Act or to the extent provided for in the licence; and

(ii) the licensee has been given a reasonable opportunity to make representations to the Minister or the board, as the case may be,

(2) If the Minister or the board, after consideration of the licensee's representations, decides to vary a condition in the licence in accordance with that licence but without the consent of the licensee, the Minister or the board, as the case may be, shall cause a notice to be served on the licensee in which the licensee is informed of the variation and the date on which that variation shall take effect, which date shall not be less than 21 days after the date of service of such notice, unless the licensee agrees to a shorter period in writing.

(3) The provisions of the licence to vary a condition in the licence under subsection (1) may allow the Minister or the board to add a condition to the licence or to omit a condition from the licence.

16 Enforcement of conditions of licence

(1) If the Minister or the board has reason to believe-

(a) that a person is likely to contravene a condition in the licence granted under section 13;

(b) that a person has contravened such a condition and there is a reasonable likelihood that the contravention will continue or be repeated; or

(c) that a person has contravened such a condition and that the contravention can be remedied,

the Minister or the board, as the case may be, may apply to a High Court for an order prohibiting the contravention or, as the case may be, requiring the licensee and any other person who appears to the court to have been party to the contravention, to take such steps as the court may direct.

(2) The liability of the licensee to pay any sum in terms of this Act or the licence or agreement pertaining thereto shall not be affected by the licence ceasing to be valid for any reason and such sum may not be set off by the licensee against any amount due and payable.

17 Grounds for revocation of licence

The licence granted under section 13 may be revoked by the Minister or the board on the following grounds:

(a) If the licensee is no longer a fit and proper person to conduct the National Lottery, whether because of the commission of an act of insolvency, liquidation or for any other valid reason;

(b) if a condition contained in the licence has been materially contravened;

(c) if any information given by the licensee, any person who in any way controls the licensee or an agent or representative of the licensee to the board-

(i) in or in connection with the application for the licence;

(ii) in accordance with a condition in the licence; or

(iii) in making representations in terms of section 18(1), in respect of financial matters regarding the National Lottery or in respect of any aspect of the management of the National Lottery,

is materially false;

(d) if any person who is managing the business or any part of the business of the licensee or who is a supplier of goods or services to the licensee is not a fit and proper person to do so, whether because of the commission of an act of insolvency, insolvency, liquidation, incarceration in a prison or other institution or for any other relevant reason, unless the licensee immediately takes steps to effectively dissociate himself, herself or itself from that person;

(e) if any person for whose benefit the licence has been acquired or who is a holding company of the licensee or who in any other way controls the licensee, is not a fit and proper person to benefit from it, whether because of insolvency, liquidation, incarceration in a prison or other institution or for any other relevant reason;

(f) if the licensee has failed to take adequate steps to prevent the commission of fraud by his, her or its employees, agents, representatives, suppliers or by participants in the National Lottery after having been alerted to or becoming aware of conditions conducive to the commission of fraud, or to instances of fraud or dishonesty;

(g) if the licensee, any of its employees, agents, representatives or suppliers prevent the board or any person designated by it from exercising its rights contemplated in section 14(2)(h);

(h) if the licensee, any of its employees or agents repeatedly and knowingly sell tickets or award or pay prizes to any person in contravention of section 14(2)(i)(iii); or

(i) if application has been made to a High Court for the sequestration or liquidation, as the case may be, of the licensee or a person who in any way controls the licensee.

18 Notice of proposed revocation

(1) If the Minister or the board is satisfied that grounds exist for the revocation of the licence granted in terms of section 13, he, she or the board, as the case may be, shall in writing

notify the licensee of the existence of such grounds and call upon the licensee to furnish reasons, within 14 days of service of that notice at the registered physical address of the licensee, as to why the licence should not be revoked, failing which the licence will cease to be valid upon the expiration of the said period of 14 days.

(2) If the licence for the National Lottery ceases to be valid in terms of subsection (1), the Minister or the board, as the case may be, shall forthwith inform the licensee and Parliament in writing of that fact and of the date upon which the licence ceased to be valid, and if Parliament is not then in session, it shall be so informed on the first day of the next session.

19 Suspension of licence

(1) The Minister or the board may order a suspension of the licence in the notice contemplated in section 18(1) as from the date of service of that notice for a period of not longer than 30 days after the licensee has furnished those reasons: Provided that the Minister or the board, whoever acts in terms of this section, shall inform the other of his or her or its actions.

(2) If the Minister or the board decides to suspend the licence in terms of subsection (1), the Minister shall forthwith inform Parliament of that fact and of the grounds for the suspension, and if Parliament is not then in session, on the first day of the next session of Parliament.

(3) The licence shall immediately cease to be valid if it is suspended for a second time.

(4) The Minister shall forthwith inform Parliament if the licence has ceased to be valid in terms of subsection (3), and if Parliament is not then in session, on the first day of the next session of Parliament.

20 Revocation of licence

(1) If reasons are furnished by the licensee as contemplated in section 18 (1), the Minister or the board, as the case may be, shall after considering such reasons-

- (a) decide whether or not to revoke the licence; or
- (b) call upon the licensee to appear before the board on a specified date to make oral representations in support of any written representations made by the licensee or to answer any questions which the Minister or the board, as the case may be, may have with regard to such written representations, whereafter the Minister or the board shall consider the matter and decide whether or not to revoke the licence.

(2) If the Minister or the board decides to revoke the licence, he or she or it shall by written notice served at the registered head office of the licensee notify the licensee of that fact, of the grounds for that revocation and of the date on which that revocation shall take effect.

(3) If the Minister or the board decides to revoke the licence in terms of subsection (1), the Minister or the board, as the case may be, shall inform the Minister of Finance and Parliament of that fact and of the grounds for that revocation forthwith, and if Parliament is not then in session, on the first day of the next session of Parliament.

21 Establishment of National Lottery Distribution Trust Fund

(1) There is hereby established a fund to be known as the National Lottery Distribution Trust Fund, to be managed by the board.

(2) The board shall annually table a report in Parliament in respect of the fund, which may form part of the report contemplated in section 12(1)(b).

22 Fund to vest in and to be administered by board

- (1) The fund shall vest in and be administered by the board.
- (2) The fund shall be held in trust by the board for the purposes mentioned in this Chapter.

23 Revenue of fund

The fund shall consist of-

- (a) the sums paid to the fund in terms of section 14(2)(e);
- (b) interest and dividends derived from the investment of money standing to the credit of the fund; and
- (c) other money lawfully paid into the fund.

- 3 On 12 June 2013, the process for the appointment of a new operator began with the publication in the Gazette of an invitation to interested parties to buy a copy of the request for proposal (RFP) for R50 000. The RFP sets out how an interested party must submit a proposal to qualify for consideration as the new operator. Potential proposers were required to attend a compulsory conference (which was held on 27 and 28 June 2013). Responses to the RFP were required to be put in by 30 November 2013. Each proposer had to pay a non-refundable fee of R2,5 million. Ultimately four responses were submitted timeously: from Gidani, the third respondent (Ithuba), the fourth respondent (Mzansi) and the fifth respondent (Grand Lottery).

- 4 The responses were then evaluated, verified and ultimately adjudicated pursuant to a complex process. Proposers made presentations and there were interactions with members of the Board and third parties appointed as part of the process.
- 5 The process contemplated the selection of a “preferred applicant” and a “reserve applicant” by the Board. The preferred applicant is the proposer which the Board recommends the Minister appoint as operator. The reserve applicant is the proposer which the Board recommends the Minister appoint as operator if for some reason the Minister does not appoint the preferred applicant.
- 6 Gidani was recommended by the Board as the preferred applicant. Ithuba was recommended by the Board as the reserve applicant. But the Minister did not designate Gidani as the preferred applicant. Instead, the Minister reversed the order and selected Ithuba as the preferred applicant and Gidani as reserve applicant.
- 7 Gidani was aggrieved by the Minister’s conduct in declining to select Gidani as preferred applicant. It maintained that the Minister’s conduct in selecting Ithuba was irrational and arbitrary, that relevant considerations were not properly taken into account, and that irrelevant considerations were taken into account. By notice of motion

dated 7 November 2014, Gidani instituted proceedings. In Part A of the notice of motion, Gidani sought urgent interim relief. In Part B, brought in the normal course, Gidani sought to review and set aside the Minister's decision to select Ithuba as preferred applicant and for an order remitting the awarding of the operator license to the Minister for reconsideration.

- 8 Part A of the notice of motion, the application for urgent interim relief, is before me for consideration. The urgent relief sought, as formulated in the notice of motion, is for an order interdicting the Minister from "concluding, finalising and/or signing with ... Ithuba ... any license agreement for the implementation or conduct of the [lottery]" and for an order interdicting Ithuba from "taking any steps to implement ... any license agreement for the conduct of the [lottery]".
- 9 The urgent relief as framed has been somewhat overtaken by events: the Minister proceeded to negotiate with Ithuba and these parties came to terms. The Minister decided to appoint Ithuba as the successful applicant, a term used in the RFP to identify the proposer to whom the Minister has decided to issue the license appointing it as the operator of the lottery. And then the Minister in fact issued the necessary license to Ithuba. This license contains certain terms and conditions and when read with the quoted provisions of the Lotteries

Act functions, additionally to its character as an administrative law permission, much like a comprehensive commercial contract between Ithuba and the Minister.

- 10 The matter was fully argued before me over the course of an entire day on 5 December 2014. Five sets of counsel respectively represented the applicant and the first to fourth respondents, only Grand Lottery electing to abide. This judgment is required urgently. Substantial revenue streams are at stake and the right to operate the lottery is clearly a lucrative opportunity. All my conclusions are provisional, in the sense that they are made on the material before me and should not be taken as binding on the court which hears the review in due course.
- 11 That the Minister had actually awarded the lottery to Ithuba was only made known to Gidani in the answering affidavits. It has had the effect that most of the urgent relief sought in the notice of motion became moot and was abandoned. The only relief now sought is that Ithuba be temporarily interdicted from taking any steps to implement its license agreement for the conduct of the lottery. The papers show that there is a great deal of preparatory work which a successful applicant must do, at its own financial risk and at great cost, to prepare itself to

take over its responsibilities on its license commencement date, which in this case is 1 June 2015.

- 12 Because this is an application for interim interdicts, the applicant must establish a *prima facie* right, a well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted, an absence of any other satisfactory remedy and a balance of convenience in favour of the grant of interim relief. Where there are factual disputes, the facts set out by the applicant must be taken together with any facts as set out by the respondent which the applicant cannot dispute and the court must consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief. The facts set up in contradiction by the respondent then fall to be considered. An applicant upon whose case serious doubt is thrown cannot succeed in obtaining temporary relief.
- 13 Once a well grounded apprehension of irreparable harm is established, in the absence of an adequate ordinary remedy, the court is vested with a discretion, which will usually resolve into a consideration of prospects of success and the balance of convenience. The stronger the prospects of success, the less need for such balance to favour the applicant. Conversely, the weaker the prospects of success, the greater the need for the balance of

convenience to favour the applicant. *Cipla Medipro (Pty) Ltd v Aventis Pharma SA and Related Appeal* 2013 4 SA 579 SCA para 40.

- 14 Ultimately the debate before me revolved around the requirements for an interim interdict: that the applicant show, at least *prima facie*, a right worthy of protection pending the proceedings to enforce its claim, prospects of success in those proceedings and a balance of convenience in its favour.
- 15 Before I proceed to consider these matters, some procedural background is required. The case was brought by *Gidani* before it learnt that *Ithuba* had been awarded the all important license. Its attack was therefore directed at the appointment of *Ithuba* as preferred applicant. *Gidani* shifted ground in reply to cater for the changed situation. No criticism can be directed at *Gidani* for having done so. But what *Gidani* also sought to do was rely on material put up by the Minister to answer the criticisms about its decision to appoint *Ithuba* as *preferred* applicant to make a case that the Minister acted unlawfully in appointing *Ithuba* as *successful* applicant.
- 16 I have considerable doubt whether this is even permissible. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 6 SA 223 CC (“*OUTA*”), the court held at para 44:

... courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself.

- 17 The relief presently sought does not in its terms seek to restrain the exercise by the Minister of his powers. But this distinction was not made during argument and the effect of the relief would effectively preclude the implementation, *pendente lite*, of the decision of the Minister to appoint Ithuba to operate the lottery.
- 18 What Gidani asking me to do so is to interdict implementation of the Minister's decision on grounds additional to those advanced in the founding affidavit on the basis of material put up by the Minister to defend himself against attacks which in fact were made in the founding affidavit. I do not think that this would be fair. If the attack had been made in the founding affidavit, the Minister might well have presented additional evidence to justify what was alleged to have been done wrong. To allow Gidani to make a case out of what was said in the answering affidavit coupled with what was said by Gidani

in the replying affidavit would be to consider an attack on a respondent which he had not been called upon to answer.

19 It was said that I have a discretion to allow a case to be made in this manner. Perhaps I do. But although Gidani's cause of action is sourced in administrative law, this is essentially a commercial case in which all concerned are powerful entities playing for huge stakes. I see no reason at a discretionary level to bend the rules of procedure in this case. Gidani's remedies were to seek leave to amplify its founding affidavit or withdraw the present proceedings and come again now that it knows what the Minister has said he has done and his reasons for doing so.

20 The other preliminary matter which I must mention is the issue of confidentiality. It arose like this. The Minister responded to Gidani's founding papers by demanding a confidentiality undertaking from Gidani's lawyers. Under the undertaking as framed on behalf of the Minister, only the lawyers would be allowed to see the material which the Minister decided was confidential. Confidentiality in this context relates purely to commercial confidentiality. Gidani's lawyers were not even allowed to show the material to their own clients, Gidani's representatives. Gidani's lawyers signed the undertakings under protest because that was the only way they could move the case

along. The Minister delivered a confidential and a non-confidential set of answering affidavits. Because of the restrictions, Gidani's attorney deposed to the main replying affidavit, a most unsatisfactory state of affairs in itself.

- 21 In addition to delivering replying affidavits, Gidani invoked rules 35(12) and (14) to call for production of the license agreement. Production was refused by the Minister. This document assumed significant proportions in the hearing, particularly because of a financial guarantee which the Minister says that Ithuba agreed to provide during the negotiations following its selection as preferred applicant.
- 22 This made the adjudication of the case entirely unwieldy. The only way I could determine what was confidential and what was not was by comparing the confidential with the non-confidential affidavit, an exercise which I did not undertake. I called upon counsel to address me on the subject and, where appropriate, defend the regime imposed by the Minister.
- 23 In the result, fortunately for the administration of justice, counsel for the Minister and for Mzansi abandoned any reliance on the confidentiality undertakings for the purpose of the hearings before me, without prejudice to any rights to assert such confidentiality in later

proceedings. Acting under s 173 of the Constitution, I released counsel for the applicants from all confidentiality restrictions undertaken by them under protest. Responding to my enquiry, counsel for the applicants then elected forthwith not to discuss the heretofore confidential material with Gidani's representatives, not to put up additional affidavits, not to seek compliance with the notices calling for the license agreement and to get on without more ado with the case as framed in the papers before me.

- 24 One of the reasons I record this is because counsel raised the refusal of the Minister to supply relevant documents and the confidentiality restrictions in argument as justifying a departure from the strict rule that a case must be made in the founding affidavit. While I deprecate the choice made by the Minister to deny Gidani's representatives sight of important documents relevant to their case, this was cured when the confidentiality restrictions were lifted. The position in which Gidani then found itself was caused not by the failure of the Minister to disclose but Gidani's election to proceed on the papers as they stood.

- 25 I turn to a consideration of the grounds upon which Gidani in its founding papers contended it had prospects of success in the review. Because of the firm views I have formed as to the right which Gidani claims to protect *pendente lite* and to balance of convenience, I shall be brief on this score.
- 26 The process initiated by the notice and the RFP envisaged an initial evaluation by the Board. This was done in two stages. In each case, the organs of the Board scored the proposers for compliance with certain specified “metrics”, which included considerations such as whether the proposer’s suppliers of equipment adequately demonstrated local content, the nature of the technology offered by a proposer, whether the proposer was a fit and proper person, the proposer’s game design, operational risk management and player protection, the nature of the proposer’s business and marketing plans and the contribution of the proposer toward broad based black economic empowerment.
- 27 A most important set of metrics, by all accounts, is that devoted to the National Lottery Distribution Trust Fund (NLDTF). This fund³ represents the bottom line of the scheme envisaged by the Lotteries Act. The lottery is a revenue generation mechanism. It offers certain

³ Referred to in Chapter 3 of the Lotteries Act, from which I have quoted ss 21-23.

games, all of which require the game player, or investor, to pay an amount of money, a stake, for the right to be considered for a payout, determined by chance, to a fortunate few investors. Those stakes form the lottery's single gross revenue stream. The difference between the gross revenue taken by the operator and the cost of implementing the scheme goes to the NLDTF. The trustees of the NLDTF then use the funds entrusted to them to fund worthy causes. At present, the annual revenue flowing to Gidani exceeds R4 billion.

- 28 The amount which each proposer forecast it would contribute to the NLDTF is expressed as a percentage of gross revenue. In the case of Gidani, this percentage was 34%. Ithuba forecast that it would contribute 27,4%. But Ithuba forecast that its marketing model would generate significantly more gross revenue than forecast by its rivals. Although the papers before me run to 1 600 pages, it is on these few, important assertions that the case turns. It is important for an evaluation of the issues to remember that these figures are not facts. They are predictions and except in limited but important respects (a subject to which I shall return) they are not guaranteed. The predictions, and the material put up by the proposers to support their predictions, were scrutinised by experts in the field of economics. Their opinions differed.

- 29 To revert to the process before the Board: the first stage in the evaluation was done by an organ of the Board called the Evaluation Committee (EC). The EC scored Ithuba *above* Gidani, by an over all score of 179,47 to 163,54. Then the matter went to another organ of the Board called the Adjudication Committee (AC). The AC also scored Ithuba above Gidani on both technical and financial evaluation, by scores of 179,47 to 166,5.
- 30 But the AC, by majority, proceeded to recommend Gidani as preferred applicant, not on the scoring as such but on the scores as *moderated by the AC's assessment of the risk factors as well as what the Board saw as the realistic contributions which would probably be made by these two proposers to the NLDTF*. The recommendations of the AC became the recommendations of the Board.
- 31 The assessment of risk cannot in my view be described as an exact, and therefore a true, science. How those members of the AC whose risk evaluations favoured one party or another arrived *mathematically* at their conclusions is not before me. But however it is dressed up, it probably depended ultimately upon a gut feeling. On the evidence presently before me, I do not think that the conclusions of any one side in the debate can be characterised as irrational.

32 Both the EC and the AC presented reports to the Minister. The Minister then sought advice from experts, including a team of advisors drawn from within the Minister's department, and from lawyers in private practice, the latter in relation to legal matters. The Minister also sought advice from a team of economists carrying on business within Genesis Analytics (Pty) Limited in Johannesburg. The advice from the Genesis experts was embodied in two reports. I shall describe these reports, as was done in argument, as Genesis 1, dated 1 October 2014, and Genesis 2, dated 17 October 2014.⁴

33 I gained the impression from counsel for Gidani that it was their submission that the Genesis reasoning should enjoy a higher status than that of the Board organs. I see no basis in the evidence to support this contention, if such there was. I do not think that it was *incumbent* upon the Minister to show any greater deference toward the Genesis reasoning than he did toward any other advice he received and I do not know if the Minister in fact did so. I proceed to analyse the arguments around the Genesis reports with this in mind.

34 The authors of Genesis 1 agreed with the two organs of the Board that Ithuba and Gidani stood well above the other two proposers. They posed the question whether one of these two "consistently stands

⁴ The lead member of the Genesis team was identified in argument as Mr James Hodge.

above the other” in order clearly to determine the preferred bidder. From the substantive assessments, Genesis 1 concluded, the two were “closely matched with both performing generally well in every category”. Each displayed slightly different strengths compared to the other across categories.

- 35 But, concluded Genesis 1, it was therefore important to point out the differences in the respective bids. Paragraph 169 of Genesis 1 reads:

169 In our view the most substantial difference between the two concerns the NLDTF contribution.

169.1 Ithuba’s business model is to pay a substantially lower NLDTF percentage contribution ... and provide higher player payouts in the hope that higher player payouts will increase sales sufficiently to more than compensate for the lower NLDTF payout percentage

196.2 In our opinion, Ithuba’s sales forecast is unrealistic... We have calculated that [Ithuba’s sales would have to be around 25% higher than those of Gidani] in order to ensure absolute contributions to the NLDTF are the same. In our view, whilst Ithuba does more than Gidani on the business plan and is therefore likely to achieve higher sales, we are of the opinion that this seems unlikely and presents a risk of lower contributions.

- 36 Genesis 1 went on to identify other perceived differences between the two proposals.
- 37 The Minister then asked Genesis through his attorneys to provide a quantitative scoring of the competing bids. This resulted in Genesis 2. In undertaking this task, the authors of Genesis 2 made use of the scoring approach adopted in the “government regulations in respect of procurement”. Using a methodology said to be based on these regulations, whatever the Genesis experts perceived them to be, Genesis 2 evaluated all four proposals and expressed its conclusions as percentages. Genesis 2 scored Gidani at 84,2%, Ithuba at 83,6%, Mzansi at 77,8% and Grand Lottery at 68,4%.
- 38 In paragraph 14.1, Genesis 2 concludes that Ithuba and Gidani are “scored very close together overall” and that while Ithuba did better on business plan, Gidani did better on marketing and NLDTF contributions while both were fairly equal on financial analysis.⁵
- 39 After the Minister selected Ithuba as preferred applicant, the Minister and Ithuba entered into negotiations. The Minister says in paragraph 105 of his answering affidavit that he used the negotiation phase to

⁵ Confronted with this variety of expert opinion, the Minister opined publicly to the effect that there had been a dead heat between Ithuba and Gidani. This seems to be a legitimate commercial assessment.

... test with Ithuba whether the trade-off between the lower NLDTF contribution percentage and higher player payout percentages would result in higher Rand Value contributions to the NLDTF (which is what ultimately matters). This was achieved by requiring in the negotiations that Ithuba commit to a minimum guaranteed Rand value contribution in each year that improved on historic contribution levels. Ithuba would only do so if it had confidence that its business plan would achieve the higher sales required to meet this minimum guarantee.

- 40 The disclosures that the Minister had sought advice after receiving the Board's reports and the invitation during negotiations to Ithuba to put its money where its mouth was through the provision of a guarantee led to attacks on the lawfulness of the Minister's conduct by counsel for both Gidani and Mzansi. It was submitted that the process identified by the RFP did not permit the Minister to obtain additional advice (legal advice strictly so called excepted). The invitation to Ithuba to provide this type of guarantee, it was argued, exceeded what the RFP rendered permissible because it amounted to an offer not extended to the other proposers to better its initial proposal. If it were permissible for the Minister to do any of this, the submission was that he could only legitimately do so if he offered the other proposers the same opportunities. I am sceptical of these submissions but I need not consider them because they were not identified in the founding affidavit. They could not have been because Gidani and Mzansi did

not know the facts underlying the submissions.⁶ I have already explained why I shall not allow the attacks on the Minister's conduct to be enlarged beyond the founding affidavit.

41 In *Democratic Alliance v President of the Republic of South Africa and Others* 2013 1 SA 248 CC, the nature of rationality review in relation to executive decisions was identified at para 32:

... rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional.

I see no reason why the rationality investigation in relation to an administrative action, such as the present decision under consideration to award a license, should be undertaken on a different principle.

⁶ Lest I be misunderstood, I must say that I appreciate that there were grounds of challenge in the founding affidavit within which the attacks in question could have fitted. But the *substance* of the founding affidavit shows that these specific attacks were not contemplated by Gidani when it launched its application.

42 The evaluation process contemplated by the RFP is intended to determine which proposer will “maximise the net proceeds for distribution to good causes”. But the Minister is not obliged to accept the proposal with the highest return to good causes.⁷ In fact the Minister came to the conclusion that Ithuba’s business model would achieve the desired result. The Minister considered that the model proposed by Ithuba would reinvigorate the lottery. Whether the Minister made the best choice is not the issue. But the Minister had regard to the risk factor in relation to Ithuba’s gross revenue forecast identified by several of those whose advice he took, including the Board, through the AC, and Genesis. The Minister decided to mitigate this risk by taking a financial guarantee from Ithuba.

43 On these facts, I cannot conclude that the Minister’s impugned conduct was irrational. Maximising the returns for good causes is a legitimate government goal. It seems to me that the common and entirely legitimate commercial course of obtaining a suitable guarantee to provide reasonable commercial comfort in the pursuit of higher rand value contributions to the NLDTF is the very essence of rationality. Much will depend on the terms of the guarantee itself, which is not before me. I have no reason however on what is before

⁷ Item 2.2.1 under the heading “Disclaimer”.

me to conclude that the guarantee obtained will not achieve the purpose of the Minister.

44 Gidani has therefore established, at best, weak prospects of success on the merits of the pending review. Against that, I proceed to evaluate the alleged right which Gidani seeks to protect pending review and the balance of convenience.

45 I have already expressed strong reservations about the nature of the right which Gidani seeks to protect. Every aggrieved person who seeks to overturn an administrative decision is entitled to a hearing on review and appropriate relief. As Gidani accepts, nothing that the Minister or Ithuba have done threatens that right. What Gidani actually seeks to protect is something different. Gidani is worried that if Ithuba is allowed to prepare itself to take up its responsibilities on 1 June 2015 by entering into contracts and making other financial commitments, Ithuba will create, as it were, facts on the ground and position itself better to make an argument to a reviewing court that upon a finding of invalidity in relation to the Minister's decision, the award of the license to Ithuba should not be set aside because of the great prejudice to Ithuba and because of the dislocation to the administration of the lottery that this would cause.

46 That is manifestly of considerable commercial interest to Gidani. I can well understand that from a commercial perspective it would not want to risk the considerable resources required to mount the review unless it has sound prospects of having the award of the license to Ithuba set aside. Gidani is not an NGO, litigating in the public interest. It is a commercial being, conceived for and dedicated to the pursuit of profit. And there is nothing wrong with that. But Gidani is not bringing the review to vindicate the rule of law. It is bringing the review in the hope that the Minister's decision will be set aside and, on reconsideration, the Minister will award the license to Gidani.

47 I have the greatest scepticism with the proposition that this is the kind of interest which the law will protect. Assuming that Gidani's risk assessment is in this regard realistic, the risk is one which goes with the commercial territory within which Gidani has chosen to do business.

48 I am however not at all convinced that this risk assessment is indeed justified. Counsel on all sides put up precedents to me in which the equivalent of the first commercial prize toward which Gidani strives was, and was not, granted. A recitation of authority would be otiose because each case must go off on its own facts. But I am by no means convinced that a market participant in this high risk high reward

industry which chooses to spend money on risk will receive much judicial sympathy in the context described. I think that the weight which Gidani ascribes to the alleged risk to its commercial interests is overstated.

49 As to the balance of convenience: if an interdict is granted, Ithuba will be prevented from preparing itself to assume its duties to take over the operation of the lottery on 1 June 2015. Counsel for the Board submitted that the inevitable delay that this would cause to the proper operation of the lottery would be at least three months and the irrecoverable loss of revenue some R500 million a month. Counsel emphasised that this revenue would be lost for ever. Counsels' submissions in this regard have substance and were not challenged by their opponents. Against this, Gidani will suffer no prejudice at all if an interdict is refused, except in relation to its commercial interest which I have discussed.

50 In heads of argument submitted on behalf of the Board and Mzansi, counsel pointed to the failure by Gidani to tender a guarantee if an interdict is granted but the review goes against it. Nor was there an undertaking not to raise the fact of any interdict as a defence to a claim for reimbursement of lost income of the review fails. Counsel for Gidani declined on behalf of Gidani to tender either a guarantee or an

undertaking. Counsel for Gidani argued that because this case had public law dimensions, no weight should be given to the refusal to provide the guarantee or the undertaking.

51 While this case has a public law framework, Gidani's purpose in bringing the proceedings is the pursuit of commercial profit, entirely untrammelled by any desire to advance the public good. I therefore conclude that the present case does indeed fall within the principle in *Cronshaw and Another v Coin Security Group (Pty) Ltd* 1996 3 SA 686 A 689-690 and that Gidani's refusal to act to mitigate any loss which the relevant respondents will inevitably suffer in the circumstances described should carry at the very least considerable weight.

52 Counsel for Gidani further submitted that a refusal to grant an interdict would potentially prejudice the upholding of the rule of law if the Minister's decision were ultimately found on review to be unlawful. Of course, on the logic of the argument, the contrary would also be correct: the maintenance of the rule of law would be prejudiced if an interdict were granted, preventing Ithuba from doing what was, objectively and retrospectively viewed, always lawful because Gidani ultimately failed on the merits of the review. I would on this analysis give this consideration scant weight. But I think the more principled

consideration, in line with *Oudekraal* and *OUTA* principles, is that an administrative action is valid until set aside. There can be no prejudice to the maintenance of the rule of law if Ithuba is permitted to continue doing what, even without the award of the license in its favour, it may do: incur financial obligations at its own risk.

53 I therefore conclude that the balance of convenience is strongly against Gidani. This taken together with the, at best, weak *prima facie* case made out by Gidani both in relation to the right which it seeks to protect *pendente lite* and its weak prospects, on the material presently before me, in the pending review means that the claim for an interdict *pendente lite* cannot succeed.

54 On the question of costs, I was urged to treat the applicant, if unsuccessful, as one would an applicant who sought unsuccessfully against the opposition of organs of state to vindicate constitutionally protected rights. Such an applicant, as laid down in *Biowatch*, can escape an adverse costs order under certain widely stated circumstances. But I have already characterised this case as essentially commercial. I have not overlooked the fact that the Minister withheld on what seem to me, *prima facie*, spurious grounds, essential information from Gidani and then abandoned that position without a struggle when I raised the issue before argument on the case proper

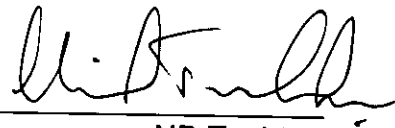
began. But Gidani's forensic disability was cured when the Minister abandoned the claim of confidentiality. As I have pointed out above, when Gidani elected to go on with the case without the material previously denied it, any possible predicament was of Gidani's own making. There seems to me no good reason why the general rule in such cases, that costs should follow the result, should not apply, except in relation to the Minister's non-confidential affidavits.

55 Finally on costs, Mzansi came to court to support Gidani's application. There is no reason why Gidani should pay Mzansi's costs.

56 I make the following order:

- 1 The application by Gidani (Pty) Limited for urgent interim relief under Part A of the notice of motion dated 7 November 2014 is dismissed.
- 2 Gidani (Pty) Limited must pay the costs of the first, second and third respondents, in each case including the costs consequent upon the employment both of senior and of junior counsel; provided, however, that no party shall be entitled to any costs in relation to the set of affidavits described as "non-confidential".

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A handwritten signature in black ink, appearing to read 'NB Tuchten', written over a horizontal line.

NB Tuchten
Judge of the High Court
9 December 2014

GidaniLottery81420.14